UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Regarding the Commission's Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement

September 15, 2021

Today the FTC leadership continues the disturbing trend of pulling the rug out under from honest businesses and the lawyers who advise them, with no explanation and no sound basis of which we are aware. In the past two months, the FTC has withdrawn just as many bipartisan policies.[1] Now, the partisan majority will rescind the 2020 Vertical Merger Guidelines issued jointly by the FTC and the Antitrust Division ("2020 Guidelines") and the Commentary on Vertical Merger Enforcement ("Commentary"),[2] with the minimum notice required by law, virtually no public input, and no analysis or guidance.

Sowing confusion regarding the legality of vertical mergers is particularly troublesome at this time, given American businesses' ongoing attempts to shore up supply chain vulnerabilities exposed during the COVID-19 pandemic. Today's action, together with other recent attacks on the Hart-Scott-Rodino merger review process,[3] threatens to chill legitimate merger activity and undermine attempts to rebuild our economy in the wake of the pandemic.

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We believe that American consumers, businesses, and taxpayers deserve better. For these reasons, we dissent.

Section 7 of the Clayton Act, the main U.S. law governing mergers, bars tr13.98 0 1289.5[(s)-2 (, t)-2 (he)ai96rg

while Disney used its resources to expand Pixar's production, resulting in several beloved movies.[7] If you or your children watched a Pixar film on Disney+ during the pandemic, you benefited directly from a vertical integration.

Not all vertical mergers are benign. Some may harm competition and consumers. The 2020 Guidelines describe how such harm can occur and the framework that the FTC and DOJ have developed, over decades of experience, to analyze both the anti- and procompetitive effects of vertical mergers.[8] Contrary to decades of established case law, the Majority claim that the 2020 Guidelines "contravene the text of the statute" by recognizing the "procompetitive effects, or efficiencies, of vertical mergers."[9] The Majority commits two flaws in its analysis. First, they conflate procompetitive effects of a merger with merger efficiencies.[10] Second, they ignore the burden shifting framework adopted by the circuit courts recognizing that procompetitive effects may render a competition-eliminating merger procompetitive on the whole.[11] Similarly, a successful efficiency defense, *i.e.*, that the proposed merger's efficiencies would likely offset the merger's potential harm to consumers, is sufficient to save a merger. That said, Guidelines have long counseled skepticism, which is routinely applied. But the fact remains that vertical mergers are different animals from mergers of competitors, changing incentives in ways that are, on the whole, more likely to improve efficiency, bolster competition, and benefit consumers.[12] As such,

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[7] Brooks Barnes, *Disney and Pixar: The Power of the Prenup*, NY TIMES (June 1, 2008), https://www.nytimes.com/2008/06/01/business/media/01pixar.html

[8] Indeed, staff's careful application of that framework to the evidence in the Illumina/Grail investigation led us to support challenging that vertical merger.

[9] Lina M. Khan, Rohit Chopra, & Rebecca Kelly Slaughter, Chair & Comm'rs, Fed. Trade Comm'n, Statement on the Withdrawal of the Vertical Merger Guidelines (Sept. 15, 2021).

[10] VMGs at 11 ("The elimination of double marginalization is not a production, research and development, or procurement efficiency; it arises directly from the alignment of economic incentives between the merging firms. Since the same source drives any incentive to foreclose or raise rivals' costs, the evidence needed to assess those competitive harms overlaps substantially with that needed to evaluate the procompetitive benefits likely to result from the elimination of double marginalization.").

[11] *See* Otto Bock HealthCare North America, Inc., 2019 WL 5957363, at *33-35 (F.T.C. Nov. 1, 2019) (opinion authored by Comm'r Rohit Chopra); United States v. AT&T, Inc., 310 F. Supp. 3d 161 (D.D.C. 2018); FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001); United States v. Baker Hughes Inc., 908 F.2d 981, 982 (D.C. Cir. 1990); ProMedica Health Sys. v. FTC, 749 F.3d 559, 571 (6th Cir. 2014); FTC v. H.J. Heinz Co., 246 F.3d 708, 720-22 (D.C. Cir. 2001); FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1054-55 (8th Cir. 1999); FTC v. Univ. Health, Inc., 938 F.2d 1206, 1222–24 (11th Cir. 1991).

[12] *See* 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"); Global Antitrust Institute, Antonin Scalia Law Sch., Geo. Mason Univ., Comment Submitted in the Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers, at 5-9 (filed Sept. 6, 2018); Francine Lafontaine & Margaret Slade, Vertical Integration and Firm Boundaries: The Evidence, 45 J. ECON. LIT. 629, 680 (2007) (conducting a broad study of past vertical integrations and concluding "even in industries that are highly concentrated . . . , the net effect of vertical integration appears to be positive in many instances"); Cooper, Froeb, O'Brien, & Vita, supra note 20, at 658 ("Most studies find evidence that vertical restraints/vertical integration are procompetitive" and "[t]his efficiency often is plausibly attributable to the elimination of double-markups or other cost savings."); Global Antitrust Institute, Antonin Scalia Law Sch., Geo. Mason Univ., Comment Submitted in the Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers, at 5-9 (filed Sept. 6, 2018) (summarizing the available empirical studies and concluding that either nine or ten of the eleven studies "indicated vertical integration resulted in positive welfare changes" or "no change" in welfare); David Reiffen and Michael Vita, Is There New Thinking on Vertical

they require an approach that fully accounts for their good as well as their bad effects. Anything less will hurt consumers, not help them.

The 2020 Guidelines marked an important development in U.S. merger enforcement and provided needed transparency into the agencies' evaluation of vertical (and other non-horizontal) mergers. They are well founded, based on accepted economic principles, reflect precedent from courts and the agencies, and were the result of robust public comment.

The 2020 Guidelines incorporate the federal antitrust agencies' accumulated knowledge from nearly four decades of experience investigating and challenging anticompetitive non-horizontal mergers, as well as economic analysis on the potential harms and benefits of these types of mergers. By laying out the analytic framework the agencies use to evaluate non-horizontal mergers, the 2020 Guidelines are a useful guidepost for businesses that seek to ensure their conduct is lawful.

The 2020 Guidelines also benefitted from well-informed, substantial, and valuable public input in response to the draft Vertical Merger Guidelines released for comment on January 10, 2020,[13] the FTC's Competition and Consumer Protection Hearings for the 21st Century,[14] and a public workshop the staff held on [illegible]

mergers that the Majority believes are anticompetitive.[22] The majority could have waited to rescind the 2020 Guidelines until they had something with which to replace it. It appears they prefer sowing uncertainly in the market and arrogating unbridled authority to condemn mergers without reference to law, agency practice, economics, or market realities. The public and Congress should be alarmed by the majority's repeated withdrawal of existing guidance and transparency in favor of an amorphous bureaucratic fog that will provide cover for those who seek to politicize antitrust.

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We lament the majority's continued rejection of administrable, predictable, and credible merger