New Merger Guidelines and Recent Merger-Related FTC and DOJ Announcements

Yesterday, antitrust enforcers at the Department of Justice Antitrust Division ("DOJ") and the Federal Trade Commission ("FTC") (together, "the Agencies") issued draft Merger Guidelines ("Guidelines"), which would replace and expand upon the existing 2010 Horizontal Merger Guidelines ("2010 HMGs"). Recent changes in antitrust enforcement have focused especially upon mergers, and the Guidelines articulate how the Agencies are evaluating their legality. They mark the clearest statement yet of the Biden Administration's more aggressive and wide-reaching approach to competition policy. This note summarizes the Guidelines and also recent proposed changes to the HSR filing process and guidance concerning bank mergers.

01

PROPOSED NEW MERGER GUIDELINES

On July 19, 2023, the DOJ and FTC proposed the Guidelines[1] and opened a 60-day public comment period ending on September 18, 2023. We expect the Agencies to finalize the guidelines by the end of the calendar year.

The Guidelines follow a long process that began with President Biden's July 2021 Executive Order on Promoting Competition in the American Economy (the "EO"), which directed the Agencies to consider revising the merger guidelines to "address consolidation in many markets". The Agencies announced a request for information on January 18, 2022, and received over 5,800 comments in response. We do not expect them to reissue another draft for public comment after this comment period ends.

Consistent with recently filed merger actions and public statements by agency officials over the last two years, the Guidelines reflect the following shifts in the interpretation and application by the Agencies of the Clayton and Sherman Acts to mergers:

- Lower thresholds for structural presumptions of harm that capture more deals;
- Additional focus on non-economically verifiable means of identifying a lessening of competition;
- Increased emphasis on non-price harms;
- Expanded liability for vertical and other non-horizontal transactions;
- Elevating theories of lessened competition that have not been focal points of enforcement in recent decades (potential competition, conglomerate mergers, etc.); and
- De-emphasis of defenses to liability.

The net result, again consistent with policy pronouncements over the last few years, is that the Agencies are declaring more deals to be illegal. We have already seen some enforcement actions that would not have been filed before this change in approach, and we expect to see more. But it remains

to be seen to what extent the Agencies will prevail in stopping the additional mergers the Guidelines would capture. Agency leadership have repeatedly expressed their desire to "deter" anticompetitive mergers and articulating the breadth of where they see violations of law will contribute to deterrence. But agency capacity and court reception are variables that will also impact implementation of the Guidelines.

Companies considering mergers should continue to be prepared for longer and more searching reviews, and they should also consider the litigation that may follow. Companies should remain mindful that agency practice occurs in the shadow of court scrutiny, where the Agencies have had less success of late.

A NOTE ON REMEDIES

The Guidelines do not address remedies. A footnote states that they address only "whether a merger or acquisition is illegal" and that remedies fall outside their scope. In recent litigation, the Agencies have taken the position that remedies should not be considered in evaluating the legality of a transaction, though courts have not followed that lead.[2] The Agencies have also taken the public position that they are not inclined to negotiate remedies and enter into consent agreements with parties. The DOJ has agreed to only one since Assistant Attorney General Kanter took office, and then in the middle of litigation;[3] and the FTC has not agreed to any since December 2022.[4] As the Agencies have refused to discuss remedies, however, merging parties have turned to "fixing it first" and courts have rendered liability decisions taking remedies into account. Remedies have an important effect; and, in evaluating potential mergers, they should be a focal point early on in the discussion.

THE THIRTEEN GUIDELINES

The Guidelines include thirteen specific guidelines, eight of which are general rules, four of which deal with particular scenarios that raise concern with the Agencies, and one of which is a catch-all to include potentially anticompetitive scenarios not contemplated in the first twelve. Many of the individual guidelines are drafted with legal precedents in mind; but they are largely decades-old, and omit for the most part contemporary merger caselaw.

We summarize each of the specific guidelines below:

Mergers should not significantly increase concentration in highly concentrated markets.

- This guideline applies two alternative "structural presumptions", and if either is met the merger will be presumed illegal.
- The first lowers the Herfindahl-Hirschman Index ("HHI")[5]-related thresholds to the level used in the 1982 merger guidelines, both for what constitutes a "highly concentrated market" and for the change in concentration ("ΔHHI") as a result of the transaction, providing that the transaction is presumed illegal where:
  - HHI > 1,800 and ΔHHI > 100.
  - This lowers such thresholds from the 2010 HMGs levels of HHI > 2,500 and ΔHHI > 200.
- The second, based on the 1963 *U.S. v. Philadelphia National Bank* decision, presumes liability if the parties' combined shares equal 30% or more, and if ΔHHI > 100.
- A footnote to this guideline also states that a merger may lessen competition by "threaten[ing] to cause the exit of a current market participant, such as a leveraged buyout that puts the target firm at significant risk of failure".[6] This is broadly consistent with public statements concerning private equity by leaders at the Agencies in recent months and arguments advanced by the DOJ in the *UnitedHealth / Change* merger challenge. It also suggests that enforcers will consider capital structures in evaluating competitive effects.

Mergers should not eliminate substantial competition between firms.

- This guideline focuses on evidence of competitive effects apart from concentration, *i.e.*, "unilateral effects" from reducing the competition between the merging firms.

Mergers should not increase the risk of coordination.

- This guideline addresses "coordinated effects" and applies another structural presumption.
- The Agencies will presume that a "highly concentrated market" (which, as noted above, now has a lower threshold) created by the merger will be susceptible to coordinated effects.

- They will also review traditional indicia of likely coordination, like past coordination, the elimination of a maverick firm, and other factors.

Mergers should not eliminate a potential entrant in a concentrated market.

- Unlike the 2010 HMGs, but consistent with the FTC's recent *Meta/Within* merger[7] challenge, this guideline focuses in depth upon "actual potential competition" and "perceived potential competition".
- With respect to actual potential competition, the Agencies will examine whether one or both of the merging parties has a "reasonable probability" of entering the relevant market and whether such entry has "substantial likelihood" of producing deconcentration or other procompetitive effects, which will be presumed to flow from entry.[8]
- In examining the elimination of perceived potential competition, the Agencies will consider whether a current market participant could reasonably consider the relevant merging party a potential entrant. The Agencies will also consider evidence that the potential entrant had a competitive effect on existing rivals.
- For both actual potential competition and perceived potential competition, the Agencies apply an "objective" standard, meaning the Agencies do not require any evidence that the party in question actually was considering entering (for actual potential competition) or was considered a potential entrant by a market actor (for perceived potential competition). The Agencies instead state that it is sufficient if there is "objective evidence" that the party simply has "sufficient size and resources" or is "well-situated" to enter.

Mergers should not substantially lessen competition by creating a firm that controls products or services that its rivals may use to compete.

- Principle 5 is similar to the withdrawn 2020 Vertical Merger Guidelines, looking at a lessening of competition from either (1) an ability and incentive to raise rivals' costs by foreclosing access to products or services they need to compete;[9] or (2) giving access to competitively sensitive information of a rival.
- Recent enforcement actions by the Agencies reflect the vigorous pursuit of deals they allege raise these issues, for example the FTC's *Microsoft/Activision* case and the DOJ's *UnitedHealth/Change* case.
- The Agencies explain, however, that such mergers need not involve traditional vertical supply or distributor relationships—merely control of related products or services that rivals do (or may in the future) use. The guideline sweeps broadly, including related products or services that rivals may use in the future, that influence consumer decisions, or that raise the value of rivals' products.
- Guideline 5 indicates heightened skepticism of rebuttal evidence, such as little weight accorded to reputational harms or claims or commitments not to harm rivals.[10]

Vertical mergers should not create market structures that foreclose competition.

- This guideline introduces a structural presumption for certain vertical mergers, which neither courts nor the Agencies have embraced in decades.
- Where the merged firm would control above 50 percent in a "related market", *i.e.*, "a product, service, or customer that rivals use to compete" in the market where the rivalry occurs,[11] the Agencies state that the share alone is a sufficient basis to conclude the merger may substantially lessen competition, subject to rebuttal evidence.
- For mergers below this threshold, the Agencies will consider "plus factors" such as a trend toward vertical integration and concentration of the relevant market.

Mergers should not entrench or extend a dominant position.

- This guideline returns to the 1968 Merger Guidelines and cases like *FTC v. Procter & Gamble Co.*[12], which have animated one recent enforcement action.[13] In recent years, the Agencies had rejected such theories as inconsistent with sound antitrust law and economics.[14]
- The Agencies are concerned about maintaining the possibility for future deconcentration, and the guideline addresses mergers that entrench a dominant position or extend dominance into a related market.

- In assessing "dominance", the Agencies will look to direct effects or market share in excess of 30 percent. By applying such a low share threshold to mean dominance and defining the illegal conduct to include results of competitive behavior like furthering a firm's position or moving into a new market, the scope of this specific guideline is difficult to calibrate.
- The guideline also notes that mergers involving the elimination of nascent threats may be examined under Section 2 of the Sherman Act.[15] The Agencies have brought merger cases under this theory in recent years.[16]

Mergers should not further a trend towards concentration.

- Under this vaguely worded principle, the Agencies will consider whether the merger is taking place in an industry where either horizontal or vertical integration capable of foreclosing certain rivals is taking place.
- They will view evidence of steadily increasing HHI exceeding 1,000 and nearing 1,800; the exit of significant players; or a ΔHHI > 200 as indicative of such a trend.

When a merger is part of a series of multiple acquisitions, the Agencies may examine the whole series (i.e., serial acquisitions).

- The Agencies are concerned about a series of transactions that together lessen competition. This guideline provides for the examination of the series together.
- The January 2022 RFI concerning merger guidelines asked questions specifically about private equity firms. This guideline regards conduct that former and current Agency leaders have associated with private equity firms, pharmaceutical companies and technology companies.
- In November 2022, the FTC specifically identified serial acquisitions as a pattern it believed might violate Section 5 of the FTC Act.[17]

When a merger involves a multi-sided platform, the Agencies examine competition between platforms, on a platform, or to displace a platform.

- Digital platforms have been a fixture of the antitrust reform debate and targets of agency enforcement, including in the context of mergers.
- The guideline articulates Agency concern about acquiring platforms that might challenge dominant players, critical platform participants, platform service providers, other providers of important platform inputs, or means to displace platform competition. It introduces a "conflict of interest" concern that would appear to bar vertical integration by platforms.

When a merger involves competing buyers, the Agencies examine whether it may substantially lessen competition for workers or other sellers.

- While monopsony, including competition for labor, has always been a concern of antitrust,[18] and the Agencies have been evaluating effects of mergers on labor for years, this guideline expands significantly on the topic, reflecting the Administration's priorities.
- Last year, the DOJ successfully blocked the proposed merger between Simon & Schuster and Penguin Random House on the theory of anticompetitive harm to authors.[19]

When an acquisition involves partial ownership or minority interests, the Agencies examine its impact on competition.

- The 2010 HMGs address the acquisition of partial ownership and minority interests, with a focus on managerial influence, reduced incentives to compete and access to competitively sensitive information.
- This guideline also alludes to common ownership concerns, which have been an aspect of academic interest but not enforcement in recent years.

Mergers should not otherwise substantially lessen competition or tend to create a monopoly.

- This is a catch-all provision.

MARKET DEFINITION

The Guidelines shift emphasis away from the Hypothetical Monopolist Test ("HMT") in their discussion of market definition. First, they emphasize that substantial competition between the merging parties can demonstrate the market exists.

Second, they discuss direct evidence of market power. The Guidelines emphasize evaluating anticompetitive effects on the basis of factors other than price, like quality and innovation. Separating

manifestations of market power from negative effects from factors unrelated to lessened competition will be analytically difficult.

Third, as they have re-emphasized in recent litigation and decisions, the Agencies will employ "practical indicia" associated with *Brown Shoe*.

Lastly, the Agencies discuss the HMT as a means of market definition. Again consistent with the focus beyond price, the Guidelines expand the test to include an evaluation of the traditional Small but Significant and Non-transitory Increase in Price ("SSNIP"), but now also to "or worsening of Terms" ("SSNIPT"). The terms that may worsen can include quality, service, capacity investment, choice or innovation.

FAILING FIRM

The Guidelines provide four categories of rebuttal evidence that the Agencies will consider to show that a purposed merger may not have the effect of substantially lessening competition. The first is the "failing firm" defense, consistent with past guidelines and court precedent. The Guidelines reiterate the Supreme Court requirements of (1) grave probability of business failure, (2) prospects of reorganization are dim or nonexistent and (3) acquirer is the only available purchaser. The Agencies will only consider this defense when the target is in a desperate financial situation, *i.e.*, business operations will soon cease, not simply a situation of declining sales or negative profits. Additionally, the target must demonstrate that it has made actual efforts to reorganize under Chapter 11 Bankruptcy and that it has sought in good faith other reasonable buyers who would not raise competitive concerns.

ENTRY AND REPOSITIONING

The second category is that increased profits in the merged industry will induce market entry restoring competition. For this evidence to be credited, the Agencies require that entry be (1) timely, (2) likely and (3) sufficient to counteract the negative impact on competition. To be timely, entry must both occur before any anticompetitive effects arise (which is difficult to achieve), and must be durable in that the level of competition must remain for a sustained period of time. To be likely, the potential entry must begin exerting competitive pressure once the merger is announced and the Agencies will scrutinize why the entry was not planned prior to the merger announcement and evaluate if the merger creates any barriers to entry making entry less likely. Finally, to be sufficient, entry must "at least replicate the scale, strength, and durability of one the merging parties".

PROCOMPETITIVE EFFICIENCIES

The third category of potential rebuttal is that procompetitive efficiencies indicate that substantial lessening of competition is in fact threatened. The Agencies have always taken a skeptical view of efficiencies, and the Guidelines' view is more so. The Guidelines require efficiencies be merger-specific and verifiable. To be merger-specific, efficiencies must not be achievable through any other means except the merger, and the Guidelines express the view that many benefits are achievable by contract. To be verifiable, efficiencies must be demonstrated using reliable methods, reliable evidence and not based on subjective predictions of the firms or their agents.

The Agencies have added new requirements, the first being that the efficiencies must "within a short period of time" be passed through to "improve competition", not just benefit the merged firm. Second, the efficiencies must be "procompetitive", meaning that they must not worsen terms for trading partners, increase concentration or result in vertical integration.

Unlike the withdrawn 2020 Vertical Merger Guidelines, the Guidelines neither recognize nor distinguish from other efficiencies the "Elimination of Double Marginalization" ("EDM") that inheres in vertical integration.

The anticipated effect is that almost no efficiencies from a merger will be credited.

STRUCTURAL BARRIERS TO COORDINATION UNIQUE TO THE INDUSTRY

The final category of rebuttal evidence, specifically concerning coordinated effects, is that a structural barrier exists that will prevent those effects. The Guidelines state that structural barriers to coordination must be so much greater in the industry that they rebut the normal presumption of coordinated effects. The Agencies state that "structural conditions that prevent coordination are exceedingly rare in the modern economy", so such rebuttal arguments are unlikely to resonate with the agencies.

CONCLUSION

As courts have repeatedly written, merger guidelines are not law.[20] They do, however, reflect current agency practice; and courts have historically looked to them in applying the Clayton and Sherman Acts in merger cases.[21] Changes to the guidelines are not unprecedented, and this will be the seventh major edition of the guidelines since they were first issued by the DOJ in 1968. (Subsequent revisions occurred in 1982, 1984, 1992, 1997, and most recently in 2010.)[22]

The changes reflected in these new guidelines rely heavily on Supreme Court merger precedents from the 1960s and early 1970s. The court decisions depart in several notable ways not only from recent guidelines but also appellate and district court merger cases over the last fifty years. While the Guidelines cite certain recent appellate court cases, decisions routinely cited in merger cases like *Baker Hughes* are almost entirely absent. We expect the Agencies to abide by the new guidelines. It remains to be seen whether courts will follow them to the same extent.

Merging parties can continue to expect close scrutiny of transactions, with liability expanded and defenses limited per the Guidelines. We expect the Agencies to continue not to engage in extensive discussions concerning remedies. Companies should, however, continue to evaluate transactions in light of prevailing law, both with respect to liability and remedies.

02

HART-SCOTT-RODINO ("HSR") FILING CHANGES

On June 27, 2023 the FTC, with the concurrence of the DOJ, announced proposed changes to the HSR rules to (i) reorganize the information required to be included with an HSR filing, (ii) add additional information to the filing and (iii) make changes in accordance with the Merger Filing Fee Modernization Act of 2022 ("2022 Amendments"). The 2022 Amendments change the fees to file and create new reporting rules related to subsidies by certain foreign governments, so the most significant changes to the HSR form go to the second category — *i.e.*, additional information that parties will be required to submit if the proposal goes into effect. In effect, the FTC is proposing to collect information in initial filings that is currently reserved for voluntary request letters and second requests.

The notice of proposed rulemaking ("NPRM") was published in the Federal Register on June 29, 2023. The FTC set a comment period of 60 days, unless it is extended, meaning all comments must be received on or before August 28, 2023. The agency will take the comments filed into account and then can do one of four things: (1) finalize the proposed rule, (2) finalize an amended rule, (3) put an amended rule out for further comment or (4) decide not to proceed with the proposed HSR changes. We expect the agency to proceed, though amendments are possible. The White House's Office of Management and Budget may review a proposed rule for assess the costs and benefits of the rule as well as evaluate how it promotes other goals of the Administration. We also believe that interested parties may challenge a final rule in court.

The NRPM does not make changes to the triggers of HSR reportability, meaning it does not impact the thresholds for reporting or the exemptions to those thresholds. If a transaction is reportable when a new rule comes into effect, its requirements will apply. The most significant threshold in determining reportability is the minimum size of the transaction, which in 2023 is $111.4 million. Conversely, whether because they do not meet that test or are otherwise exempt from HSR, deals not reportable today will not be impacted by these changes.

The proposal makes certain changes to how information should be submitted, but the biggest impact is to add, as the FTC acknowledges, "a significant amount of additional information" to HSR filings that includes (but is not limited to):

- Additional information about minority holders of entities related to the acquiring party, and from limited partnerships about minority equity holders; and the identification of officers, directors, and board observers of related entities and other entities they serve or recently have served;
- Narrative descriptions of the transaction and its rationale, horizontal overlaps, and non-horizontal relationships, similar to what competition authorities outside the US (*e.g.*, UK, EU) require;
- Substantially more documents than those currently required to be submitted, including from a broader group of custodians (*e.g.*, "deal team leads") and drafts of certain documents;

- Information about the parties' workforce, including labor and safety violations;
- Prior Acquisitions; and
- Other jurisdictions where the parties have filed or expect to file, with a waiver option to allow the sharing of HSR information with those authorities.

The agency recognizes that this will require substantial additional work. Its own estimates indicate that the hours required to comply with an HSR filing will nearly quadruple, and those estimates likely understate the impact. If adopted, we believe these changes may add weeks or even months to the process of filing HSR forms, especially for more complicated deals.

03

ASSISTANT ATTORNEY GENERAL KANTER DISCUSSES BANK MERGER ENFORCEMENT

President Biden's July 2021 EO directed the DOJ, in consultation with the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency, to review current practices and adopt a plan for the "revitalization" of merger oversight under the Bank Merger Act and the Bank Holding Company Act of 1956. On June 20, 2023, Assistant Attorney General Jonathan Kanter delivered a speech at the Brookings Institution on "Promoting Competition in Banking".[23] The speech outlined how the agency is revising its approach for assessing the competitive effects of bank mergers.

In the speech, Kanter emphasized the DOJ's "important, but specific, role" in bank merger review under federal banking laws: (1) "to serve in an advisory capacity to the banking agencies by providing the banking agencies a report on competitive factors involved in a bank merger" and (2) "to serve in its law enforcement capacity by challenging any anticompetitive bank merger that violates antitrust law".[24]

According to Kanter, focusing on local branch deposit concentration no longer reflects "current market realities and how competition presents itself today".[25] He noted three examples of changes since 1995: (i) conglomerates compete across geographic and product markets; (ii) customers have increasingly diverse financial needs; and (iii) the emergence of fintechs and other nonbank financial companies.[26]

Kanter highlighted the ways that the DOJ is revising its approach:

- Taking into account not just local deposits and bank overlaps, but a wider range of metrics including "fees, interest rates, branch locations, product variety, network effects, interoperability, and customer service".[27]
- Focusing on: (1) "mergers that increase risks associated with coordinated effects and multi-market contacts", including those involving "the largest and most powerful actors"; and (2) the impact of a merger on competition for different customer segments.[28]
- Consistent with its approach to merger enforcement without the banking sector, Kanter discussed "reorienting the Antitrust Division's role to focus on providing [its] advisory opinion" and away from "remedies agreements with parties (as has become custom over the last many years)".[29] In particular, he stated that the DOJ "no longer views branch divestitures as adequate measures to address competitive concerns".[30]

1 Press Release, *FTC and DOJ Seek Comment on Draft Merger Guidelines*, FTC (July 19, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines; U.S. Department of Justice and Federal Trade Commission, *Draft Merger Guidelines* (July 19, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

2 "The FTC . . . contends Microsoft's binding offer is a 'proposed remedy' that may not be considered until the remedy phase, that is, after a Section 7 liability finding. . . . [The FTC's citation] says nothing about whether the merger-challenging plaintiff must address offered and executed agreements made before any liability trial, let alone liability finding; that is, whether the FTC must address the circumstances surrounding the merger as they actually exist. The caselaw that directly addresses the issue contradicts the FTC's position." *Fed. Trade Comm'n v. Microsoft Corp.*, No. 23-CV-02880-JSC, 2023 WL 4443412, at *15 (N.D. Cal. July 10, 2023) (citations omitted); *see, e.g.*, *United States v. AT&T, Inc.*, 916 F.3d 1029, 1042–43 (D.C. Cir. 2019) ("Thus, even viewing the statements to the FCC as supportive of the government, the district court's finding of the efficacy of Turner Broadcasting's irrevocable offers of no-blackout arbitration agreements means the merger is unlikely to afford Turner Broadcasting increased bargaining leverage.").

3 Bryan Koenig, *Does DOJ's Assa Abloy Deal Encourage More Fix-It First?*, Law360 (May 9, 2023 4:29 PM), https://www.law360.com/articles/1605432/does-doj-s-assa-abloy-deal-encourage-more-fix-it-first-.

4 The FTC entered into several consents in 2022, the last involving Tractor Supply Company's for acquiring Orscheln Farm and Home LLC. Press Release, *FTC Approves Final Order Preserving Farm Store Competition in the Midwest and the South*, FTC (Dec. 9, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-approves-final-order-preserving-farm-store-competition-midwest-south. This was based on a search of FTC press releases and case filings for the keyword "consent" filtered to mission "Competition" and topic "Merger". In February 2020, Holly Vedova, Director of the FTC's Bureau of Competition, stated that "parties should expect the agency to be skeptical and risk averse when considering offers to settle in our merger investigations". Holly Vedova, Director of the Bureau of Competition, Federal Trade Commission, "Update from the FTC's Bureau of Competition", Remarks at 12th Annual GCR Live: Law Leaders Global Conference, Miami, Florida 12 (Feb. 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/vedova-gcr-law-leaders-global-conference.pdf.

5 HHI is how the Agencies measure concentration in a market, beginning in the 1982 merger guidelines. HHI is calculated by squaring each market participant's market share and then adding those numbers together. The maximum HHI is 10,000, *i.e.*, a monopolist with 100% market share, $100^2 = 10,000$. For illustrative purposes, a market with 4 firms of equal size has an HHI of 2,500, with 6 firms of equal size has an HHI of 1,667 and with 10 firms of equal size has an HHI of 1,000.

6 *Draft Merger Guidelines*, *supra* note 1, at p. 6 n.25.

7 *See Fed. Trade Comm'n v. Meta Platforms Inc.*, No. 5:22-CV-04325-EJD, 2023 WL 2346238, at *21 (N.D. Cal. Feb. 3, 2023).

8 The Guidelines' articulation of this test departs from one recent court decision. It states: "for mergers involving one or more potential entrants, the higher the market concentration, the lower the probability of entry that gives rise to concern". The court in *Meta/Within* interpreted reasonable probability instead as "a likelihood noticeably greater than fifty percent". *Id.* at *22.

9 This standard is broadly consistent with that articulated by the court in *AT&T / Time Warner* and the Agencies in the 2020 vertical merger guidelines. *United States v. AT & T Inc.*, 310 F. Supp. 3d 161, 252 (D.D.C. 2018) ("As such, the Government's evidence is too thin a reed for this Court to find that AT & T has, in that well-worn turn-of-phrase, either the 'incentive' or the 'ability' to withhold HBO promotional rights in order to 'lessen competition substantially.'"), *aff'd sub nom. United States v. AT&T, Inc.*, 916 F.3d 1029 (D.C. Cir. 2019); U.S. Department of Justice & The Federal Trade Commission, *Vertical Merger Guidelines*, FTC (June 30, 2020), https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary.

10 The Guidelines call for an "objective analysis" and disfavors "speculative claims". *Draft Merger Guidelines*, *supra* note 1, at p. 16. While the guidelines do not directly address whether contractual commitments are sufficiently objective, it would be reasonable to argue that this type of commitment is credible and objective. Public commitments are less likely to be credited, but may also be considered objective and not speculative because a firm that retracts a public commitment would suffer actual, not speculative, harm.

11 *See* Guideline 5.

12 386 U.S. 568 (1967).

13 Complaint, *FTC v. Amgen Inc.*, No. 23-CV-3053 p. 2 (N.D. Ill. May 16, 2023) (alleging merger will allow Amgen to use its "portfolio of blockbuster drugs" to foreclose entry into markets that Horizon allegedly has monopoly power). *See also* Press Release, *FTC Sues to Block Biopharmaceutical Giant Amgen from Acquisition That Would Entrench Monopoly Drugs Used to*

Treat Two Serious Illnesses, FTC (May 16, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-sues-block-biopharmaceutical-giant-amgen-acquisition-would-entrench-monopoly-drugs-used-treat.

14 James Mancini & Gaetano Lapenta, *Roundtable on Conglomerate Effects of Mergers – Background Note*, OCED 46 (May 24, 2020), https://one.oecd.org/document/DAF/COMP(2020)2/en/pdf ("Empirical evidence of conglomerate effects is limited, and generally does not provide conclusive proof of competition harm or efficiency effects").

15 *Accord United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001).

16 *See, e.g.*, Press Release, *Justice Department Sues to Block Visa's Proposed Acquisition of Plaid*, DOJ (Nov. 5, 2020), https://www.justice.gov/opa/pr/justice-department-sues-block-visas-proposed-acquisition-plaid; Press Release, Press Release, *FTC Challenges Illumina's Proposed Acquisition of PacBio*, FTC (Dec. 17, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/12/ftc-challenges-illuminas-proposed-acquisition-pacbio; Complaint for Injunctive and Other Equitable Relief, *FTC v. Questcor Pharmaceuticals*, No. 1:17-cv-00120 p. 13 (D.D.C. Jan. 25, 2017).

17 Federal Trade Commission, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* 13 & n.73, 14 & n.82 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf.

18 *NCAA v. Alston*, 141 S. Ct. 2141, 210 L. Ed. 2d 314 (2021).

19 *United States v. Bertelsmann SE & Co. KGaA*, No. CV 21-2886-FYP, 2022 WL 16949715, at *36-37 (D.D.C. Nov. 15, 2022) ("The government has presented a compelling case that predicts substantial harm to competition as a result of the proposed merger of PRH and S & S. It has properly defined a relevant market — focused on publishing rights for anticipated top-selling books — that encompasses 70 percent of the advances that publishers pay to authors. . . . Accordingly, the Court finds that the proposed merger of PRH and S & S violates Section 7 of the Clayton Act because it is likely to substantially lessen competition in the market for the publishing rights to anticipated top-selling books.").

20 *See, e.g.*, *Olin Corp. v. F.T.C.*, 986 F.2d 1295, 1301 (9th Cir. 1993) ("Olin argues that it is inconsistent to recognize a larger, dry sanitizers market once a relevant ISOS-only market has been identified. While this may be true under the Department of Justice Merger Guidelines, it is not true as a matter of federal antitrust law.").

21 *See, e.g.*, *Chicago Bridge & Iron Co. N.V. v. F.T.C.*, 534 F.3d 410, 434 n.13 (5th Cir. 2008) ("The Merger Guidelines do not guide adjudicative decisions at the agency and court-level, because they are merely enforcement policy statements that establish standards for exercising prosecutorial discretion. . . . Enforcement policy is not binding on the agency and has no force of law.") (citations omitted).

22 Note that in 2020, Vertical Merger Guidelines were issued separately for the first time; however, the FTC withdrew from the guidelines in 2021. Press Release, *Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary*, FTC (Sept. 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary.

23 Jonathan Kanter, Assistant Attorney General, Department of Justice, Antitrust Division, Keynote Address at the Brookings Institution's Center on Regulation and Markets Event, "Promoting Competition in Banking" (June 20, 2023).

24 *Id*.

25 *Id*.

26 *Id*.

27 *Id*.

28 *Id*.

29 *Id*.

30 *Id*.

NEW YORK

Christine A. Varney
+1-212-474-1140
cvarney@cravath.com

Margaret T. Segall
+1-212-474-1231
msegall@cravath.com

Daniel K. Zach
+1-212-474-1818
dzach@cravath.com

Michael J. Zaken
+1-212-474-1888
mzaken@cravath.com

WASHINGTON, D.C.

Noah Joshua Phillips
+1-202-869-7740
nphillips@cravath.com

CRAVATH, SWAINE & MOORE LLP

NEW YORK

Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
+1-212-474-1000

LONDON

CityPoint
One Ropemaker Street
London EC2Y 9HR
+44-20-7453-1000

WASHINGTON, D.C.

1601 K Street NW
Washington, D.C. 20006-1682
+1-202-869-7700

cravath.com

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