

The Durability of the New Vertical Merger Guidelines

BY DARREN S. TUCKER AND THOMAS W. BOHNETT

TO A TORRENT OF BOTH PRAISE AND criticism, the Department of Justice and Federal Trade Commission released updated Vertical Merger Guidelines on June 30, 2020.¹ The degree of engagement and disagreement is hardly surprising, given that two of the five FTC commissioners dissented from issuing the new Guidelines and that vertical merger policy is at the forefront of current antitrust debates. It is also unsurprising in the larger historical context given that the development and release of antitrust enforcement guidelines often have been controversial.

Yet the development and longevity of past enforcement guidelines suggest that initial controversy itself is not a sign that the new Guidelines will be doomed to irrelevance or disuse. Guidelines that courted controversy when released, such as the 1982 Merger Guidelines, came to be recognized as an important evolutionary step in merger enforcement. Neither is unanimity a guarantee of longevity, as with the withdrawal in 2012 of the unanimously approved 2003 FTC Policy Statement on Monetary Equitable Remedies in Competition Cases.²

A better predictor of the durability of prior agency guidelines has been the extent to which they reflect then-current FTC and DOJ enforcement practices. In this respect, the Vertical Merger Guidelines appear well-positioned to serve as an enduring statement of enforcement policy. Finding a middle ground was a stated goal of the agencies, and the Vertical Merger Guidelines indeed appear to be a consensus-driven document reflecting recent enforcement practice. Neither reformers nor conservatives got everything—or even most of what—they wanted, which could explain in part the volume of criticism directed at the draft guidelines released for public comment from those on both the political left and right.³ In this, the agencies are trying to follow the approach of the Horizontal Merger Guidelines, which have evolved over the

years but have survived multiple changes in administrations. In contrast, the 1985 Vertical Distribution Restraints Guidelines, the 2008 Section 2 Report, and the 2013 SEP Policy Statement were seen as a departure from established enforcement practices and were discarded almost at the first opportunity following a change in administration.

Intra-Agency Discord at FTC

The DOJ and FTC jointly released the Vertical Merger Guidelines, but they are hotly contested within the FTC. Democratic Commissioners Rohit Chopra⁴ and Rebecca Kelly Slaughter⁵ declined to support the release of the Guidelines in a continuation of differences over vertical merger enforcement between the Republican and Democratic Commissioners since the beginning of their tenures.⁶

Commissioners Chopra and Slaughter, and many of the commenters on the draft guidelines, argue that there has been insufficient enforcement of vertical mergers and that the Guidelines should be drawn with a greater skepticism of the benefits of vertical mergers and with a correspondingly lower threshold for potential harm to competition before enforcement is warranted.⁷ They also argue that a wider range of potential harms should be considered.⁸ In contrast, Republican Commissioners Christine S. Wilson and Noah J. Phillips, and many other commenters,⁹ have advocated for more relaxed standards for reviewing vertical mergers than their Democratic colleagues. Commissioner Wilson explained that “it may be appropriate to presume that certain vertical efficiencies are verifiable and substantial in the absence of strong evidence to the contrary.”¹⁰ Similarly, Commissioner Phillips said that “vertical integration is generally pro-competitive, or competitively neutral.”¹¹

Conflict over Guidelines Does Not Predict Success or Failure

A review of past enforcement guidelines suggests that controversy does not itself predict either their success or failure. For instance, the 1982 Guidelines have come to be recognized as an evolutionary leap in antitrust enforcement in part because of the introduction of the hypothetical monopolist test.¹² Twenty years after their introduction, former Assistant Attorney General Charles James said that no policy document has had “more enduring or far-reaching” impact than the 1982 Guidelines.¹³ Today’s antitrust practitioners may be surprised to learn that at the time, the 1982 Guidelines elicited heated criticism that the hypothetical monopolist test was “impractical”¹⁴ and “completely non-operational.”¹⁵ Many also questioned whether the concentration thresholds in the 1982 Guidelines were too high or too low.¹⁶ Former Assistant Attorney General Thomas Kauper reflected, “Criticism has come from the business community and antitrust bar, the very groups who might have been expected to welcome the 1982 Guidelines.”¹⁷

The DOJ and FTC jointly issued the 1992 Merger Guidelines, which today are generally seen to reflect a mainstream

Darren S. Tucker is a partner and Thomas W. Bohnett is a senior associate in the Washington, D.C. office of Vinson & Elkins LLP. The authors thank Hill Wellford for helpful comments. The opinions expressed are those of the authors and do not necessarily reflect the views of our firm or its clients.

For all of the criticism directed at the new Vertical Merger Guidelines, few have called them extreme or outside the mainstream, and in certain aspects, they disappoint both reformers and conservatives.

approach. Courts have cited them as “highly persuasive authorities.”¹⁸ Judge Leval wrote in 1995 that “[a]lthough it is widely acknowledged that Merger Guidelines do not bind the judiciary in determining whether to sanction a corporate merger or acquisition for anticompetitive effect... courts commonly cite them as a benchmark for legality.”¹⁹ The 1992 Guidelines lasted 18 years, through both Democratic and Republican Administrations, with only minor adjustments in 1997 that were adopted on a unanimous basis.²⁰ At the time of their release they elicited a dissent from FTC Commissioner Mary Azcuenaga, who questioned whether the new 1992 Guidelines “accurately express what the Commission does now or is likely to do in analyzing mergers,”²¹ but the 1992 Guidelines did in fact turn out to predict and shape agency action.

Other enforcement guidelines that attracted controversy, including between the DOJ and FTC, have not lasted. For example, the DOJ’s 1985 Vertical Distribution Restraints Guidelines were “controversial from the outset.”²² Even its supporters acknowledged that those guidelines did not reflect then-current enforcement practices or case law.²³ Congress expressed its displeasure with the guidelines, and the National Association of Attorneys General responded by endorsing a competing set of vertical restraints guidelines.²⁴ The DOJ withdrew its guidelines after the change to a Democratic administration in 1993.²⁵

Likewise, after a year of joint public hearings with the FTC, the DOJ released its 2008 report on enforcement under Section 2 of the Sherman Act.²⁶ FTC staff had an equal role in drafting the report; however, after a divided vote of the Commission, the FTC declined to join the report, with three FTC Commissioners calling the report “a blueprint for radically weakened enforcement.”²⁷ The three commissioners wrote that the Section 2 Report “cannot be said to represent the consensus, or even the prevailing, view of the myriad stakeholders interested in Section 2 enforcement.”²⁸ In their view, “the Department adopts standards that are tougher—and in some cases much tougher—than existing standards as defined by Section 2 case law.”²⁹ The DOJ withdrew the Section 2 Report in the early days of the Obama administration.³⁰ Neither agency subsequently released a detailed counter-statement of Section 2 enforcement policy, and the Trump administration made no attempt to re-institute the report.³¹

A third example is the DOJ and Patent and Trademark Office’s 2013 SEP policy statement, which was issued under

the Obama administration without the FTC.³² The subject addressed by that policy statement—when standards-essential patent owners should be entitled to injunctive relief or an exclusionary order—has fostered a vigorous academic debate and remains a controversial issue to this day. The same agencies withdrew the 2013 SEP statement in 2018 under the Trump administration, and, along with the National Institute of Standards and Technology, issued a new policy statement in 2019 (which the FTC also did not join).³³

New Merger Guidelines Reflect a Mainstream Approach

The Vertical Merger Guidelines are the first vertical merger guidelines to be released jointly by the FTC and DOJ. Chairman Simons said in 2019 that he wanted the Vertical Merger Guidelines to be “as bipartisan as possible” so that they would survive a change in party in the White House.³⁴ The collaboration between the two agencies to release the Guidelines stands in contrast to disagreements between the two agencies in a number of other areas.³⁵

The Guidelines, despite being developed by a Republican administration, draw on Horizontal Merger Guidelines enacted during a Democratic administration for concepts such as market definition³⁶ and measuring market shares and concentration.³⁷ The Guidelines also take more moderate stands than the Republican Commissioners on certain issues. For example, while Commissioner Wilson has expressed that “competitive harm is less likely to occur in a vertical merger than in a horizontal one,”³⁸ the Guidelines contain no such presumption, in contrast with the 1984 Merger Guidelines.³⁹

Additionally, the Guidelines take a somewhat different view of the elimination of double marginalization (EDM) than Commissioners Wilson and Phillips have publicly supported. Commissioner Wilson has said that “[s]ome commentators view EDM as a phenomenon inherent in vertical mergers, which may indicate that a lower burden of proof for at least some efficiencies claims would be appropriate in the vertical merger context,”⁴⁰ and Commissioner Phillips has expressed similar views.⁴¹ In contrast, the Guidelines state that the Agencies evaluate efficiency claims following the same approach as the Horizontal Merger Guidelines and that “it is incumbent upon the merging firms to provide substantiation for claims that they will benefit from [EDM].”⁴²

The Guidelines reflect current theories of harm in vertical merger cases, including foreclosure, raising rivals’ costs, preventing the entry of an effective rival, and misuse of sensitive information. Notably, neither Commissioner Slaughter nor Commissioner Chopra object to the Guidelines on the grounds that they do not accurately reflect the agencies’ current enforcement approach or current law. The heart of their criticism, and of other reform-minded commenters, is that the Guidelines fail to envision a new and more expansive approach to vertical merger enforcement that would incorporate new analytical theories.⁴³

The Guidelines also reflect an effort to incorporate the views of critics from the public comment period. The Guidelines omit perhaps the most controversial aspect of the draft guidelines—the statement that “[t]he 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%, and the related product is used in less than 20% of the relevant market.”

Conclusion

For all of the criticism directed at the new Vertical Merger Guidelines, few have called them extreme or outside the mainstream, and in certain aspects, they disappoint both reformers and conservatives. Chairman Simons deserves credit for his effort to uphold the FTC’s bipartisan tradition on a controversial topic.⁴⁵ The Guidelines are also notable for representing a tight collaboration between the DOJ and FTC, at a moment when the agencies find themselves at odds on other issues.⁴⁶

By providing a description of current enforcement practice for both agencies instead of an aspirational statement of what the law should be, the Guidelines already separate themselves from discarded enforcement guides of the past. In that respect, the Guidelines should be well-positioned to provide a durable and effective guide for practitioners and the business community as well as to influence the development of the (admittedly limited) case law on vertical mergers. ■

¹ U.S. Dep’t of Justice & Fed. Trade Comm’n, Vertical Merger Guidelines (2020), <https://www.justice.gov/atr/page/file/1290686/download>.

² Press Release, Fed. Trade Comm’n, FTC Issues Policy Statement on Use of Monetary Remedies in Competition Cases (July 31, 2003), <https://www.ftc.gov/news-events/press-releases/2003/07/ftc-issues-policy-statement-use-monetary-remedies-competition> (5-0 vote in favor of issuing the policy statement); Press Release, Fed. Trade Comm’n, FTC Withdraws Agency’s Policy Statement on Monetary Remedies in Competition Cases; Will Rely on Existing Law (July 31, 2012), <https://www.ftc.gov/news-events/press-releases/2012/07/ftc-withdraws-agencys-policy-statement-monetary-remedies> (4-1 vote to rescind policy statement).

³ U.S. Dep’t of Justice & Fed. Trade Comm’n, Draft Vertical Merger Guidelines (Jan. 10, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561715/p810034verticalmergerguidelinesdraft.pdf [hereinafter Draft Guidelines]. The agencies received more than 70 public comments on the Draft Guidelines, on top of many comments received on vertical merger enforcement during the FTC’s Hearings on Consumer Protection and Competition. Fed. Trade Comm’n, FTC Hearing #5: Vertical Merger Analysis and the Role of the Consumer Welfare Standard in U.S. Antitrust Law (Nov. 1, 2018), <http://www.ftc.gov/news-events/events-calendar/ftc-hearing-5-competition-consumer-protection-21st-century>.

⁴ Dissenting Statement of Commissioner Rohit Chopra Regarding the Publication of Vertical Merger Guidelines, FTC File No. P810034 (June 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577503/vmgchopradissent.pdf; see also Statement of Commissioner Rohit Chopra Regarding the Request for Comment on Vertical Merger Guidelines, FTC File No. P810034 (Jan. 10, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561727/p810034chopravmgabstain.pdf [hereinafter Chopra Guidelines Statement].

⁵ Dissenting Statement of Commissioner Rebecca Kelly Slaughter Regarding

FTC-DOJ Vertical Merger Guidelines, FTC File No. P810034 (June 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577499/vmgslaughterdissent.pdf; see also Statement of Commissioner Rebecca Kelly Slaughter on FTC-DOJ Draft Vertical Merger Guidelines, FTC File No. P810034 (Jan. 10, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561721/p810034slaughtervmgabstain.pdf [hereinafter Slaughter Guidelines Statement].

⁶ See Darren S. Tucker & Thomas Bohnett, *The Antitrust Divergence at the FTC: Beyond Vertical Mergers*, ANTITRUST, Summer 2019, at 37.

⁷ Slaughter Dissenting Statement, *supra* note 5, at 2–3; Chopra Dissenting Statement, *supra* note 4, at 1–2, 7–8; see also Slaughter Guidelines Statement, *supra* note 5, at 2–3; Chopra Guidelines Statement, *supra* note 4, at 3 (stating that vertical merger reviews have been “overly permissive”); Nicholas Economides et al., Comment on the DOJ/FTC Draft Vertical Merger Guidelines (Feb. 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg14_economides_comment.pdf (“[T]he legal landscape for prosecuting vertical mergers is challenging, potentially discouraging enforcement against anticompetitive vertical mergers.”).

⁸ Chopra Dissenting Statement, *supra* note 4; Slaughter Dissenting Statement, *supra* note 5, at 7; see also Chopra Guidelines Statement, *supra* note 4, at 5; Slaughter Guidelines Statement, *supra* note 5, at 4.

⁹ See, e.g., Christopher S. Yoo, Comments on the U.S. Department of Justice and the Federal Trade Commission Draft Vertical Merger Guidelines (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/yoo_comments_on_draft_vertical_merger_guidelines_022620.pdf (advocating for including a statement in the Guidelines that vertical mergers are less likely than horizontal mergers to cause competitive problems); Global Antitrust Institute, Antonin Scalia Law School, Comment on the DOJ/FTC Draft 2020 Vertical Merger Guidelines (Feb. 7, 2020), <https://media.justice.gov/vod/atr/comments-draft-vmg/dvmg-0005.pdf> (“The results [of empirical research] continue to suggest that the modern antitrust approach to vertical mergers should reflect the empirical reality that vertical relationships are generally procompetitive or neutral.”).

¹⁰ Commissioner Christine S. Wilson, Vertical Merger Policy: What Do We Know and Where Do We Go? Remarks Before the GCR Live 8th Annual Antitrust Law Leaders Forum (Feb. 1, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455670/wilson_-_vertical_merger_speech_at_gcr_2-1-19.pdf.

¹¹ Commissioner Noah Phillips, FTC Hearing #5: Competition and Consumer Protection in the 21st Century, Remarks Before Georgetown University Law Center 1–2 (Nov. 1, 2018), https://www.ftc.gov/system/files/documents/public_statements/1419437/20181101_njp_opening_remarks_ftc_hearings.pdf.

¹² See Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, 71 ANTITRUST L.J. 253 (2003).

¹³ Charles A. James, Ass’t Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Remarks on the Occasion of the Twentieth Anniversary of the 1982 Merger Guidelines 2 (June 10, 2002), <https://www.justice.gov/atr/file/632446/download>.

¹⁴ Thomas W. Dunfee et al., *Bounding Markets in Merger Cases: Identifying Relevant Competitors*, 78 Nw. U. L. Rev. 733, 754 (1984) (“impractical conceptual device”).

¹⁵ George J. Stigler & Robert A. Sherwin, *The Extent of the Market*, 28 J.L. & Econ. 555, 582 (1985) (asserting that the Guidelines’ approach is “completely nonoperational” because “[n]o method of investigation of data is . . . specified that will allow the market to be determined empirically”).

¹⁶ See, e.g., Thomas E. Kauper, *The 1982 Horizontal Merger Guidelines: Of Collusion, Efficiency, and Failure*, 71 CAL. L. REV. 497, 512 (1983) (“This level [of 1800], in my judgment, is both higher than economic analysis dictates, and too great a departure from judicially developed standard.”).

¹⁷ *Id.* at 499.

¹⁸ *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 434 n.13 (5th Cir. 2008).

¹⁹ *United States v. Kinder*, 64 F.3d 757, 771 & n.22 (2d Cir. 1995).

²⁰ Press Release, Fed. Trade Comm’n, FTC/DOJ Announce Revised Guidelines

- on Efficiencies in Mergers (Apr. 8, 1997), <https://www.ftc.gov/news-events/press-releases/1997/04/ftcdoj-announce-revised-guidelines-efficiencies-mergers> (approving revisions 5-0).
- ²¹ Dissenting Statement of Commissioner Mary L. Azcuenaga on the Issuance of the Horizontal Merger Guidelines (Apr. 2, 1992).
- ²² Anne K. Bingaman, Ass't Att'y Gen., Antitrust Div., Antitrust Enforcement: Some Initial Thoughts and Actions 5 (Aug. 10, 1993), <https://www.justice.gov/atr/file/518756/download> (explaining that the Vertical Restraints Guidelines "unduly elevate theory at the expense of factual analysis" and fail to reflect an optimal balancing of procompetitive and anticompetitive effects).
- ²³ Joe Sims & Robert H. Lande, *Vertical Restraints Guidelines: A Step Forward*, LEGAL TIMES, Mar. 4, 1985, at 17 ("We doubt that the department has ever analyzed a single vertical restraint using the precise methodology set forth in these guidelines. Certainly it has never filed a complaint after engaging in this reasoning process. In this respect, the guidelines are more a statement of future intentions than a picture of present practice.").
- ²⁴ Alan A. Fisher et al., *Do the DOJ Vertical Restraints Guidelines Provide Guidance?*, 32 ANTITRUST BULL. 609, 639 (1987).
- ²⁵ Bingaman, *supra* note 22, at 5.
- ²⁶ Press Release, U.S. Dep't of Justice, Justice Department Issues Report on Antitrust Monopoly Law (Sept. 8, 2008), https://www.justice.gov/archive/atr/public/press_releases/2008/236975.htm.
- ²⁷ Press Release, Fed. Trade Comm'n, FTC Commissioners React to Department of Justice Report, Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act (Sept. 8, 2008), <https://www.ftc.gov/news-events/press-releases/2008/09/ftc-commissioners-react-department-justice-report-competition-and>.
- ²⁸ *Id.*
- ²⁹ *Id.*
- ³⁰ Press Release, U.S. Dep't of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), <https://www.justice.gov/opa/pr/justice-department-withdraws-report-antitrust-monopoly-law>.
- ³¹ Today the Section 2 Report sits prominently on the DOJ's website but is marked with a neutrally worded notice about its withdrawal.
- ³² U.S. Dep't of Justice & U.S. Patent & Trademark Office, Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (Jan. 8, 2013), <https://www.justice.gov/atr/page/file/1118381/download>.
- ³³ U.S. Patent & Trademark Office, National Institute of Standards and Tech. & U.S. Dep't of Justice, Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/Rand Commitments (Dec. 19, 2019), <https://www.justice.gov/atr/page/file/1228016/download>.
- ³⁴ Pallavi Guniganti, *US Agencies Contemplate New Vertical Guidance*, GLOBAL COMPETITION REV. (Mar. 29, 2019).
- ³⁵ See, e.g., Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur, *FTC v. Qualcomm Inc.*, No. 19-16122 (9th Cir. Aug. 30, 2019) [hereinafter Brief of the United States, *FTC v. Qualcomm*].
- ³⁶ Vertical Merger Guidelines, *supra* note 1, § 3 ("[T]he Agencies generally use the methodology set forth in Sections 4.1 and 4.2 of the Horizontal Merger Guidelines to define relevant markets for vertical mergers.").
- ³⁷ *Id.* § 3 ("The Agencies use the methodology set out in Section 5 of the Horizontal Merger Guidelines to measure shares and concentration in a relevant market . . .").
- ³⁸ Wilson, *supra* note 10, at 4; see also Phillips *supra* note 11, at 2 (stating that "vertical integration is generally pro-competitive, or competitively neutral").
- ³⁹ U.S. Dep't of Justice, Merger Guidelines, § 4 (1984), <https://www.justice.gov/archives/atr/1984-merger-guidelines> ("non-horizontal mergers are less likely than horizontal mergers to create competitive problems").
- ⁴⁰ Statement of Commissioner Christine S. Wilson 5, *Sycamore Partners II, L.P., Staples, Inc. and Essendant Inc.*, FTC File No. 181-0180 (Jan. 28, 2019), https://www.ftc.gov/system/files/documents/public_statements/1448307/181_0180_staples_essendant_wilson_statement.pdf.
- ⁴¹ Christopher Cole, *FTC's Phillips Says Vertical Merger Rules Badly Need Refresh*, LAW360 (Feb. 5, 2020) ("[T]here are very natural efficiencies that attend most integrations above and below in the supply chain."); Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson 2, *United-Health Group and DaVita*, FTC File No. 181-0057 (June 19, 2019), https://www.ftc.gov/system/files/documents/public_statements/1529366/181_0057_united_davita_statement_of_cmmrs_p_and_w.pdf (stating that "vertical mergers often generate procompetitive benefits" including EDM).
- ⁴² Vertical Merger Guidelines, *supra* note 1, § 6; see also Makan Delrahim, Ass't Att'y Gen., Antitrust Div., "Harder Better Faster Stronger": Evaluating EDM as a Defense in Vertical Mergers (Feb. 15, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-george-mason-law-review-22nd> ("[T]he burden is on the parties in a vertical merger to put forward evidence to support and quantify EDM as a defense.").
- ⁴³ For instance, Commissioner Chopra calls for an examination of the "market structure" in which merging firms compete, whether smaller firms in the same market would have "diminished access to capital" after a merger, and "the labor competition issues that vertical transactions create." Chopra Dissenting Statement, *supra* note 4, at 2, 8. Commissioner Slaughter would have the Agencies "accept[] more litigation risk and refus[e] the call to avoid the false positives of overenforcement at the expense of allowing the false negatives of underenforcement." Slaughter Dissenting Statement, *supra* note 5, at 8.
- ⁴⁴ Concurring Statement of Commissioner Christine S. Wilson Regarding Publication of FTC-DOJ Draft Vertical Merger Guidelines for Public Comment 1, FTC File No. 810034 (Jan. 10, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561709/p810034wilsonvmgconcur.pdf.
- ⁴⁵ See Allison Grande, *FTC Nearing Decision on Facebook Antitrust Probe*, LAW360 (Jan. 7, 2020) ("We [as commissioners] don't always agree on everything . . . but we have a long history of bipartisan cooperation, which has been important in the past and will continue to be important in the future."); Chairman Joseph Simons, Prepared Remarks at Hearing on Oversight of the Federal Trade Commission Before the Committee on Commerce, Science, and Transportation (Nov. 27, 2018), https://www.ftc.gov/system/files/documents/public_statements/1423967/js_oral_remarks_hearing_on_oversight_of_the_federal_trade_commission.pdf ("The FTC has a long history of bipartisanship, and we work hard to maintain that tradition.").
- ⁴⁶ See Brief of the United States, *FTC v. Qualcomm*, *supra* note 35.