February 25, 2020

Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Washington DC 20530

Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

Re: Publication of FTC-DOJ Draft Vertical Merger Guidelines for Public Comment

Matter Number P810034

Via Online Submission

To Whom It May Concern:

On behalf of the undersigned organizations, we provide comments on the Federal Trade Commission – Department of Justice Draft Vertical Merger Guidelines.

U.S. Supreme Court Justice Louis Brandeis long ago warned against the "curse of bigness" in corporate power. Speaking at a time when American trustbusters sought to rein in excessive corporate power by enacting bold laws to protect competition, he warned against what has now come to pass-- the growth of corporate power overwhelming the rights of the citizenry. The laws of the progressive era and the challenges of the present day alike have been repeatedly hamstrung by short-sighted court decisions and the failures of our pro-competition agencies, which have failed to adapt to changing markets and technology. These failures have resulted in an overwhelming amount of corporate concentration in America that harms consumers and our democracy.

We have worked for decades to protect consumers from predatory corporate behavior and to resist anticompetitive practices that injure consumers, cheat workers and stifle our economy. Unfortunately, given the current lax state of campaign finance law and a permissive political climate, market power goes hand-in-hand with political clout. Americans' right to enjoy the benefits of the democracy our founders built is being threatened by companies willing to use their political power to directly stymie competition and harm consumers, in order to inflate their profit margins. Reform of our antitrust laws and practices, and developing a new pro-competition, pro-consumer approach to an economy governed by new technologies and new corporate structures is an important step in returning government power to the hands of citizens, where it belongs.

Comments on the Draft Vertical Merger Guidelines

The notion that the 1984 Non-Horizontal Merger Guidelines[1] should be rescinded and replaced has near universal acceptance.[2] The antitrust enforcement agencies do not rely on the Guidelines, and yet they are often influential on courts, resulting in merger approvals even in the rare cases where enforcers seek to stop vertical mergers.[3] Vertical mergers have generally gone unchallenged under Guidelines that established a presumption that vertical mergers are harmless. While we are encouraged by the effort to replace the 1984 Guidelines after 35 years, we have several concerns with the Draft Guidelines that fall in two main categories:

- First, there continues to be a presumption that vertical mergers are procompetitive, as well as a reliance on economic theory that does not capture all of the actual anticompetitive harm caused by vertical mergers.

- Second, we believe that this effort presents a real opportunity to provide antitrust enforcers with flexibility to remain effective in a dynamic and changing business environment. This is especially true in markets where the use and hoarding of data and intellectual property can create significant market power, and do not line up well with traditional economic pricing models. However, the overly prescriptive, yet limiting proposed guidelines will stand as a missed opportunity that could result in another four decades of anticompetitive vertical consolidation.

Review and Reconsideration of Vertical Mergers Effects

As noted in the statements of Commissioners Slaughter and Chopra on the Draft Guidelines,[4] the Guidelines should include an analysis of how vertical mergers have affected competition since the 1984 Non-Horizontal Merger Guidelines, and a retrospective review of prior merger approvals, as well as an ongoing review of new mergers that would test some of the economic theories and arguments that have been used to justify such mergers. Presumptions about efficiencies and elimination of double marginalization should be tested through real world experience. This sort of review would provide enforcers with a greater understanding of anticompetitive effects of vertical integration and the instances where enforcement has been effective or too lax. Most importantly, economic and procompetitive arguments advanced by merging companies would be subject to scrutiny, and potentially invalidated, which would prevent or curtail the use of such erroneous arguments in the future.

Potential questions to ask in retrospective review and analysis include:

- Did promised efficiencies, synergies, and consumer welfare benefits materialize?

[1] U.S. DEP'T OF JUST., NON-HORIZONTAL MERGER GUIDELINES (June 14, 1984) [hereinafter "1984 Guidelines"], https://www.justice.gov/sites/default/files/atr/legacy/2006/05/18/2614.pdf
[2] Bryan Koenig, DOJ Vertical Merger Guidelines Called "Badly Out Of Date," LAW360 (Nov. 1, 2018), https://www.law360.com/articles/1098243
[3] *See* United States v. AT&T Inc., 310 F.Supp.3d 161, 189 (D.D.C. 2018).
[4] Comm'r Rebecca Kelly Slaughter, Fed. Trade Comm'n, Statement on FTC-DOJ Draft Vertical Merger Guidelines for Public Comment, File No. P810034 (January 10, 2020); Comm'r Rohit Chopra, Fed. Trade Comm'n, Statement on Publication of Vertical Merger Guidelines, File No. P810034 (January 10, 2020).

- Were promising alternative technologies or competitive innovations dismantled?
- What were the impacts on workers, both in terms of jobs and wages?
- Did the integrated firms exercise market power or engage in anticompetitive practices?
- What is the state of competition in a given industry post-integration? (i.e. greater barriers to entry, further consolidation, rate of new entrants)

Reviews should be ongoing and scheduled periodically after all approved vertical integrations in order to continually test the effects of vertical mergers and the economic theories relied upon by merging parties.

Any Presumptions Should be Against Vertical Integration

In simplest terms, antitrust laws seek to prevent monopolies and anticompetitive conduct – they do not seek to ensure corporations can merge and grow. The Clayton Act is a statute that stops corporate mergers in their incipiency if they threaten competition and places a lower legal burden on the government than does the Sherman Act. The Supreme Court has stated that "the core question is whether a merger may substantially lessen competition, and necessarily requires a prediction of the merger's impact on competition, present and future."[5] The Court went on to say that the Clayton Act "can deal only with probabilities, not with certainties[.]" and "If the enforcement of [the Act] turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipiency would be frustrated."[6] The courts have consistently held that government challengers in merger cases must only establish a "reasonable probability" of harm to competition.[7]

The Draft Guidelines presume competitive benefits of vertical mergers

In drafting the Clayton Act, Congress saw rising concentration as a threat to the economic and political interests of Americans. In seeking to limit the harms of mergers, Congress also rejected an efficiencies defense.[8]

While the Draft Guidelines do not create a presumption that vertical mergers are lawful, they do include implicit procompetitive presumptions that are not necessary or appropriate under the Clayton Act. Section 3 of the Draft Guidelines, which includes a "safe-harbor" provision (discussed below), directs agencies to identify competitive effects in some cases, which establishes a presumption that such competitive effects will exist in vertical mergers.[9] Section 6, which discusses the elimination of double marginalization (EDM) (discussed below), concludes that a merger will not be anticompetitive if there is a net positive effect of EDM.[10] Section 7, which discusses the anticompetitive effects of coordination, suggests that EDM might reduce

[5] FTC v. Procter & Gamble Co., 386 U.S. 568, 577 (1967).
[6] *Id.*
[7] E.g., United States v. Von's Grocery Co., 384 U.S. 270, 285 (1966) (Stewart, J., dissenting); FTC v. H.J. Heinz Co., 246 F.3d 708, 713 (D.C. Cir. 2011); United States v. Dairy Farmers of Am., Inc., 426 F.3d 850, 858 (6th Cir. 2005).
[8] Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 135-36 (1982).
[9] *See* Draft Vertical Merger Guidelines § 3.
[10] *Id.* at § 6.

coordination, and thereby presumes a procompetitive effect.[11] Finally, Section 8, discusses efficiencies and provides a presumption of a competitive benefit of cognizable efficiencies and directs enforcers not to challenge a merger with such efficiencies.[12]

The Draft Guidelines should not make any presumptions of procompetitive effects of vertical mergers. These presumptions are fully speculative, largely unprovable, and contrary to the intent of the Clayton Act and the role of the FTC. For example, both efficiencies and EDM require a leap of faith that the integrated firm will use the economic profit created by the ability to reduce costs or cut marginal revenue to reduce prices and will be realized as a benefit to consumers. This is not something that can be measured in advance of a vertical integration. Further, in the case of significant market power and high entry barriers, efficiencies and the ability to eliminate margins could easily become the economic profit of a monopoly firm with an incentive to line the pockets of executives and investors, which would ultimately harm consumers and competition.

Importantly, for the same reasons, no attempt should be made to balance anticompetitive harms with speculative and unprovable procompetitive benefits as Section 5 of the Draft Guidelines suggest.[13]

No Safe Harbor Should be Established in Guidelines

Section 3 of the Draft Guidelines seeks to establish a standard approach using measures of market share and market concentration to evaluate a merger. While we agree that these measures can be useful, and could be used to set bright line prohibitions on mergers, establishing an effective safe harbor for any proposed merger below a certain market share ignores the potential anticompetitive effects that can exist even when there is a relatively low market share (and further, we do not agree that 20 percent is a low market share).

Confusingly, immediately after the statement in Section 3 of the Draft Guidelines that "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…"[14] there is a discussion of instances where market shares below the 20 percent threshold could result in anticompetitive mergers. **We agree that even small vertical mergers can create anticompetitive harms**.

If there is an acknowledgement that the threshold will allow anticompetitive mergers, then the threshold should not be established as a guideline at all. Rather, an upper threshold should be established that would trigger a challenge to a merger that would result in a market share or market concentration over a certain level, with close scrutiny of mergers below such level.

At minimum, any attempt to create a lower threshold for scrutiny (or a lack of scrutiny) should be matched with an upper threshold to require scrutiny.

[11] *Id.* at § 7.
[12] *Id.* at § 8.
[13] *Id.* at § 5.
[14] *Id.* at § 3.

Unilateral Effects as Insurmountable Barriers to Entry

Section 5 of the Draft Guidelines discusses unilateral effects including Foreclosure and Raising Rivals' Costs. However, there is no discussion[15] of the potential consequence of foreclosure as a result of a vertical integration where a prospective competitor would need to enter both upstream and downstream markets at the same time to effectively compete (so-called two-level or two-stage entry). This is a departure from the 1984 Guidelines which included a discussion of the difficulty of "Two-Level" and "Simultaneous" entry of integrated markets.[16] Two-level entry can serve as a significant barrier to entry for potential competitors because of increased risk, cost, and level of expertise required to enter more than one market simultaneously.[17]

This can be of particular concern with dominant platforms. For example, if a major online retail platform acquired a warehouse and home delivery service it would become extremely difficult to compete as a new entrant in the delivery service business or the online retail platform business. Thus, the foreclosure conduct of an integrated firm could result in the anticompetitive requirement of two-level entry. The Draft Guidelines should include a specific discussion of the issues surrounding two-stage entry, with direction for enforcers to closely scrutinize vertical mergers that may result in the need for potential competitors to entry both markets simultaneously, especially in the case where a dominant platform vertically integrates.

Elimination of Double Marginalization Should Not be a Factor in Guidelines

As discussed above, The Elimination of Double Marginalization (EDM) is speculative, unprovable, and relies on a vertically integrated company to act in a way that defies reason, even if predicted by some economic models. EDM is a theoretical phenomenon whereby there are two firms in a supply chain, each extracting a marginal profit, and after they vertically integrate the integrated firm would forego the marginal profit at different places in the supply chain in exchange for a single marginal profit. This would ideally result in a lower price for a purchaser. Notwithstanding our concern that the EDM analysis in the Draft Guidelines is overly theoretical, it also ignores the mandate of the Clayton Act to stop mergers that may tend to lessen competition in exchange for a potential for lower prices. Further, unlike the Safe Harbor discussed above, there is no flexibility in the EDM language which states that "The Agencies will not challenge a merger if…".[18] This will cause enforcers to approve mergers based on questionable assertions about pricing that are not testable or provable.

At minimum, the language around EDM should be made significantly less prescriptive so that evidence of EDM might be considered in an evaluation but will not be determinative of whether or not to challenge a merger.

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[15] The Draft Guidelines do provide an example (#5) of a two-stage entry that may be anticompetitive, but there is no discussion, explanation, or mention of the concept outside of this one example.
[16] 1984 Guidelines, 28 – 29.
[17] Steven C. Salop & Daniel P. Culley, *Revising the U.S. Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners*, 4 J. ANTITRUST ENFORCEMENT 1, 16 (2016).
[18] *Id.* at § 6.

Finally, evidence of EDM should not be used to "reduce or reverse the adverse unilateral effects" as suggested in section 5 of the Draft Guidelines.[19] If a merger creates an untenable situation for a rival, potentially lower costs for a consumer cannot cure the anticompetitive aspects of the merger and the Guidelines should not assert that such a balance is appropriate.

Market Definition Should Provide Flexibility

Section 2 of the Draft Guidelines establish a looser market definition to include a "related product."[20] We support this approach in the Draft Guidelines and believe that this language provides more flexibility than focusing strictly on upstream and downstream product markets. Specifically, the discussion of a related product as "an input, a means of distribution, or access to a set of customers"[21] will allow for maximum flexibility in defining where in the market structure competition may be harmed.

Guidelines Should be Aspirational and Adaptable

The Draft Guidelines are a significant improvement over the 1984 Guidelines, for example they specifically identify competitive harms associated with vertical mergers including foreclosure, raising rivals' costs, and access to competitively sensitive information. However, they suffer a failure of imagination by simply memorializing existing Agency practice rather than identifying a framework by which enforcers might approach proposed mergers today, and in the years to come. Guidelines should allow for significant flexibility as business models and structures shift and change over time.

One way to achieve this approach is to charge enforcers with the expectation that they endeavor to understand and explain the rationale for a proposed merger so that all the potential harms to competition can be assessed accurately. Only by understanding the reasons why a merger is sought can the possible anticompetitive motivations for a merger be identified. Assuming a motive that aligns with an untested economic theory is rigid and limiting, but such an assumption also fails to consider the various factors that might drive a management decision. These factors might include acquisition of an intangible asset that is not directly related to firm revenue or even current business function, but nevertheless provides an unfair competitive advantage, or creates a barrier to entry from potential competitors that are not immediately obvious.

Data and New Technology Must be Factored into Guidelines

As Commissioner Chopra highlighted in his statement on the Draft Guidelines,[22] technology and data has changed how firms are structured, as well as the motivations for mergers. Data alone may very well be a driving factor for a vertical merger, the anticompetitive harms of which may not be obvious under a traditional analysis. Business decisions made by using large quantities of

[19] *Id.* at § 5.
[20] *Id.* at § 2.
[21] *Id.*
[22] Comm'r Rohit Chopra,
Fed. Trade Comm'n, Statement on Publication of Vertical Merger Guidelines, File No. P810034 (January 10, 2020).

data to feed algorithm powered artificial intelligence tools may give firms an advantage over enforcers trying to understand the implications of a given merger. Even defining the data assets may be an arduous task for enforcers. The guidelines must include a directive to assess the impact of data involved in any potential merger, including the use of data to evaluate the merger itself, as well as how the integrated company might leverage the combined or acquired data to engage in anticompetitive conduct or potentially harm consumer and citizen privacy.

This will require a fundamental new approach to the competitive impacts of the interplay of data and technology. Enforcers must establish a rigorous review process that begins with a presumption against data hoarding and an expectation that data assets will be fully accounted for in any merger review. In addition, enforcers must be able to fully articulate a merger rationale to ensure that motivations, and the competitive effects, line up with available information.

Most importantly, this is an area where the enforcers must be adaptable and willing to limit merger activity until data implications are fully understood.

Comment Period

We appreciate the comment period extension and that decision to host workshops on this important topic. As Commissioner Slaughter rightly pointed out, given the significance of the update to the Vertical Merger Guidelines the comment period should give adequate time for all interested stakeholders to submit comments.

In addition, we would request that there be additional time for comments after workshops are concluded to allow for responses to issues that are raised as part of the workshop discussions.

Conclusion

We appreciate the opportunity to provide comments on the important effort to replace the Vertical Merger Guidelines. Vertical mergers have contributed to the intense concentration across the economy, and these guidelines are a key step in reversing this harmful trend. Anticompetitive mergers harm consumers, cheat workers, stifle our economy, and compromise our democracy. These Draft Guidelines present an opportunity to reinvigorate enforcement and follow the intent of the Clayton Act, but serious changes must be made to ensure that the status quo of lax enforcement of the last four decades does not continue in the decades to come.

Sincerely,

American Economic Liberties Project
Campaign for a Commercial-Free Childhood
Campaign for Family Farms and the Environment
Center for Digital Democracy
Color of Change
Economic Policy Institute
Public Citizen
Rural Advancement Foundation International - USA