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WHAT A DIFFERENCE A YEAR MAKES: FTC WITHDRAWS VERTICAL MERGER GUIDELINES

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In September 2021, the five-member Federal Trade Commission voted 3-2 along party lines to withdraw its support for the Vertical Merger Guidelines[1] ("Guidelines") and related FTC commentary on vertical merger enforcement.[2] At the same time—indeed, only hours later on the same day—the acting head of the Antitrust Division of the Department of Justice issued a statement indicating that the Guidelines "remain in place" at the DOJ while the agency conducts a "careful review" of its process for making enforcement decisions.[3]

What a difference a year makes. The Guidelines had been jointly adopted by the FTC and the DOJ in mid-2020, marking the first revision in more than 35 years and following the DOJ's failed attempt to block AT&T's acquisition of Time Warner.[4] At that time, Republican leadership at both agencies lauded the new Guidelines. The head of the DOJ's Antitrust Division said the new Guidelines would "give greater predictability and clarity to the business community, the bar, and enforcers." The FTC Chair echoed this sentiment, explaining that the "new guidelines reflect our current enforcement approach and, through increased transparency, will help businesses and practitioners understand how we evaluate vertical transactions."

As the saying goes, elections have consequences. The last two administration changes resulted in repeals of antitrust guidance. The Obama Administration repealed the Bush Administration's monopolization guidance, and the Trump Administration repealed the Obama Administration's guidance on merger remedies. The Biden FTC's repeal of the Vertical Merger Guidelines continues that pattern and builds on a number of personnel announcements and policy decisions

IN THIS ISSUE:

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by President Biden squarely directed at increasing enforcement of U.S. antitrust laws. Since taking office in January 2021, President Biden has named pro-enforcement leadership to key positions in the White House and at both federal antitrust agencies; he also issued a sweeping executive order instructing federal agencies to promote competition in the American economy.

Within the world of merger enforcement, U.S. enforcement actions historically have been focused most on horizontal transactions—combinations involving direct current or future competitors. The prevailing view had been that these deals were more likely than vertical transactions to raise significant competitive concerns due to the agencies' conclusion that transactions involving parties operating at different levels in the same supply chain often resulted in efficiencies that benefit competition and consumers.

The sands, however, are shifting. The drafting and adoption of the Guidelines, including their recognition that vertical deals often result in efficiencies that are pro-competitive, generated significant controversy with some in the antitrust bar and within the agencies themselves. The current FTC majority believes the Guidelines rely on "unsound economic theories that are unsupported by the law or market realities." Some of the FTC majority's objections have been criticized as inconsistent with accepted economic principles.[5] Other aspects of the majority's critique simply reflect a more pro-enforcement policy position.

We describe below the creation of the 2020 Vertical Merger Guidelines, the FTC's decision to withdraw the Guidelines, and what merging parties should expect going forward.

New Guidelines Emerge After Extensive Public Input

The DOJ issued its first Non-Horizontal Merger Guidelines in 1984. These original Guidelines remained officially on the books for almost 40 years but were widely understood to no longer reflect actual agency practice by the time the DOJ and FTC jointly revisited them in 2020.

While there was nearly unanimous consensus that the Guidelines required updating, there was little agreement on what the new version should

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say. The DOJ and FTC issued draft guidelines and invited public comment. During a contentious six-month public comment period, the agencies received more than 70 comments from the private bar, economists, state enforcers, and academia. Depending on your perspective, the draft document was either too anti- or pro-enforcement. The agencies made several changes to the draft Guidelines to address criticism received, including removing a non-binding "safe harbor" for vertical mergers where the parties' combined share was less than 20% in either the upstream or downstream market. Although the proposed market share screen was a flashpoint among commenters, the agencies rarely have challenged vertical mergers in practice unless the parties' upstream and downstream market shares were substantial, often above 50%.[6]

The Guidelines that emerged in June 2020 highlighted four primary theories of harm potentially caused by vertical transactions:

1. The merger incentivizes the merged company not to sell inputs or outputs to its rivals ("foreclosure").

2. The merger incentivizes the merged company to raise rivals' costs by charging them higher price(s) or decreasing the quality of products or services sold to them.

3. The merged company gains access to competitively sensitive information about its upstream or downstream competitors.

4. The merger increases the likelihood of industry coordination.

The Guidelines directly addressed one controversial topic by acknowledging that, because vertical mergers combine complementary functions and eliminate middle-man mark-ups, they "often" produce efficiencies. These include: streamlining production, inventory management, and distribution; facilitating the creation of new products; and cost savings, such as eliminating "double marginalization." A vertical merger can lower the merged company's costs if it self-supplies the input, eliminating the margin that the formerly independent supplier charged before the deal. Defendants have regularly pointed to such efficiencies in past DOJ/FTC vertical merger reviews.

Contentious from the Start

From the new Guidelines' inception, the fault lines over their content extended within the agencies themselves. The final adoption of the Guidelines was achieved over the vigorous dissent of the FTC's then-two Democratic Commissioners Slaughter and Chopra. Both abstained from the vote advancing the draft Vertical Merger Guidelines. Even after significant revisions to address their objections—including the removal of the safe harbor discussed above—the minority Commissioners strongly objected to the Guidelines' adoption.[7] Chopra lamented that the new Guidelines did "not directly address the many ways that vertical transactions may suppress new entry or otherwise present barriers to entry," and characterized the economic theories underpinning the assumption that such deals could yield procompetitive benefits as "speculative" and "often inaccurate." Commissioner Slaughter went further, arguing that the Guidelines should have "disavow[ed] the false assertion that vertical mergers are almost always procompetitive." She pushed for the agency to "accept[] more litigation risk" by following not only the theories of harm laid out in the Guidelines, but also "additional

theories of harm as economic learning and investigatory experience evolves."

The Commission attempted to address some of the comments expressed after the Guidelines' adoption by issuing a further independent "Commentary on Vertical Merger Enforcement" in December 2020. In addition to citing specific case examples of the potential issues created by vertical transactions, the Commentary further discussed the "procompetitive effects that are often associated with vertical mergers." Commissioners Slaughter and Chopra again dissented.[8] In recognition of the potential for shifting enforcement priorities under a new administration, they "strongly caution[ed] the market against relying on the Vertical Merger Guidelines . . . as an indication of how the FTC will act upon past, present, and future transactions." They "look[ed] forward to turning the page on the era of lax oversight and to beginning to investigate, analyze, and enforce the antitrust laws against vertical mergers with vigor." Following the confirmation of new FTC Chair Lina Khan and the new Democratic FTC majority, practitioners widely predicted that the Guidelines likely would be withdrawn in whole or in part.[9]

Differing Agency Responses to Guidelines

While the Guidelines' demise seemed to be a matter of when, not whether, the FTC's decision to withdraw its approval of the Guidelines without the DOJ's backing is surprising and unfortunate. Independent of whether one believes the policy statements require revisions, we are now confronted with different policy standards at two federal agencies that have overlapping jurisdiction. While we expect the DOJ will follow suit after the anticipated confirmation of the President's nominee to lead the Antitrust Division, the differing agency responses creates uncertainty in the interim, as we discuss below.[10]

In withdrawing the Guidelines, the FTC released two statements by the Commissioners—one issued by the Democratic majority and another by the two dissenting Republicans—which illuminate the deep divisions within the FTC on this and other aspects of antitrust enforcement. In echoes of Commissioners Slaughter's and Chopra's earlier dissents, the FTC majority statement criticizes the Guidelines for "flawed provisions," particularly those that discuss the "purported procompetitive benefits of vertical mergers, especially . . . the elimination of double marginalization."[11] According to the majority, the Guidelines recognized an efficiencies defense that is inconsistent with the statutory text of the Clayton Act, which in the majority's view "does not provide for a balancing test where an 'efficient' merger is allowed even if it may lessen competition." The majority also criticized the use of behavioral remedies to fix vertical mergers. Overall, these criticisms are in keeping with their views that merger enforcement has been too permissive and has allowed rampant industry consolidation.

The dissenting statement of Commissioners Phillips and Wilson censures the withdrawal decision as part of a "disturbing trend of [the FTC] 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."[12] The dissent describes the procompetitive benefits that may flow from vertical transactions, emphasizing that such mergers are "different animals from mergers of competitors" and "on the whole, more likely to improve efficiency,

bolster competition, and benefit consumers." The dissent accuses the majority of conflating procompetitive benefits with merger efficiencies and ignoring court recognition that "procompetitive effects may render a competition-eliminating merger procompetitive on the whole." Finally, it expresses concern that the FTC's withdrawal will result in uncertainty, confusion, and the chilling of legitimate merger activity at a time when the economy is recovering from the effects of the pandemic.

On the same day as the FTC vote to withdraw, the acting head of the DOJ, Richard Powers, issued a statement explaining that the Guidelines "remain in place" at the DOJ. He noted, however, that the agency "is conducting a careful review of the Horizontal Merger Guidelines and the Vertical Merger Guidelines to ensure they are appropriately skeptical of harmful mergers," and he listed several areas where the Guidelines may need to be scrutinized through a "robust public engagement process."[13] Finally, he expressed a commitment to work closely with the FTC on merger guideline updates (a commitment echoed in the FTC majority's statement).

Significance of the FTC's Withdrawal: What Can We Expect Moving Forward?

In many respects, the FTC's withdrawal of the Guidelines is not particularly surprising. The vote to approve the Guidelines last year was narrow (3-2) and strictly along party lines, and the ensuing election meant that the previously minority viewpoint was likely to prevail once three sitting Democratic commissioners were installed. As noted above, similar withdrawals of agency guidelines historically have occurred when presidential administrations change. Unlike the DOJ's withdrawal of its Section 2 report in 2009, however, the FTC's rescinding of the Guidelines creates a divide between the two agencies that results in uncertainty for the business community and brings questions of fairness to the forefront if the agencies are to conduct investigations using different analytical frameworks for vertical mergers.

Overlapping jurisdiction between the DOJ and FTC has resulted in the agencies drawing their own lines on which agency reviews particular transactions. Those lines are based roughly on each agency's historical expertise with particular industries, though in recent years there have been reports of an increasing number of so-called clearance fights—disputes over which agency should run point on a given investigation that have been resolved only after being escalated to leadership at both agencies.[14] This dynamic could become more pronounced in the future to the extent there are procedural and substantive differences between the FTC and DOJ. Unfortunately, the length and/or outcome of a vertical merger investigation now may depend on which agency is cleared to review the deal, which provides additional fodder for those on Capitol Hill who call for a one-agency approach to antitrust enforcement in order to reduce bureaucracy and increase fairness.[15]

The FTC majority's views on procompetitive benefits and efficiencies from vertical mergers are noteworthy and have already drawn strong criticism from significant voices in the antitrust community.[16] Those voices note that the majority's limited view of the elimination of double marginalization is incorrect as a matter of economic theory, and they question whether such a statement was ever vetted by the FTC's own economists.[17] They also critique the FTC's statement that the Guidelines are inconsistent with the

language of the Clayton Act, and note that procompetitive benefits must be considered for the statutory text to have any meaning.[18]

In practical terms, the FTC's position means that companies with vertical deals at the FTC may find that investigations take longer and proceed along novel paths as the agency looks to explore new theories of harm and find test cases.[19] This is particularly true in light of the FTC's September 28, 2021 announcement that it was making its merger review process "more rigorous" by "[p]roviding heightened scrutiny to a broader range of relevant market realities," including how proposed mergers will impact cross-markets and labor markets.[20] Parties will likely face an uphill battle at the Commission if they intend to heavily rely on efficiencies arguments, particularly the elimination of double marginalization, to justify their transactions. And finally, convincing the FTC on solely behavioral remedies to fix perceived harms may be even more challenging in light of the current composition of the Commission.[21] The scope and speed with which these changes are implemented, however, may be slowed by the agency's current limited resources and practical difficulties in making quick changes to established views among agency staff, including in the FTC Bureau of Economics.

Ultimately, we do not expect the FTC's withdrawal of the Guidelines significantly to change the outcome in the vast majority of vertical merger reviews. It is possible, however, that the withdrawal will have at least some chilling effect on vertical merger activity overall, especially in transactions involving high-profile merging parties in sectors that are subject to heightened antitrust scrutiny, such as technology. The FTC itself has complained that the recent increase in merger filings has taxed federal antitrust enforcers and resulted in agency resources spent reviewing "anticompetitive transactions that should have never been contemplated."[22]

In the end, however, the agencies must go to court to enjoin a merger, and the agencies' limited resources mean that they will need to act judiciously in the cases they bring and the theories they advance.[23] Indeed, very few vertical merger cases have been litigated, and the sparse case law that exists takes a less hostile view than the FTC majority on points such as balancing pro- and anticompetitive effects and recognizing efficiencies.[24] The government has significant leverage over merging parties during the investigation phase, with the ability to craft wide-ranging information requests, extend the timeline of merger reviews through timing agreements, and extract onerous remedies by threatening to block the deal in court. However, if parties are willing to litigate, the government will need to satisfy its burden of proof before an independent federal judge. This is typically more challenging in vertical deals, but courts have found that the government failed to meet its burden even in horizontal transactions, as the 13 states and the District of Columbia discovered in challenging T-Mobile's acquisition of Sprint. In that case, District Judge Marrero rejected the plaintiffs' effort to block the transaction. Although the court was "mindful of the uncertainty in the state of the law regarding efficiencies" and emphasized that they were only one of many factors to consider, efficiencies figured prominently in the court's analysis.[25] According to the court, "Defendants' proposed efficiencies are cognizable and increase the likelihood that the Proposed Merger would enhance competition in the relevant markets to the benefit of all consumers."[26] Procompetitive

arguments are not a silver bullet—and never have been—but antitrust enforcers that are overly dismissive of well-supported efficiencies claims (along with other credible evidence pointing to lack of competitive harm) may find a skeptical judiciary.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

ENDNOTES:

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

[2]Fed. Trade Comm'n, Commentary on Vertical Merger Enforcement, Dec. 22, 2020, *available at* https://www.ftc.gov/system/files/documents/reports/federal-trade-commissions-commentary-vertical-merger-enforcement/p180101verticalmergercommentary_1.pdf.

[3]Press Release, U.S. Dep't of Justice, Justice Department Issues Statement on the Vertical Merger Guidelines (Sept. 15, 2021), *available at* https://www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines.

[4]*See United States v. AT & T Inc.*, 310 F. Supp. 3d 161, 2018-1 Trade Cas. (CCH) ¶ 80407 (D.D.C. 2018), aff'd, 916 F.3d 1029, 2019-1 Trade Cas. (CCH) ¶ 80685 (D.C. Cir. 2019).

[5]*See, e.g.*, Carl Shapiro and Herbert Hovenkamp, *How Will the FTC Evaluate Vertical Mergers?*, ProMarket (Sept. 23, 2021), https://promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/.

[6]Letter from Am. Bar Ass'n Antitrust Law Sec. to Fed. Trade Comm'n and Dep't of Justice, Comments on the Draft Vertical Merger Guidelines Issued by the Department of Justice and Federal Trade Commission Comments (Feb. 24, 2020), *available at* https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/february-2020/comment-22420-ftc-doj.pdf.

[7]Comm'r Rohit Chopra, Fed'l Trade Comm'n, Dissenting Statement of Commissioner Rohit Chopra Regarding the Publication of the Vertical Merger Guidelines (June 30, 2020), *available at* https://www.ftc.gov/system/files/documents/public_statements/1577503/vmgchopradissent.pdf; Comm'r Rebecca Kelly Slaughter, Fed'l Trade Comm'n, Dissenting Statement of Commissioner Rebecca Kelly Slaughter In re FTC-DOJ Vertical Merger Guidelines (June 30, 2020), *available at* https://www.ftc.gov/system/files/documents/public_statements/1577499/vmgslaughterdissent.pdf.

[8]Comm'rs Rohit Chopra and Rebecca Kelly Slaughter, Fed'l Trade Comm'n, Joint Dissenting Statement of Commissioners Rohit Chopra and Rebecca Kelly Slaughter Regarding the Vertical Merger Commentary (Dec. 22, 2020), *available at* https://www.ftc.gov/system/files/documents/public_statements/1585062/p181201chopraslaughtervmcdissent.pdf.

[9]Michael A. Gleason and Lauren Miller Forbes, *Executive Order Signals New Era in Antitrust Enforcement and Merger Review*, 25 The M&A Lawyer 7 (July/August 2021), at 1.

[10]DOJ's Antitrust Division remains under acting leadership. Jonathan Kanter's confirmation hearing before the Senate Judiciary Committee was held on Oct. 6, 2021.

[11]Comm'rs Lina M. Khan, Rohit Chopra, Rebecca Kelly Slaughter, Fed'l Trade Comm'n, Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines (Sep. 15, 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

[12]Comm'rs Noah Joshua Phillips and Christine S. Wilson, Fed'l Trade Comm'n, Dissenting Statement of Commissioners Noah Joshua Phil-

lips and Christine S. Wilson Regarding the Commission's Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement (Sept. 15, 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1596388/p810034phillipswilsonstatementvmgrescission.pdf.

[13]Those areas include: "(1) Whether the Vertical Merger Guidelines create confusion as to the merging parties' burden to establish that the elimination of double marginalization is verifiable, merger specific and will likely be passed through to consumers. (2) Whether the Vertical Merger Guidelines unduly emphasize the quantification of price effects, which is not the only means to determine that a vertical merger is unlawful. (3) Whether the Vertical Merger Guidelines appropriately account for the traditional burden shifting framework applied by U.S. courts in their review of mergers. . . . (4) Whether the Vertical Merger Guidelines should more fully explain, as some have suggested would be appropriate, the range of circumstances that can lead to a concern that a merger may have anticompetitive effects. (5) Whether the Vertical Merger Guidelines would benefit from further elaboration of the circumstances in which mergers raise concerns of harm related to the evasion of regulation." Press Release, Dep't of Justice, Justice Department Issues Statement on the Vertical Merger Guidelines (Sep. 15, 2021), *available at* https://www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines.

[14]*See* Jeremy Morrison, Kate Brockmeyer, and Charlie Stewart, *The Mystifying Antitrust Agency Clearance Process; or How I Learned to Accept Disorder and Move Forward*, 25 The M&A Lawyer 8 (September 2021), at 9; Jeremy Bryan Koenig, *For DOJ and FTC, Clearing Deals Remains a Gray Area*, Law360 (Mar. 20, 2020), *available at* https://www.law360.com/articles/1255073/for-doj-and-ftc-clearing-deals-remains-a-gray-area (describing the clearance process as "more fraught than ever" and occasionally resulting in a coin toss to resolve the agency dispute).

[15]*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-TheHouse-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.").

[16]*See, e.g.,* Carl Shapiro and Herbert Hovenkamp, "How Will the FTC Evaluate Vertical Mergers?" Stigler Center ProMarket.Org, (Sept. 23, 2021) *available at* https://promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/ (calling the FTC's majority statement "flatly incorrect as a matter of microeconomic theory and . . . contrary to an extensive economic literature about vertical integration").

[17]*Id.* ("In some cases, EDM justifies a vertical merger, but in other cases it does not. . . . EDM applies (a) to multi-product firms, (b) regardless of whether the firms at either level have monopoly power or charge monopoly prices, and (c) regardless of whether the downstream production process involves fixed proportions. All of this has been included in economics textbooks for decades, building on a seminal 1950 paper by Joseph Spengler. None of the conditions cited by the majority are required for EDM to apply, although they are clearly relevant when one is measuring EDM in a specific vertical merger. While EDM does not save every vertical merger, it should be part of any vertical merger inquiry and is not nearly as limited as the majority's statement suggests. In drafting its statement, the majority appears not to have consulted with the FTC's own Bureau of Economics. As a result, we have the spectacle of a federal agency basing its policies on a demonstrably false claim that ignores relevant expertise.").

[18]*Id.* ("If a merger will generate procompetitive effects and thus will promote competition, on what basis can the Chair claim that the merger

will substantially lessen competition, a requirement that is explicit in the text of the statute?").

[19]Of note, this appears to be occurring for all kinds of transactions, not simply vertical deals. Last month, the Commission announced that it has begun issuing letters to some parties at the end of the initial waiting period, warning parties that the investigation remains "open" and that parties who close their transaction risk a post-closing challenge. *See* Holly Vedova, "Adjusting Merger Review to Deal with the Surge in Merger Filings," FTC Competition Matters Blog (Aug. 3, 2021), *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings?utm_source=govdelivery. While the agency announcement states that the letters are necessary to deal with a significant uptick in merger filings, it also hints at a broadening of the FTC's views on potential harms that may result from transactions. *Id.* (noting that the FTC may challenge deals that "threaten to reduce competition and harm consumers, workers, and honest businesses"). *See also* Bryan Koenig, "Nontraditional Question Appearing in FTC Merger Probes," Law360 (Sept. 24, 20201), *available at* https://www.law360.com/competition/articles/1425218/-nontraditional-questions-appearing-in-ftc-merger-probes?nl_pk=17d1415f-068a-48b3-987f-c955d401b121&utm_source=newsletter&utm_medium=email&utm_campaign=competition (noting that FTC staff have begun raising novel questions not relevant to an analysis of competition concerns, such as queries around unionization at the merging companies, environmental issues, and corporate governance practices).

[20]Holly Vedova, Bureau of Competition, Fed'l Trade Comm'n, Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave (Sep. 28, 2021), https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/making-second-request-process-both-more-streamlined?utm_source=govdelivery.

[21]*See* Letter from Lina Khan, Chair, Fed'l Trade Comm'n, to Elizabeth Warren, Senator, U.S. Congress (Aug. 6, 2021), *available at* https://www.warren.senate.gov/imo/media/doc/chair_khan_response_on_behavioral_remedies.pdf ("While structural remedies generally have a stronger track record than behavioral remedies, studies show that divestitures, too, may prove inadequate in the face of an unlawful merger. In light of this, I believe the antitrust agencies should more frequently consider opposing problematic deals outright"). The FTC majority statement promises to evaluate past remedy practices and provide clear guidance on when remedies are unlikely to be effective.

[22]Holly Vedova, Bureau of Competition, Fed'l Trade Comm'n, Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave (Sep. 28, 2021), https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/making-second-request-process-both-more-streamlined?utm_source=govdelivery.

[23]Existing case law makes clear that the government needs particularly strong evidence—in the form of third-party testimony, business documents, and most importantly economic analysis—if it is to be successful in a vertical merger challenge, and the *AT&T/Time Warner* matter illustrates well the litigation risk of bringing such cases.

[24]*See, e.g., United States v. AT&T, Inc.*, 916 F.3d 1029, 2019-1 Trade Cas. (CCH) ¶ 80685 (D.C. Cir. 2019); *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 2020-1 Trade Cas. (CCH) ¶ 81082 (S.D. N.Y. 2020) ("Sprint/T-Mobile").

[25]Sprint/T-Mobile, at 217.

[26]*Id.*