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

Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson

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 In the past two months, the FTC has withdrawn just as many bipartisan policies.[1] Now, the partisan majority will rescind the 2020 Vertical Merger Guidelines issued jointly by the FTC and the Antitrust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.

---

[1] Noah Joshua Phillips & Christine S. Wilson, Comm'rs, Fed. Trade Comm'n, Dissenting Statement on the Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591710/p210100phillipswilsondissentsec5enforcementprinciples.pdf; Noah Joshua Phillips, Comm'r, Fed. Trade Comm'n, Dissenting Statement Regarding the Commission's Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592398/dissenting_statement_of_commissioner_phillips_regarding_the_commissions_withdrawal_of_the_1995.pdf; Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Oral Remarks Regarding Policy Statement on Prior Approval and Prior Notice Provisions in Merger Cases (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf.

[2] U.S. Dep't of Just. & Fed. Trade Comm'n, Vertical Merger Guidelines (hereinafter "VMGs") (June 30, 2020), https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf; Fed. Trade Comm'n, Commentary on Vertical Merger Enforcement (Dec. 20, 2020), https://www.ftc.gov/system/files/documents/reports/federal-trade-commissions-commentary-vertical-merger-enforcement/p180101verticalmergercommentary_1.pdf.

[3] *See* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Statement Regarding the Announcement of Pre-Consummation Warning Letters (Aug. 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf; Noah Joshua Phillips & Christine S. Wilson, Comm'rs, Fed. Trade

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

The Majority's Decision Will Chill Procompetitive Deals and Hurt Consumers

Section 7 of the Clayton Act, the main U.S. law governing mergers, bars transactions where "the effect may be substantially to lessen competition".[4] Vertical mergers are *not* mergers of competitors. Rather, they combine firms that are in a buyer-seller relationship.[5] Suppose a company that specializes in manufacturing only smartphones merges with a company that specializes in manufacturing only smartphone chips, some of which it was selling to the smartphone manufacturer. That is a vertical merger. It does not directly eliminate competition, as the companies were not competing (or about to compete) with each other before they merged.

Vertical integration is a common "make or buy" phenomenon similar to choices that consumers make daily—it's one way that companies grow. When considering what to have for dinner, a consumer may choose to outsource food preparation by eating at a restaurant or getting take-out; alternatively, he may rely on groceries in his refrigerator and pantry to make dinner himself. When discovering a leak in her home, a consumer can outsource the repairs by hiring a plumber; alternatively, a handy consumer may fix the leak herself.

One immediate and positive effect of a vertical merger is that transactions (*e.g.,* chip sales) that were occurring at arm's length in the market now take place within the merged firm. As a consequence, the merged firm is no longer paying a markup on the product it is now supplying to itself (*e.g.,* smartphone chips), a phenomenon that economists call the "elimination of double marginalization".[6] The merged firm benefits from a lower manufacturing cost for each unit it produces (*e.g.,* each smartphone), allowing it to compete more aggressively by lowering its price and selling more units, and leaving consumers better off. Vertical mergers can also increase efficiency and competitiveness in other ways, like saving the substantial time and money that often go into finding reliable trading partners, negotiating terms of sale, coordinating R&D and product design, and writing contracts that cover multiple contingencies but can never capture them all. Take Disney's 2006 acquisition of Pixar. Prior to the merger, Disney was partially financing and distributing Pixar's films; but once combined, Pixar revitalized Disney's animation department, while Disney used its resources to expand Pixar's production, resulting in several beloved movies.[7]

Comm'n, Statement Regarding the Indefinite Suspension of Early Terminations (Feb. 4, 2021), https://www.ftc.gov/system/files/documents/public_statements/1587047/phillipswilsonetstatement.pdf.

[4] 15 U.S.C. § 18.

[5] Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Closing Remarks at FTC Hearing #5: Vertical Merger Analysis and the Role of the Consumer Welfare Standard in U.S. Antitrust Law, Hearings on Competition and Consumer Protection in the 21st Century (hereinafter "Vertical Merger Hearing") at 360, https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_session_5_transcript_11-1-18_0.pdf.

[6] As the 2020 VMGs correctly point out, "[t]he 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." *See also* Roger D. Blair, Christine S. Wilson, et. al, *Analyzing Vertical Mergers: Accounting for the Unilateral Effects Tradeoff & Thinking Holistically About Efficiencies*, 27 Geo. Mason L. Rev. 761 (2020).

[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

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,

---

[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 ("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 Mergers? A Comment, 63 ANTITRUST L.J. 917 (1995) (arguing the economics suggests the vast majority of vertical mergers are efficiency-enhancing); Michael H. Riordan & Steven C. Salop, Evaluating Vertical Mergers: Reply to Reiffen and Vita Comment, 63 ANTITRUST L.J. 943, 944 (1995) (agreeing with Reiffen and Vita that "efficiency

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 Majority Discards Transparency in Favor of Uncertainty

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 FTC and Department of Justice hosted on March 11, 2020.[15] The Majority discards the 2020 Guidelines today with *zero* public input.

While the 2020 Guidelines reflect the agencies' current enforcement practices and policy, the Commentary provides a historical description of the Commission's analysis in non-horizontal merger cases. This document promotes agency transparency and facilitates the predictability, credibility, and integrity of the Commission's merger review process. Withdrawing the 2020 Guidelines and Commentary leaves the business community without clarity as to how we will carry out vertical merger enforcement. Our colleagues have yet to articulate *any* new proposals or guidance for a new approach to vertical merger enforcement. We do not know whether the Majority intends to issue new guidance. We can only hope that they propose a path forward and will take into account and grapple with sound law and the economics in doing so.

---

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").

[13] *See* 74 Public Comments submitted regarding Draft Vertical Merger Guidelines, https://www.ftc.gov/policy/public-comments/draft-vertical-merger-guidelines.

[14] Vertical Merger Hearing.

[15] Fed. Trade Comm'n and Dep't of Just. Workshop on Draft Vertical Merger Guidelines (March 11, 2020), https://www.justice.gov/atr/public-workshops-draft-vertical-merger-guidelines#information.

The Majority's decision to foster uncertainty at this time is particularly pernicious. The COVID-19 pandemic exposed supply chain vulnerabilities in many sectors of the American economy.[16] Impacted businesses are now attempting to adapt.[17] Some of these businesses seek to bring in-house supply chain functions upstream or downstream from their operations – in other words, they seek to engage in vertical mergers. Other impacted businesses may enter into new contracting arrangements. The uncertainty imposed on businesses – by today's action regarding vertical mergers and recent Commission actions regarding contracting[18] – threatens to slow unnecessarily the American economy's recovery by denying law-abiding businesses the guidance they need to know what actions are permissible as they try to respond to supply shortages.

The Majority's decision to withdraw the Vertical Merger Guidelines also adds to the divide between enforcement at the FTC and the Department of Justice. There have long been concerns about different procedures at the agencies and perceived differences in the standards for an injunction, leading to repeated calls to modify the procedures for the FTC's merger enforcement program.[19] More recently the concerns have led members of Congress to discuss transferring the FTC's competition authority to DOJ.[20] Unless the DOJ similarly eschews the 2020 Guidelines, a new schism will appear.

The Majority Prefers Unchecked Regulatory Power Over Guidance

The uncertainty the Majority creates today is particularly troubling in light of the administration's promises to increase merger enforcement,[21] and to impose punitive penalties on parties proposing

---

[16] *See* Juliana Kaplan & Grace Kay, *Can't find chicken wings, diapers, or a new car? Here's a list of all the shortages hitting the reopening economy,* Insider (May 25, 2021), https://www.businessinsider.com/why-supply-shortages-economy-inventory-chips-lumber-cars-toilet-paper-2021-5.

[17] *See*, *e.g.*, Julia Horowitz, *How the pandemic turned humble shipping containers into the hottest items on the planet*, CNN.com (Sept. 8, 2021), https://www.cnn.com/2021/09/08/business/shipping-containers/index.html; Costas Paris, *Shipping Options Dry Up as Businesses Try to Rebuild from Pandemic*, Wall Street Journal (Sept. 12, 2021), https://www.wsj.com/articles/shipping-options-dry-up-as-businesses-try-to-rebuild-from-pandemic-11631439002?st=8wumh3fsb5i4qyp&reflink=article_email_share (describing that WalMart and Home Depot are chartering own ships to move imports from Asia).

[18] Phillips & Wilson *supra* note 1; FTC Press Release, *FTC Extends Deadline for Comments on Workshop Addressing Non-Compete Clauses in Employment Contracts* (Jan. 28, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-extends-deadline-comments-workshop-addressing-non-compete.

[19] *See* SMARTER Act, S. 4876, 116th Cong. (2020).

[20] *See* One Agency Act, S. 633, 117th Cong. § 4 (2021). *See also* The House Judiciary Republican Agenda for Taking on Big Tech (July 6, 2021), https://republicans-judiciary.house.gov/wp-content/uploads/2021/07/2021-07-06-The-House-Judiciary-Republican-Agenda-for-Taking-on-Big-Tech.pdf ("The current system of splitting antitrust enforcement between the Department of Justice and the Federal Trade Commission is inefficient and counterproductive. The arbitrary division of labor empowers radical Biden bureaucrats at the expense of Americans. This proposal will consolidate antitrust enforcement within the Department of Justice so that it is more effective and accountable.").

[21] *See* Exec Order No. 14036, *Promoting Competition in the American Economy*, 86 Fed. Reg. 36987 (July 9, 2021); Lina M. Khan, Chair, Fed. Trade Comm'n, Remarks on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591506/remarks_of_chair_khan_on_the_withdrawal_of_the_statement_of_enforcement_principles_re_umc_under.pdf.

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.

***

We lament the majority's continued rejection of administrable, predictable, and credible merger enforcement. Going forward, we fear consumers will lose the benefits of competition from vertical integration, and honest businesses will lose clarity regarding the boundaries of lawful conduct.

[22] *See* Letter from Lina M. Khan, Chair, Fed. Trade Comm'n, to Brian Deese, Director, Nat'l Econ. Council (Aug. 25, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/08/Letter-to-Director-Deese-National-Economic-Council.pdf; Lina M. Khan, Rohit Chopra, & Rebecca Kelly Slaughter, Chair & Comm'rs, Fed. Trade Comm'n, Statement on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf.