



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

Office of Commissioner
Rebecca Kelly Slaughter

**STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER
Joined by Chair Lina M. Khan and Commissioner Alvaro M. Bedoya**

Regarding FTC-DOJ Proposed Merger Guidelines
July 19, 2023

In enacting and amending the antitrust laws, and particularly under Section 7 of the Clayton Act, Congress tasked the Federal Trade Commission and the Department of Justice’s Antitrust Division with stopping in their incipiency anticompetitive mergers “in any line of commerce.”¹ Beginning with the 1968 Merger Guidelines, the Agencies have explained the analytical factors and frameworks used in merger investigations. As market realities across various sectors of our economy and economic literature have evolved over time, so have the Agencies’ merger enforcement experience and understanding. As a result, the Agencies have periodically updated our merger guidelines to help the public, business community, practitioners and the courts identify potentially illegal mergers. I therefore support the continued evolution of our analytical considerations and the public notice function reflected in the proposed merger guidelines the Agencies have released for public comment today.

I write here to note two elements of the guidelines that have become particularly important to me based on my experience at the Commission: The need for a single set of merger guidelines and the need to give appropriate weight to the “tend to create a monopoly” prong of Section 7 of the Clayton Act.

Single Set of Merger Guidelines

The practice of maintaining separate horizontal and vertical merger guidelines has suggested that transactions will fit cleanly into one of those buckets or the other. Over time, it has become increasingly evident that these artificially constructed mathematical categories do not accurately capture the full set and complexity of relationships between merging parties that can cause a transaction to run afoul of the antitrust laws.² Consistent with market realities and attendant advances in economic literature, the Agencies’ merger review experience teaches that few transactions in today’s economy are purely horizontal or vertical.³ Some include components of both relationships; many also involve adjacent markets, or other patterns that cannot be cabined into narrow geometric relationships. For these reasons, I previously supported the Commission’s decision to rescind its approval of the 2020 Vertical Merger Guidelines⁴ and strongly support the design of

¹ 15 U.S.C. § 18.

² See Comm’rs Rohit Chopra and Rebecca Kelly Slaughter, Fed. Trade Comm’n, Joint Dissenting Statement Regarding the Vertical Merger Commentary (Dec. 22, 2020), https://www.ftc.gov/system/files/documents/public_statements/1585062/p181201chopraslaughtervmcdissent.pdf.

³ See Comm’r Rebecca Kelly Slaughter, Fed. Trade Comm’n, Dissenting Statement In the Matter of Fresenius Medical Care/NxStage, File No. 171-0227 (Feb. 19, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455740/171_0227_fresenius-nxstage_slaughter_statement_2-19-19.pdf.

⁴ Comm’r Rebecca Kelly Slaughter, Fed. Trade Comm’n, Prepared Remarks Regarding the Proposed Recission of the

these proposed merger guidelines to capture in one document the various ways and dimensions in which competition presents itself in the modern economy as well as the range of tools required to analyze the likely competitive effects of transactions in all relevant lines of commerce.

Reinvigorating the “Tend to Create a Monopoly” prong of Section 7

In addition to the benefits of a single set of merger guidelines, the proposed revisions recognize the full meaning to the text of Section 7 of the Clayton Act by expressly incorporating its “tend to create a monopoly” language in the analytical frameworks. While Section 7 prohibits mergers and acquisitions whose effect “may be substantially to lessen competition, or tend to create a monopoly,” prior guidelines and the Commission’s past merger enforcement have focused on identifying and challenging mergers primarily on the basis that they may substantially lessen competition. However, our experience has shown that individual mergers, particularly those that may not necessarily present the risk of substantially lessening competition in a particular relevant market when analyzed in isolation, ultimately further a trend towards a firm’s unlawful acquisition or exercise of market power.⁵ The proposed merger guidelines seek to cure this deficiency and more faithfully effectuate Congress’ clear desire to arrest unlawful mergers in their incipiency, whether they threaten to either substantially lessen competition or facilitate the exercise of monopoly power.

I sincerely appreciate the hard work and collaborative engagement of Commission and DOJ staff in crafting this proposal. And I strongly encourage the public to provide comments to further inform finalization of the merger guidelines.

FTC’s Approval of the 2020 Vertical Merger Guidelines (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596408/rks_remarks_on_rescinding_ftc_approval_of_vmgs_9152021.pdf.

⁵ Comm’r Rebecca Kelly Slaughter, Fed. Trade Comm’n, Storming the Concentration Castle: Antitrust Lessons from the Princess Bride (Mar. 31, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Lastowka%20Lecture%203.31.22%20FINAL%20%28PDF%20Version%29.pdf.