Oral Remarks of Commissioner Christine S. Wilson

Open Commission Meeting on September 15, 2021

Proposed Policy Statement on the Health Breach Notification Rule

Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An FTC Study

FTC Procedural Rules Concerning Petitions for Rulemaking

Rescission of the 2020 FTC-DOJ Vertical Merger Guidelines and December 2020 Commentary on Vertical Merger Enforcement

Paradoxes are a repeating theme in antitrust law. In 1978, Judge Bork published his book, The Antitrust Paradox. In 2017, our Chair published her law review note titled "Amazon's Antitrust Paradox." And now, in 2021, we have the FTC's Transparency Paradox.

We are told that our new leadership values transparency and public input. Unfortunately, the majority repeatedly has chosen to undermine transparency and limit public input. At our Open Commission Meeting in July, the majority voted to revise our Rules of Practice so that, in rulemakings going forward, public input will be more limited. The majority has withdrawn important enforcement guidance without telling the business community what the new rules are.[1] Traditionally, FTC staff have participated in a variety of public speaking opportunities to keep the public informed about our activities. One of the new Chair's first acts was to ban public speaking. And for each Open Commission Meeting that we hold, the public is given the minimum required amount of notice. And at each of these meetings, we hear real-time public comments only after we have voted.

Today, the majority is poised to add three more items to the growing list of Transparency Paradox examples.

I. Proposed Policy Statement on the Health Breach Notification Rule

The first example concerns the Policy Statement on Breaches by Health Apps and Other Connected Devices. The Statement asserts that it "serves to clarify the scope of the [Health Breach Notification] Rule."[2] It is important to understand what the term "clarify" means here. This Policy Statement in fact expands the Rule – while contradicting existing FTC business guidance. You can read about this discrepancy in my dissent that will be posted later today.

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[1] Press Release, FTC Rescinds 1995 Policy Statement the Limited the Agency's Ability to Deter Problematic Mergers (July 21, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter (announcing rescission of the 1995 policy statement concerning prior approval and prior notice provisions); Press Release, FTC Rescinds 2015 Policy that Limited its Enforcement Ability Under the FTC Act (July 1, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under (announcing rescission of the 2015 policy statement regarding "Unfair Methods of Competition Under Section 5 of the FTC Act").

[2] FTC Policy Statement on Breaches by Health Apps and Other Connected Devices (Sept. 15, 2021) (italics added), https://www.ftc.gov/news-events/events-calendar/open-commission-meeting-september-15-2021.

Moreover, the majority advances this policy U-turn while the agency has an open rulemaking that covers not just this Rule, but *precisely the topics addressed* by their Policy Statement.[3] Specifically, at least three of the questions in our federal register notice ask the public for their thoughts on the topics in the Policy Statement. Rather than taking public input into account, though, the majority today apparently will take the matter into its own hands.

Unfortunately, this is not the first time that our new leadership has made a policy U-turn during the pendency of a directly relevant rulemaking. Last month, the FTC withdrew guidance on a specific aspect of our merger notification requirements.[4] But we have an open rulemaking on our merger notification requirements, and we solicited public comment on that very aspect of our reporting regime.[5] It's a nuanced issue, so we posed two questions with 11 sub-parts. The public's input on that issue, though, is apparently irrelevant.

Another troubling aspect of today's Policy Statement concerns the majority's decision to announce this sweeping policy change to the Health Breach Notification Rule unilaterally. Given the cross referencing in the relevant statutes, the interpretation adopted by the FTC could have implications for our sister agencies, the Social Security Administration and Health & Human Services. These agencies possess both significant expertise in the health care arena and authority for enforcing related regulatory frameworks. And our unilateral actions may impact entities otherwise subject to our sister agencies' jurisdiction.

I am sympathetic to the majority's goals of providing higher levels of protection to sensitive consumer health data. During my tenure as a Commissioner, I have been an ardent advocate for federal privacy legislation.[6] One compelling rationale for comprehensive privacy legislation that

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[3] Health Breach Notification, Request for Public Comment, 85 Fed. Reg. 31085 (May 22, 2020).

[4] FTC Blog Post, Reforming the Pre-Filing Process for Companies Considering Consolidation and a Change in the Treatment of Debt (Aug. 26, 2021), https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/reforming-pre-filing-process-companies-considering; FTC Statement, The Treatment of Debt as Consideration (Aug. 26, 2021), https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/treatment-debt-consideration.

[5] Press Release, FTC and DOJ Seek Comments on Proposed Amendments to HSR Rules and Advanced Notice of Proposed HSR Rulemaking (Sept. 21, 2010), https://www.ftc.gov/news-events/press-releases/2020/09/ftc-doj-seek-comments-proposed-amendments-hsr-rules-advanced

[6] Oral Statement of Commissioner Christine S. Wilson, FTC, Before the U.S. House Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce (July 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592954/2021-07-28_commr_wilson_house_ec_opening_statement_final.pdf; Christine Wilson, Op-Ed, *Coronavirus Demands a Privacy Law*, WALL ST. J., May 13 2020, *available at* https://www.wsj.com/articles/congress-needs-to-pass-a-coronavirus-privacy-law-11589410686; Oral Statement of Commissioner Christine S. Wilson, FTC, Before the U.S. Senate Committee on Commerce, Science, and Transportation (April 20, 2021), https://www.ftc.gov/system/files/documents/public_statements/1589180/opening_statement_final_for_postingrevd.pdf; Christine Wilson, Privacy in the Time of Covid-19, TRUTH ON THE MARKET (Apr. 15, 2020), https://truthonthemarket.com/author/christinewilsonicle/; Christine S. Wilson, A Defining Moment for Privacy: The Time is Ripe for Federal Privacy Legislation, Remarks at the Future of Privacy Forum, Feb. 6, 2020, https://www.ftc.gov/system/files/documents/public_statements/1566337/commissioner_wilson_privacy_forum_speech_02-06-2020.pdf; Oral Statement of Commissioner Christine S. Wilson Before the U.S. House Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce (May 8, 2019), https://www.ftc.gov/system/files/documents/public_statements/1519254/commissioner_wilson_may_2019_ec_opening.pdf; Oral Statement of Commissioner Christine S. Wilson, FTC, Before the U.S. Senate Committee on Commerce, Science, and Transportation Subcommittee on Consumer

I have cited repeatedly is "emerging gaps in sector-specific approaches created by evolving technologies."[7] In other words, HIPAA "applies to patient information maintained by doctors' offices, hospitals, and insurance companies, but not to wearables, apps, or websites like WebMD."[8] The COVID-19 pandemic has further underscored concerns about the privacy of sensitive health data.[9]

To the extent the Commission possesses authority to address consumer health data provided to mobile health apps through its Health Breach Notification Rule, I support employing that authority. But as I have said on other occasions, process matters. The Policy Statement issued by the majority today short-circuits our ongoing rulemaking and seeks to improperly expand our statutory authority – and to do so unilaterally, rather than in concert with other federal agencies with shared jurisdiction like HHS and the Social Security Administration.

For these reasons, I vote "no."

II. Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An FTC Study

I want to thank FTC staff for their great work on this 6(b) study that analyzes non-HSR reported acquisitions by select technology platforms. The work they have conducted exemplifies the FTC's ability to strengthen its policy initiatives and enforcement actions through its 6(b) research powers. I hope today's presentation is only the beginning of the Commission's analysis of the information collected on non-reportable technology mergers and acquisitions. The Commission will continue to benefit from understanding these transactions and their competitive impacts.

Technology companies garner significant antitrust attention, but this is not the only industry that raises questions about the HSR notification process. When this study was announced, I called for the FTC to conduct similar studies in other industries. Commissioner Chopra joined me in that call.[10] Today, I want to publicly reiterate my call for the FTC to analyze non-reportable HSR deals in additional industries.

Protection, Product Safety, Insurance, and Data Security (Nov. 27, 2018), https://www.ftc.gov/system/files/documents/public_statements/1423979/commissioner_wilson_nov_2018_testimony.pdf.

[7] Oral Statement of Commissioner Christine S. Wilson Before the U.S. House Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce (May 8, 2019), https://www.ftc.gov/system/files/documents/public_statements/1519254/commissioner_wilson_may_2019_ec_opening.pdf

[8] *Id.*

[9] *See* Christine Wilson, Privacy in the Time of Covid-19, TRUTH ON THE MARKET (Apr. 15, 2020), https://truthonthemarket.com/author/christinewilsonicle/; Christine S. Wilson, A Defining Moment for Privacy: The Time is Ripe for Federal Privacy Legislation, Remarks at the Future of Privacy Forum, Feb. 6, 2020, https://www.ftc.gov/system/files/documents/public_statements/1566337/commissioner_wilson_privacy_forum_speech_02-06-2020.pdf

[10] Statement of Commissioner Christine S. Wilson, Joined by Commissioner Rohit Chopra, Concerning Non-Reportable Hart-Scott-Rodino Act Filing 6(b) Orders (February 11, 2020), https://www.ftc.gov/system/files/documents/reports/6b-orders-file-special-reports-technology-platform-companies/statement_by_commissioners_wilson_and_chopra_re_hsr_6b_0.pdf.

The FTC has developed significant expertise in the healthcare industry and this area should be the next target of a non-reportable transactions study. The healthcare industry is of vital importance to every American consumer and there are preliminary reasons to believe that non-reportable acquisitions are preventing Americans from receiving quality healthcare services at competitive prices. For example, the share of independent dialysis facilities has shrunk drastically over the last three decades and two national chains now own the majority of these facilities; however, most acquisitions fall below HSR thresholds and consequently escape premerger review.[11] Similar patterns have been observed in pharmaceutical and hospital markets.[12]

Additional 6(b) studies across other industries will ensure that the FTC has a more complete understanding of the competitive effects of non-reportable mergers across industries. With that enhanced understanding, we can determine whether there are legal changes that need to be made – either through legislation in Congress, or rules here at the agency.

The Commission constantly asks FTC staff to do more work with fewer resources, and staff has never failed to rise to the challenge. It is with this awareness that I believe the FTC can rise to the challenge of researching and studying additional practices and industries to better inform the Commission's decisions. The challenge of diving into ignored or unexplored areas plays into the FTC's strengths. I encourage the Commission to continue, and to expand, this pursuit.

III. FTC Procedural Rules Concerning Petitions for Rulemaking

I am always receptive to hearing from stakeholders; my decisions are more informed when I engage with diverse viewpoints. For example, the public comment period during these Open Commission Meetings raises important issues for the Commission to consider in the future. So I support transparency that fosters opportunities for stakeholders to participate in Commission business. But creating a petition machine in which every petition for rulemaking is automatically posted is a different matter entirely.

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[11] Eliason, Paul J. et al., *How Acquisitions Affect Firm Behavior and Performance: Evidence from the Dialysis Industry*, 135 Quarterly J. Econ. 221 (2020) (finding that during the past three decades, the share of independent dialysis facilities fell from 86% to 21%, so that DaVita and Fresenius now own more than 60% of facilities and earn more than 90% of the industry's revenue); Wollmann, Thomas, *How to Get Away With Merger: Stealth Consolidation and its Real Effects on US Healthcare*, working paper (2018) (finding that "many proposed dialysis facility acquisitions that would otherwise be blocked over 95% of the time are blocked less than 5% of the time when exempt from premerger notification requirements… Exempt facility acquisitions account for most of the rise in industry-wide within-market concentration over the last two decades.").

[12] Cunningham, Colleen et al. *Killer Acquisitions*, working paper (2019) (finding that "killer acquisitions" in pharma disproportionately occur just below the HSR threshold and generally appear to involve products that are less likely to launch and more likely to be discontinued); Wollmann, Thomas, *Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act*, 1 American Economic Review: Insights 77 (2019) (tracking hospital mergers from 1994 to 2011 and finding that mergers exempt under the revised, higher, filing thresholds but not exempt under the original thresholds greatly increase after the revision, and that 50% of all hospital mergers are horizontal and exempt under the higher thresholds).

First, I do not understand why we are spending staff and Commission resources on this project while the Chair and senior FTC staff repeatedly note the resource constraints we face.[13] In fact, the FTC is issuing warning letters that threaten merging parties to close at their peril because we are so resource-constrained that we can't fully investigate deals within statutorily-mandated timelines.[14]

Second, records show the FTC received 1.44 petitions on average each year between 2005 and 2013. In no year did we receive more than three. And the agency's approach to public petitions already aligns with recommendations from the Administrative Conference of the United States.[15] ACUS allows agencies to decide on a case-by-case basis whether to solicit public comment on petitions for rulemaking, which has been our practice all along.[16]

Third, I would be much more comfortable with this entire enterprise if we were to build in a requirement that obligated petitioners to disclose who is funding rulemaking petitions. I do not want the FTC unwittingly to be used as a weapon against rivals.

When I was in private practice, I saw firsthand how the citizens' petition process at the Food and Drug Administration was abused by branded drug companies to delay and exclude competition from generic drug companies. For years, I represented the generic drug companies as they fought back against those tactics. The problem got so bad that in 2018, with input from the FTC, the FDA overhauled its citizens' petition process.[17]

I am concerned about creating similar opportunities for regulatory gamesmanship here. In the face of growing discontent with capitalism, I have maintained that crony capitalism, not

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[13] Remarks of Chair Khan regarding the proposed rescission of the 1995 policy statement concerning prior approval and prior notice provisions, July 21, 2021, https://www.ftc.gov/system/files/documents/public_statements/1592338/lk_remarks_for_1995_rescission_-_final_-_1230pm.pdf ("The FTC is a significantly under-resourced agency, tasked with enforcing antitrust and consumer protection laws economy-wide—even as its staff count remains roughly 50 percent less than it was in 1980. 11 A recent surge in merger filings is stretching these resources even further, resulting in an enormous burden on the agency staff."); David McLaughlin, *FTC's Khan Says Merger Wave Is Straining Agency Resources*, BLOOMBERG, July 28, 20221, https://www.bloomberg.com/news/articles/2021-07-28/ftc-s-khan-says-merger-wave-is-straining-agency-resources (covering Chair Khan's remarks to a panel of the House Energy & Commerce Committee); Leah Nylen, *FTC Staffers told to back out of public appearances*, POLITICO, July 6, 2021, https://www.politico.com/news/2021/07/06/ftc-staffers-public-appearances-498386 ("The FTC is severely under-resourced and in the midst of a massive surge in merger filings. This is an all-hands-on-deck moment.").

[14] Holly Vedova, *Adjusting merger review to deal with the surge in merger filings*, FTC Blog Post (Aug. 3, 2021 12:28PM), https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings.

[15] Administrative Conference of the United States, Petitions for Rulemaking, at 6, Dec. 5, 2014.

[16] *Id*. at 3.

[17] Press Release, Statement from FDA Commissioner Scott Gottlieb, M.D., on new agency actions to further deter 'gaming' of generic drug approval process by the use of citizen petitions (Oct. 2, 2018), https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-new-agency-actions-further-deter-gaming-generic-drug.

capitalism, is the true source of the problem.[18] Crony capitalism perverts the free-enterprise system by allowing special interests cloaked in dark money to lobby for laws and regulations that tip the scales in their favor. The ability to pay for access to Congressional and agency leadership disadvantages rivals, skewing the playing field and harming consumers. This phenomenon is particularly pernicious in the American health care sector.[19]

The Chair recently issued a Request for Public Comment Regarding Contract Terms that May Harm Fair Competition.[20] That solicitation for public comment holds up as examples two previously submitted petitions.[21] I agree that these two petitions make good examples. They demonstrate the need for a disclosure-of-funding rule here at the FTC that protects the agency's work against petition-lobbying secretly bankrolled by powerful special interests.

The Chair's example petitions demonstrate how unworkable it would be to leave to Commissioners and staff the task of scrutinizing the petition docket and IRS filings to uncover conflicts of interest that could undermine the legitimacy of the agency's work. The two example petitions were submitted by dozens of organizations and individuals.

- Twenty organizations and 46 individuals submitted the first petition for non-compete clauses.
- Thirty-one organizations and five individuals submitted the second petition on exclusionary contracts.

There is *zero* disclosure of who paid for these petitions.

The Chair's example petitions also demonstrate the importance of understanding who is paying for petition-lobbying of the agency. Of the dozens of organizations and individuals disclosed by the two petitions, the same non-profit is named first in both cases, so it presumably played a major role in the preparation of both petitions. According to both petitions, that lead named petitioner "does not accept any funding or donations from for-profit corporations." So who is writing the six-figure checks implied by publicly available data submitted to the IRS?[22] Who paid for these petitions? I do not know.

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[18] Christine S. Wilson, Remarks for the 2020 Global Forum on Competition, Competition Policy: Time for a Reset? 1-2 (Dec. 7, 2020), https://www.ftc.gov/system/files/documents/public_statements/1589376/wilson-oecd-2020-remarks.pdf; Christine S. Wilson, Remarks at the Global Competition Law Lecture Series, Why They Built the Fence: Understanding Modern Antitrust Law 18 (Nov. 19, 2020), https://www.ftc.gov/system/files/documents/public_statements/1587210/remarks_of_commissioner_christine_s_wilson_at_kings_college_london.pdf.

[19] *See generally* Charles Silver and David A. Hyman, Overcharged: Why Americans Pay Too Much For Health Care (2018).

[20] Fed. Trade Comm'n, Solicitation for Public Comment (Aug. 5, 2021), https://www.regulations.gov/document/FTC-2021-0036-0022.

[21] Open Markets Institute et al., Petition for Rulemaking to Prohibit Worker Non-Compete Clauses, Posted by the Fed. Trade Comm'n on July 21, 2021, https://www.regulations.gov/document/FTC-2021-0036-0001; Open Markets Institute et al., Petition for Rulemaking to Prohibit Exclusionary Contracts, Posted by the Fed. Trade Comm'n on July 21, 2021, https://www.regulations.gov/document/FTC-2021-0036-0002.

[22] Open Markets Institute, Form 990 (2019), Schedule A, Part II (disclosing public support data).

I have read online that one "proud" supporter of the lead named petitioner is a philanthropic enterprise established by the billionaire founder and major shareholder of a large tech company.[23] I have no idea how much financial support is flowing from that tech billionaire through his foundation to the lead named petitioner. But the foundation itself connects its support of the lead named petitioner with its own goal of "curbing the power of dominant platforms."[24] If the non-profit corporate interest behind the non-profit veil were Amazon or Facebook, I suspect that everyone would find that fact relevant, and rightly so.

Without funding disclosures, the FTC and the public will be left in the dark about who is seeking to influence our rulemaking efforts, compromising the FTC's independence. The FDA has a disclosure-of-funding rule, and so should we.[25] To facilitate transparency and to avoid having the FTC used as a weapon in disputes between large businesses, I offer the following topping motion:

> I move that publication of the proposed amendments governing petitions for rulemaking to the Commission's Rules of Practices be postponed until such time that the General Counsel can add appropriate disclosure-of-funding provisions, approved by the Commission, that are consistent with constitutional protections of speech and association.

The lack of a disclosure-of-funding provision in this matter provides today's second example of the Transparency Paradox. Because today's proposal does not include procedural safeguards to protect the FTC from the influence of dark money, I vote "no."

IV. Withdrawing the 2020 Vertical Merger Guidelines and Commentary on Vertical Merger Enforcement

Once again, we are withdrawing a sound policy based on economic analysis, agency experience, and substantial public input – unilaterally, with little notice to the public, and with no opportunity for public input. And the Commission is not explaining the agency's new approach to vertical mergers. So we have no guidance on the rules of the road for vertical mergers at precisely the point in time when businesses are attempting to address the supply chain vulnerabilities that COVID-19 exposed.

To compound matters, the Commission is sowing confusion as the majority simultaneously proposes to impose punitive measures on companies that bring to our doorstep what the majority views as anticompetitive deals.[26] Although today the focus is the Vertical Merger Guidelines, the

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[23] Press Release, Omidyar Network Calls to Reimagine Capitalism in America (Sept. 14, 2020), https://omidyar.com/omidyar-network-calls-to-reimagine-capitalism-in-america/.

[24] *Id.*

[25] See 21 U.S.C. § 355(q)(1)(H) (covering petitions); 21 U.S.C. § 355(q)(1)(I) (covering supplemental information and comments on petitions).

[26] *See* Remarks of Chair Lina M. Khan Regarding the Proposed Rescission of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592338/lk_remarks_for_1995_rescission_-_final_-_1230pm.pdf.

problem is broader – Chair Khan and DOJ's Acting Assistant Attorney General Richard Powers have announced that they are taking a "hard look" at the Horizontal Merger Guidelines to determine if they are too permissive.[27]

The proposal to withdraw the Vertical Merger Guidelines and accompanying Commentary on Vertical Merger Enforcement provides today's third example of the Transparency Paradox.

Apart from procedural concerns, I also have substantive concerns.

The 2020 Vertical Merger Guidelines reflect accepted economic analysis. The Guidelines identify theories of competitive harm that are supported by sound economics. Some commentators have advocated other possible theories, but they were not included in the 2020 Guidelines if they were contradicted by empirical evidence. As we were reminded by the district court's opinion addressing the motion to dismiss in *Facebook*, bald allegations of harm that are not supported will not carry the day. In fact, as a matter of good government, we should not *expect* them to carry the day.

Similarly, the 2020 Guidelines and the Commentary reflect agency experience. The Commentary cites 40 Commission cases from the past 15 years to demonstrate how the analysis described in the Vertical Merger Guidelines is applied.[28]

The Vertical Merger Guidelines also reflect substantial public input. In 2019, the Commission held a hearing on vertical mergers.[29] In 2020, the FTC and DOJ published Draft Guidelines and invited public comment.[30] Then the agencies held a workshop.[31] And substantial changes to the Draft Guidelines were made in response to both the public comments and input from the workshop.

Contrary to assertions, the Vertical Merger Guidelines do not shield vertical deals from antitrust enforcement. In fact, the Guidelines identify many ways in which those deals may harm competition. And the 40 cases described in the Commentary demonstrate that there is no free pass for vertical mergers.

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[27] *See* Statement of FTC Chair Lina M. Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Competition Executive Order's Call to Consider Revisions to Merger Guidelines (July 9, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/statement-ftc-chair-lina-m-khan-antitrust-division-acting.

[28] *See* 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.

[29] FTC Hearings on Competition and Consumer Protection in the 21st Century, Hearing #5 (consumer welfare and vertical merger policy), Nov. 1, 2018, *available at* https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_session_5_transcript_11-1-18.pdf.

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

[31] 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.

Yet the Vertical Merger Guidelines recognize that there are often efficiencies and beneficial effects that arise from vertical transactions.[32] Those procompetitive effects may result in lower prices for consumers, so merger analysis should take them into account. Most notable in the vertical context is the elimination of double marginalization, which occurs when a firm does not charge itself a margin on inputs it supplies to itself. The Guidelines note that those efficiencies should be considered, but make clear that the inquiry is fact-specific. And the Commentary identifies circumstances where those procompetitive effects would be unlikely.[33]

If the Vertical Merger Guidelines are withdrawn because they are deemed by the current majority to be overly permissive, we can expect more vertical deals to be challenged. But it is worth emphasizing that vertical integration is common and less likely to harm consumers than horizontal deals. The difference in impact arises because vertical mergers between companies in a buyer-seller relationship do not eliminate a competitor.

When considering a vertical transaction, the company is deciding whether it is going to produce an input internally or purchase the input from someone else. These decisions are common for individuals and households, as well. Every night, households decide whether they will order take-out or make their own dinner. This simple example hopefully makes clear that moving production inside the household or company, rather than buying in the market, is not inherently anticompetitive. We should be wary of characterizations that vertical mergers are always, or nearly always, a problem. Sound economics does not support such a characterization.

As I noted at the outset, the Majority is proposing to withdraw the Vertical Merger Guidelines and Commentary with little notice to the public, essentially no opportunity to comment, and no replacement guidance. The same approach may soon be taken with the Horizontal Merger Guidelines.

In an effort to promote transparency and provide guidance to the business community as it attempts to address supply chain vulnerabilities exposed by the COVID-19 pandemic, I offer the following topping motion:

> I move that the Commission instruct staff to conduct merger investigations in a manner that is consistent with the principles described in the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines until new guidelines are issued.

For the reasons described above, I vote "no."

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[32] *See* U.S. Dep't of Just. & Fed. Trade Comm'n, Vertical Merger Guidelines (June 30, 2020), §6, https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf

[33] *See* Commentary on Vertical Merger Enforcement, *supra* note 28, at 34-35.