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

**Statement of Chair Lina M. Khan,
Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the
Withdrawal of the Vertical Merger Guidelines
Commission File No. P810034**

September 15, 2021

Section 7 of the Clayton Act prohibits mergers and acquisitions "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[1] Mergers or agreements to merge can also violate the prohibitions on restraints of trade, monopolization, or unfair methods of competition.[2] Despite these laws, over the past several decades the country has seen increasing levels of consolidation across the economy[3]—much of it via merger[4]—and a reduction in new firm formation.[5] That consolidation has led to a corresponding lessening of competition reflected in growing mark-ups and shrinking wages.[6]

In light of these developments, the Federal Trade Commission and the Department of Justice are reviewing their approach to enforcing the antitrust laws' prohibition of anticompetitive mergers.[7] As an immediate step, the FTC is withdrawing its approval of the

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[1] 15 U.S.C. § 18.
[2] *Id.* §§ 1-2, 45.
[3] FACT SHEET: Executive Order on Promoting Competition in the American Economy (July 9, 2021) ("For decades, corporate consolidation has been accelerating. In over 75% of U.S. industries, a smaller number of large companies now control more of the business than they did twenty years ago."), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.
[4] *See* Craig Doidge et al., *Eclipse of the Public Corporation or Eclipse of the Public Markets?*, at 4 (Nat'l Bureau of Econ. Research, Working Paper No. 24265; 2018) (the number of publicly traded firms has declined by nearly 50% from its mid-1990's peak, with 61% of firms delisting due to merger activity), https://www.nber.org/papers/w24265.
[5] *See* ECON. INNOVATION GROUP, DYNAMISM IN RETREAT: CONSEQUENCES FOR REGIONS, MARKETS, AND WORKERS, at 7 (Feb. 2017), https://eig.org/wp-content/uploads/2017/07/Dynamism-in-Retreat-A.pdf; IAN HATHAWAY & ROBERT E. LITAN, THE BROOKINGS INST., DECLINING BUSINESS DYNAMISM IN THE UNITED STATES: A LOOK AT STATES AND METROS, at 1 (May 2014), https://www.brookings.edu/wpcontent/uploads/2016/06/declining_business_dynamism_hathaway_litan.pdf; STACY MITCHELL, INST. FOR LOCAL SELF-RELIANCE, MONOPOLY POWER AND THE DECLINE OF SMALL BUSINESS: THE CASE FOR RESTORING AMERICA'S ONCE ROBUST ANTITRUST POLICIES (Aug. 2016), https://ilsr.org/wpcontent/uploads/2018/03/MonopolyPower-SmallBusiness.pdf.
[6] FACT SHEET: Executive Order on Promoting Competition in the American Economy (July 9, 2021) ("[A] lack of competition drives up prices for consumers. As fewer large players have controlled more of the market, mark-ups (charges over cost) have tripled." The fact sheet also points out that "research shows that industry consolidation is decreasing advertised wages by as much as 17%."), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.
[7] Statement of FTC Chair Lina 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-khan-antitrust-division-acting-assistant.

Vertical Merger Guidelines issued in 2020 ("2020 VMGs") to prevent further industry or judicial reliance on certain flawed provisions. In particular, the 2020 VMGs' flawed discussion of the purported procompetitive benefits (i.e., efficiencies) of vertical mergers, especially its treatment of the elimination of double marginalization ("EDM")[8], could become difficult to correct if relied on by courts.

The 2020 VMGs represent a substantial improvement over the 1984 guidelines that they replaced and address important principles such as raising rivals' costs, foreclosure, and misuse of competitively sensitive information. Going forward, the FTC intends to work with the Department of Justice to issue updated merger guidance. This update will provide an opportunity to build on the positive steps that were taken in the 2020 VMGs. In particular, our review will enable consideration of key economic evidence that has been developed about the impact of market structure on the likely competitive effects of a merger.[9] It will also provide an opportunity to directly analyze mergers affecting critical areas of our modern economy, such as digital gatekeepers and labor markets.

Until new guidance is issued, the FTC will analyze mergers in accordance with its statutory mandate, which does not presume efficiencies for any category of mergers. In any merger, the FTC will consider all relevant facts, including but not limited to market structure, to determine whether a merger may lessen competition or tend to create a monopoly.

I. BACKGROUND

The 2020 VMGs were the first update to the FTC's and Department of Justice's published guidance on vertical mergers since 1984. The 1984 vertical merger guidelines no longer reflected agency practice or modern economics, and their withdrawal in early 2020 was a key step toward bringing antitrust enforcement in line with current economic learning and market realities.[10] The agencies proposed new guidelines and solicited public comment after withdrawing the 1984 guidelines. The proposed guidelines were substantially revised in response to the comments that were received and were published on June 30, 2020. The FTC issued additional commentary based on the 2020 VMGs in December 2020.

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[8] The 2020 Guidelines do not refer to EDM as an "efficiency." *See* 2020 VMGs, at 11. Instead, they note that EDM creates an incentive for the merged firm to lower prices. *Id.* at 12. We refer to EDM as an efficiency here because, like other efficiencies, when it exists it is a merger-related change in the market that may theoretically incentivize the merged firm to lower prices. Like all other forms of efficiency, EDM is simply not relevant to the legality of a merger if it does not result in the preservation of competition in the post-merger market, with the assessment of competition not limited to price.

[9] *See, e.g.*, Serge Moresi & Steven C. Salop, *vGUPPI: Scoring Unilateral Pricing Incentives in Vertical Mergers*, 79 ANTITRUST L.J. 185 (2013) (analyzing the incentives created by vertical mergers to increase prices); Marissa Beck & Fiona M. Scott Morton, *Evaluating the Evidence on Vertical Mergers*, 59 REV. IND. ORG. 273 (2021) (compiling studies of the impact of vertical mergers in various industries and observing that half find competitive harm).

[10] Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1983 (2018) (noting that "[t]he 1984 Non-Horizontal Guidelines are out-of-date" and compiling citations).

II. THE 2020 VMGS' FOCUS ON EDM IS INCONSISTENT WITH THE STATUTORY TEXT AND MARKET REALITIES.

The Clayton Act prohibits any merger or acquisition that "may" substantially lessen competition in any line of commerce or activity affecting commerce. This is a broad mandate aimed at prohibiting mergers even when they do not constitute monopolization and even when their tendency to lessen competition is not certain.[11] The statute does not distinguish between "horizontal" and "vertical" mergers, nor does it contain exceptions for mergers that lessen competition but also create some form of efficiency.[12] Accordingly, even if a merger does create efficiencies, the statute provides no basis for permitting the merger if it nevertheless lessens competition.[13] Consistent with the statutory language and the Supreme Court's holdings, virtually no cases have relied on an efficiencies defense to permit a merger where that merger might have lessened competition.[14] Cases treating efficiencies that might lower prices as potentially offsetting a merger's lessening of competition generally followed the lead of the DOJ's 1982 and 1984 Guidelines, which suggested that approach.[15]

The 2020 VMGs contravene the text of the statute, devoting a whole section to the discussion of procompetitive effects, or efficiencies, of vertical mergers.[16] This approach is legally flawed because the statute does not provide for a balancing test where an "efficient" merger is allowed even if it may lessen competition. Many "efficiencies" simply make the merged firm more profitable, without affecting the level of competition in the market.[17] Yet

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[11] Open Markets Inst. et al., Comment Letter No. 31 on #798: Draft Vertical Merger Guidelines ("Draft VMGs"), Matter No. P810034 at 4 (Feb. 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/comment_to_ftc-doj_re_vertical_merger_guidelines.pdf.

[12] *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962), *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967); *U.S. v Phila. Nat'l Bank*, 374 U.S. 321, 371 (1963); *FTC v. Penn State Hershey Medical Center*, 838 F.3d 327, 347-48 (3d Cir. 2016) (discussing an efficiencies defense and noting that the Supreme Court has "cast doubt on its availability"); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L. J. 65, 134 (1982).

[13] *See, e.g.*, *Saint Alphonsus Medical Center-Nampa v. St. Luke's*, 778 F.3d 775, 790 (9th Cir. 2015) ("We remain skeptical about the efficiencies defense in general and about its scope in particular."); *U.S. v. Anthem, Inc.*, 855 F. 3d 345, 353, 355 (D.C. Cir. 2017) (observing that "it is not at all clear that [efficiencies] offer a viable legal defense to illegality under Section 7" but considering claimed efficiencies in assessing the merger's impact on competition). There is also significant debate as to what types of "efficiencies" should be cognizable under the antitrust laws. *See, e.g., id.* at 369 (Millet, concurring) (rejecting a claimed efficiency because "securing a product at a lower cost due to increased bargaining power is not a procompetitive efficiency when doing so simply transfers income from supplier to purchaser without any resource savings").

[14] *See* Herbert Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703, 704 (2017) ("efficiency claims … are often raised but almost never found to justify a merger that has been shown to be prima facie unlawful. The decisions that credit claimed efficiencies as justification typically also find that the government failed to make out its prima facie case against the merger.").

[15] *See, e.g.*, *United States v. Rockford Mem'l Corp.*, 717 F. Supp. 1251, 1289 (N.D. Ill. 1989) (considering efficiency argument based on the DOJ Merger Guidelines, but rejecting it as factually unsupported), *aff'd*, 898 F.2d 1278 (7th Cir. 1990).

[16] *See* 2020 VMGs, at 11 (explaining under the heading "procompetitive effects" that vertical mergers may give rise to "efficiencies that benefit competition and consumers").

[17] Moreover, in many cases the predicted efficiencies simply never materialize. For example, AT&T claimed that it would be incentivized by the cost savings of its merger with DirecTV to deploy broadband to more than 13 million households by 2019, but so far has only deployed broadband to 3 million households. *See* Charlotte Slaiman & Joshua Stager, Public Knowledge & Open Tech. Inst., Comment Letter No. 66 on #798: Draft VMGs, at 8-9 (Feb.

under the statute, efficiencies are only relevant insofar as they shed light on the level of post-merger competition, which must be considered across many dimensions—price, quality, innovation, variety, service, and more.[18]

The VMGs' emphasis on a non-statutory efficiency defense leads to their most significant flaw—their treatment of the elimination of double marginalization (EDM). The VMGs identify EDM as the principal reason to treat vertical mergers distinctly from horizontal mergers,[19] claim that EDM "often" causes vertical mergers to benefit consumers, and suggest the agencies will proactively evaluate its impact even when not substantiated by the parties.[20] EDM is cited as a reason to discount both a merger's impact on pricing power[21] and the likelihood of coordination among the remaining firms.[22]

The VMGs' reliance on EDM is theoretically and factually misplaced. It is theoretically flawed because the economic model predicting EDM is limited to very specific factual scenarios: mergers that involve one single-product monopoly buying another single-product monopoly in the same supply chain, where both charge monopoly prices pre-merger and the product from one firm is used as an input by the other in a fixed-proportion production process.[23] Yet outside this limited context, economic theory does not predict that EDM will create downward pricing pressure.[24]

Empirical evidence suggests that we should be highly skeptical that EDM will even be realized—let alone passed on to end-users.[25] In many cases, vertical integration does not even

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26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/pk_oti_comments_on_draft_vertical_merger_guidelines_022620.pdf.

[18] *Saint Alphonsus Medical Center-Nampa v. St. Luke's*, 778 F.3d 775, 790 (9th Cir. 2015) ("The [Clayton] Act focuses on 'competition,' so any defense must demonstrate that the prima facie case portrays inaccurately the merger's probable effects on competition. In other words, a successful efficiencies defense requires proof that a merger is not, despite the existence of a prima facie case, anticompetitive.").

[19] *See* 2020 VMGs, at 2 ("Vertical mergers, however, also raise distinct considerations [from horizontal mergers], which these Guidelines address. For example, vertical mergers often benefit consumers through the elimination of double marginalization, which tends to lessen the risks of competitive harm.").

[20] *See id.* ('vertical mergers often benefit consumers through the elimination of double marginalization, which tends to lessen the risks of competitive harm"); *see also id.*at 11-12 (suggesting that EDM will be considered by the agencies "independently" even if the merging parties do not provide substantiation).

[21] *Id.* at 5 ("The elimination of double marginalization, for example, can confer on the merged firm an incentive to set lower downstream prices.").

[22] *Id.* at 11 ("a vertical merger's elimination of double marginalization (see Section 6) may increase the merged firm's incentive to cheat on a tacit agreement, thereby reducing the risk of coordinated effects.").

[23] John Kwoka & Margaret Slade, *Second Thoughts on Double Marginalization*, 34 ANTITRUST 51 (2020).

[24] *Id.* at 55 ("the classic EDM model is based on a long list of assumptions that do not necessarily hold").

[25] Jonathan B. Baker et al., Comment Letter No. 21 on #798, at 32-34 (Feb. 24, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg21_baker_rose_salop_scott_morton_comments.pdf; John Kwoka & Margaret Slade, *supra* note 23, at 56; Alliance for Pharm. Compounding et al., Comment Letter No. 46 on #798, at 2 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/02-26-20_joint_pharmacy_stakeholder_comments_-_ftc_doj_draft_vertical_merger_guidelines.pdf (citing FTC analysis and other analysis of vertical healthcare consolidation leading to price increases); *see also* Salop, *supra* note 10, at 1970-71("Claims that EDM must lead to lower downstream prices are overstated for several reasons.").

prompt firms to provide the upstream input to its own downstream division.[26] Studies of mergers between hospitals and physician groups—which have led to significant concentration in many areas[27]—suggest these vertical mergers have not achieved theorized efficiencies. Instead, they find that vertical consolidation has increased physician costs, hospital prices, and per capita medical spending, with larger effects in more concentrated markets.[28] Nor have these cost increases been associated with improved medical care.[29] Similarly, when AT&T acquired Direct TV, it successfully argued to the FCC that the merger would lead to downward pricing pressure due to EDM.[30] Yet shortly after the merger, AT&T began raising prices instead.[31]

Withdrawing from the VMGs reflects the FTC's view that it is inappropriate for the Commission's analysis of whether a transaction may lead to a substantial lessening of competition to assume that EDM is likely to exist.

III. THE FTC'S REVIEW OF ITS GUIDELINES WILL CONSIDER MARKET STRUCTURE, REMEDIES, AND ADDITIONAL MECHANISMS OF HARM.

A. The FTC will assess potential market structure-based presumptions for non-horizontal mergers.[32]

Antitrust law, as understood by both the FTC and courts, has long recognized that certain familiar practices have such a clear tendency to harm competition that they should be presumptively or even *per se* illegal. Identifying certain practices as presumptively illegal gives clear guidance to businesses and streamlines enforcement to curb the worst abuses. Moreover, bright-line rules focus judicial attention on readily observable market characteristics rather than complex economic modeling and self-interested testimony about future business plans. The FTC has reviewed many vertical mergers, providing a significant body of learning that could likewise identify common characteristics of mergers that are presumptively anticompetitive.

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[26] Baker et al., *supra* note 25, at 18-20 ("evidence from a large data base of vertically integrated firms indicates there were no internal input transfers from the upstream division to the downstream division in about half of all the vertically-integrated firms studied" (citing Enghin Atalay et al., *Vertical Integration and Input Flows*, 104 AM. ECON. REV. 1120, 1127 (2014)).

[27] Thomas L. Greaney, *The New Health Care Merger Wave: Does the "Vertical, Good" Maxim Apply?* 46 J. L. MED. & ETHICS 918, 922 (2018).

[28] *Id*.

[29] *Id*.

[30] Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, Mem. Op. and Order, MB Docket No. 14-90, ¶¶ 120-126 (July 28, 2015).

[31] Philip Dampier, *AT&T Gets Stingy with DirecTV Promotions for Existing Customers; $100+ for TV-Only Service*, STOP THE CAP! (Jan. 27, 2016), https://stopthecap.com/2016/01/27/att-gets-stingy-with-directvpromotions-for-existing-customers-some-now-pay-100-for-tv-only-service/; Amit Chowdhry, *AT&T to Increase Grandfathered Unlimited Data Plans from $30 to $35*, FORBES (Dec. 2, 2015), https://www.forbes.com/sites/amitchowdhry/2015/12/02/att-to-increase-grandfathered-unlimited-dataplans-from-30-to-35/#151b004272a4; *How a DirecTV bill really works in 2016*, 404 TECHSUPPORT (June 6, 2016), https://www.404techsupport.com/2016/06/29/directv-bill-2016/.

[32] Salop, *supra* note 10, at 1972 (advocating analysis of individual foreclosure theories in vertical merger enforcement, but also noting that "For the type of markets that are normally analyzed in antitrust, the competitive harms from vertical mergers are just as intrinsic as are harms from horizontal mergers.").

Market structure screens have been used for decades by agencies when assessing whether horizontal mergers merit a presumption of anticompetitive effects.[33] Since the 1980s, however, vertical mergers have not been subject to similar screens that use readily-observable market features. This distinct analytical approach to horizontal and vertical mergers is not justified: vertical mergers involving concentrated markets likewise have a structural tendency to harm competition.[34] Commenters suggested numerous candidate screens that pick out mergers deserving of additional focus—or a presumption of illegality—based on a variety of market characteristics.[35] In reviewing our approach to merger analysis, we will seek to identify objective factors that presumptively indicate that a merger is likely to reduce competition.

The 2020 VMGs focus exclusively on the merged firm's incentives to engage in certain general types of practices, such as foreclosing rivals, raising rivals' costs, or misuse of competitively sensitive information. These are all important mechanisms by which vertical mergers can lessen competition. However, the FTC's ability to conduct the analyses contemplated by the VMGs in an individual case depends not only on the availability of adequate data, but also on the FTC's ability to predict in advance all the specific tactics the merged firm might use to disadvantage its competitors with its newfound resources.[36] Identifying and analyzing individual exclusionary tactics is challenging even when considering only current market conditions, given that "'[a]nticompetitive conduct' can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties."[37] It is even more challenging when we know that the affected market will change over time, meaning that the specific costs and benefits of exercising the merged firm's increased market power using a given tactic will vary. Indeed, the fundamental difficulty of predicting all possible forms of exclusionary conduct in advance is one of the reasons why the agencies have traditionally preferred structural to behavioral remedies.[38]

Accordingly, where we have evidence that a particular market structure tends to lessen competition, seeking instead to predict which specific mechanism will lead to that lessening of

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[33] Different types of market structure screens have been proposed to identify mergers more likely to have anticompetitive effects. *See, e.g.*, Baker et al., *supra* note 25, at 18-20. Policymakers have long recognized the potential for vertical integration to create conflicts of interest and extend dominance, and in part for those reasons have prohibited such integration in a variety of industries. *See* Lina M. Khan, *Separating Platforms and Commerce*, 119 COLUMBIA L. REV. 973, 1052 (2019).

[34] Salop, *supra* note 10, at 1973 ("Consider first the well-understood and accepted notion that there is inherent upward pricing pressure from horizontal mergers in differentiated products markets, even without coordination. In fact, the same inherent upward pricing pressure occurs for vertical mergers in similar market structures.").

[35] Jonathan B. Baker et al., *Five Principles for Vertical Merger Enforcement Policy*, 33 ANTITRUST 12, 19 (2019) (proposing five circumstances that should give rise to a presumption of anticompetitive effects for vertical mergers).

[36] *See, e.g.*, Salop, *supra* note 10, at 1979 (advocating use of numerous quantitative analyses of a vertical merger's likely effects, but also noting that "[a]ll these quantitative methodologies also are limited because they generally focus only on a subset of the possible harms that are easiest to quantify with available data. . .").

[37] *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1087 (D.C. Cir. 1998).

[38] DEP'T OF JUST., MERGER REMEDIES MANUAL, at 4 (Sept. 2020) (conduct remedies "require the merged firm to ignore the profit-maximizing incentives inherent in its integrated structure. Moreover, the longer a conduct remedy is in effect, the less likely it will be well-tailored to remedy the competitive harm in light of changing market conditions. Conduct remedies typically are difficult to craft and enforce. For these reasons, conduct remedies are inappropriate except in very narrow circumstances"), https://www.justice.gov/atr/page/file/1312416/download; DEP'T OF JUST., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES, at 7-8 (Oct. 2004), https://www.justice.gov/atr/page/file/1175136/download.

competition in a specific case may come at great expense with no improvement in our predictive accuracy. The FTC will therefore explore clear and administrable guidance on the characteristics of transactions that are likely unlawful. Such guidance should provide market participants with clear notice, reduce burdens on antitrust enforcers, and aid judges by allowing them to focus on observable facts that tend to predict anticompetitive effects rather than on complex and speculative claims. Use of such screens can streamline enforcement in cases where economic learning suggests the merger may substantially lessen competition, and developing these screens will be a key goal of future guidance.

B. The FTC will assess appropriate remedies for non-horizontal mergers.

Going forward, it will be critical for the FTC to evaluate past remedy practices and engage with evidence that its remedies may not have fully restored competition.[39] The FTC's 2017 merger retrospective is part of a tradition of self-reflection at the FTC, and the FTC will continue to scrutinize its past enforcement actions on an ongoing basis. Providing clear guidance on when remedies are unlikely to be effective will help identify scenarios where a challenge is more likely than settlement. Identifying such scenarios may deter such mergers and avoid the wasted resources associated with their attempt.

C. The FTC will assess prevalent harms that may result from non-horizontal mergers.

The 2020 VMGs identified several harms that can arise from non-horizontal mergers, including the potential for foreclosure, raising rivals' costs, increased entry barriers, and misuse of competitively sensitive information. They did not purport to be exhaustive,[40] and no list of potential harms could have been. Our merger policy review will expand on the work done in 2020 to consider various features that often characterize firms in the modern economy, including in digital markets. We will also look to provide guidance on how the FTC will analyze a merger's impact on labor markets.

Digital platforms are an increasingly significant part of the economy. The five largest firms in the United States by market capitalization[41] all operate digital platforms characterized by significant network externalities, and collectively they have made hundreds of acquisitions, including hundreds of acquisitions that fell below the HSR reporting thresholds.[42] It is critical

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[39] *See, e.g.*, JOHN E. KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (MIT Press, 1st ed. 2015); Fernando Luco & Guillermo Marshall, *Vertical Integration with Multi-Product Firms: When Eliminating Double Marginalization May Hurt Consumers* 1, 15 (Oct. 20, 2017) (unpublished manuscript), http://www.ftc.gov/system/files/documents/public_events/1208143/luco_marshall.pdf (offering evidence that Coca-Cola and PepsiCo bottler acquisitions raised prices of Dr. Pepper Snapple products, while reducing prices of Coca-Cola and PepsiCo products).

[40] 2020 VMGs, at 4 ("These effects do not exhaust the types of possible unilateral effects."); *id.* at 10 ("The theories of harm discussed … are not exhaustive, but rather are illustrations of the manner in which a merger may lessen competition due to coordinated effects.").

[41] The five firms are: Apple, Microsoft, Alphabet (Google), Amazon, and Facebook. *See Largest American companies by market capitalization*, COMPANIESMARKETCAP.COM, https://companiesmarketcap.com/usa/largest-companies-in-the-usa-by-market-cap/ (last visited Sept. 14, 2021).

[42] *See* FED. TRADE COMM'N, NON-HSR REPORTED ACQUISITIONS BY SELECT TECHNOLOGY PLATFORMS, 2010-2019: AN FTC STUDY (Sept. 2021); *see also* MAJORITY STAFF REP. AND RECOMMENDATIONS OF THE SUBCOMM. ON

that the FTC establish a framework for merger analysis that accounts for features specific to digital markets, including characteristics that can enable dominant firms to capture markets and dissuade entry,[43] as well as non-price effects.[44] For example, markets with network effects can create a strong incentive to acquire or exclude nascent competitors, a tendency that should be considered when dominant platforms acquire start-ups.[45] Additionally, the fact that digital markets may enable firms to engage in myriad forms of non-price discrimination—for example, thorough degrading interoperability, reneging on access policies, or gaming algorithms—means that revised guidelines should pay greater attention to the broader set of tactics that firms may use to raise rivals' costs,[46] as well as the impact of an acquisition on competitors' access to capital.[47]

Finally, a process to revise the guidelines should consider harms in labor markets, a topic not previously addressed in merger guidelines.[48] Section 7 prohibits mergers that will lessen competition "in any line of commerce or in any activity affecting commerce," which extends beyond the scope of the products and services sold by the merging parties to include other markets affected, such as labor markets. Because labor market analysis in merger review would be novel, the FTC, merging parties, and courts would benefit from a clear framework for evaluating these common issues.

IV. LOOKING AHEAD

The FTC will work with the Department of Justice to seek input and review evidence on the effectiveness of prior enforcement practices. It is critical that our enforcement program comprehensively captures the relevant harms that may arise from transactions, uses our

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ANTITRUST, COMMERCIAL, AND ADMIN. LAW OF THE COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, at 406 – 431 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519.

[43] Salop, *supra* note 10, at 1984 (recommending a revision to the 1984 guidelines in which "Enforcement should pay special attention to acquisitions by leading firms, particularly in oligopoly or dominant firm markets subject to network effects or economies of scale. This would include acquisitions of firms that may become significant potential competitors").

[44] The VMGs correctly acknowledge that non-price elements of competition such as product quality and innovation must be considered, but did not provide a framework for how these non-price factors would be assessed, instead highlighting quantitative models of price effects. 2020 VMGs, at 4 (noting that rivals may be harmed if the merged firm lowers the quality of goods sold to those rivals); *id.* at 6 (noting the use of merger simulation to predict price increases).

[45] Salop, *supra* note 10, at 1989 ("the existence of substantial economies of scale and demand-side network effects can lead to severe incumbency advantages, high barriers to entry, and incentives to use vertical mergers to decrease the likelihood of entry."); *see also* Baker et al., *supra* note 25, at 18-20 (proposing a presumption of anticompetitive effects for vertical mergers involving dominant platforms). Platform issues are present in many markets, not just digital ones, including healthcare markets (e.g., insurance networks, pharmacy benefits manager networks), payments, and many others. *See* NON-HSR REPORTED ACQUISITIONS BY SELECT TECHNOLOGY PLATFORMS, 2010-2019: AN FTC STUDY.

[46] The 2020 VMGs recognized that a merged firm may have an incentive to raise rivals' costs and that it may do so by degrading quality, but this topic is worth significant additional attention. 2020 VMGs, at 4.

[47] Indeed, some venture capitalists refer to a "kill zone": an area where firms that might compete with extremely large companies cannot obtain funding. Sai Krishna Kamepalli et al., *Kill Zone* (Becker Friedman Inst., Working Paper No. 2020- 19), https://ssrn.com/abstract=3555915.

[48] Jose Azar et al., *Labor Market Concentration*, 56 J. OF HUM. RESOURCES 1, 5 (2020).

substantial experience to identify appropriate bright-line screens for unlawful mergers, and carefully and continuously reviews empirical learning. Based on that review, the FTC will issue updated guidelines or rules to ensure our merger analysis aligns with market realities. In the interim, the Commission will rely on its statutory authority to apply existing laws when assessing proposed transactions.

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