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Remarks for "Merger Control in USA" Panel

GCR Interactive: Merger Control

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* The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. Many thanks to my Attorney Advisors Thomas Klotz and Pallavi Guniganti for their assistance in the preparation of these remarks.

I. Introduction

Let me begin by thanking GCR and Ilene for the invitation to participate on this panel. Of course, the original planning envisioned this program as an in-person event in Brussels. Because 2020 has been, shall we say, unique, we now have a virtual panel in October. I try to look for the silver lining in hovering dark clouds, so here's one for today: given the current timing, two weeks out from the presidential election, it's a great opportunity to reflect on merger enforcement during this Administration, and to discuss what the future may hold.

Before I launch into substance, let me give the standard disclaimer: The views I express are my own, and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

Today we will focus on the state of merger analysis. To do that properly – whether we are looking back to assess the Trump administration or looking forward to the next four years – we need to consider where we are today. I began my preparation for this panel by looking at the list of merger matters before the Commission during my time as a Commissioner. My review reminded me just how busy the past two years have been on the merger front.

During the last year (FY2020), the Commission brought 28 merger enforcement actions. Seven complaints were voted out by the Commission, 10 settlements were accepted for public comment, and 11 transactions were abandoned or restructured.[1] The year before (FY2019), the Commission brought 21 merger enforcement actions. Nine proposed acquisitions were abandoned or restructured to address Commission concerns, 10 merger matters were resolved when the Commission issued a consent order, and the Commission authorized two federal court challenges to block proposed mergers that were likely to harm competition.[2]

Given that enforcement record, there are many issues we could discuss. But time is finite, so I'll focus on three: vertical mergers, merger enforcement during the COVID-19 pandemic, and factors influencing market definition.

II. VERTICAL MERGERS

During my tenure at the FTC, the assessment of vertical mergers has been a topic of lively debate among the Commissioners. One early sign that this would be an issue arose during our analysis

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[1] *See* Ian R. Conner, *A Fiscal Year Like No Other*, Competition Matters blog (Oct. 6, 2020), https://www.ftc.gov/news-events/blogs/competition-matters/2020/10/fiscal-year-no-other.

[2] *See* Federal Trade Commission, Fiscal Year 2021 Congressional Budget Justification 21 (Feb. 10, 2020), https://www.ftc.gov/system/files/documents/reports/fy-2021-congressional-budget-justification/fy_2021_cbj_final.pdf.

of the *Staples/Essendant* deal. In January 2019, the Commission accepted a consent order to resolve potential competitive concerns associated with Staples' acquisition of Essendant.[3]

The transaction combined Staples, a leading retailer of office supplies, with Essendant, a leading wholesaler that serves independent dealers that compete with Staples for the business of mid-sized business customers. Technically, the merger was not vertical in nature, as Essendant was neither upstream nor downstream from Staples. Instead, Essendant was adjacent to Staples, serving customers through a separate distribution chain. But the transaction raised the common vertical merger problem of information sharing, because owning Essendant would allow Staples to understand the cost structure of some of its competitors – namely, the independent dealers that purchase supplies from Essendant.

The Commission accepted the consent agreement by a vote of three to two, with Commissioners Chopra and Slaughter dissenting.[4] Altogether, the Commissioners issued four statements: one by the majority and three individual statements by Commissioners Chopra, Slaughter, and me.[5] This consent was announced as the five-week shutdown of the federal government in 2019 drew to a close, and I sometimes think the number of statements in this matter is directly correlated to the amount of time we Commissioners had on our hands during that shutdown.

The statements' contents fell into two categories. First, the majority and our dissenting colleagues debated various points related to the case itself. For example, the statements addressed whether the firewall we imposed was sufficient to remedy the only source of likely anticompetitive harm arising from the transaction.[6] Commissioner Chopra also asserted that there were other viable theories of harm that needed to be remedied.[7] Second, Commissioner Slaughter and I used this opportunity to explain our views on vertical merger policy more generally.

Commissioner Slaughter expressed concern that vertical mergers can be at least as pernicious as horizontal mergers, a perspective that would play out subsequently in our drafting of the Vertical Merger Guidelines.[8] She also expressed concern "that our conclusions depend on unreliable

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[3] Press Release, FTC Imposes Conditions on Staples' Acquisition of Office Supply Wholesaler Essendant Inc., Jan. 28, 2019, https://www.ftc.gov/news-events/press-releases/2019/01/ftc-imposes-conditions-staples-acquisition-office-supply.
[4] *Id.*
[5] Statement of Chairman Simons, Commissioner Phillips, and Commissioner Wilson, Sycamore Partners II, L.P., No. 181-0180, Jan. 28, 2019 [hereinafter Majority Statement]; Statement of Commissioner Chopra, Sycamore Partners II, L.P., No. 181-0180, Jan. 28, 2019 [hereinafter Chopra Statement]; Statement of Commissioner Slaughter, Sycamore Partners II, L.P., No. 181-0180, Jan. 28, 2019 [hereinafter Slaughter Statement]; Statement of Commissioner Wilson, Sycamore Partners II, L.P., No. 181-0180, Jan. 28, 2019 [hereinafter Wilson Statement].
[6] Majority Statement, *supra* note 5, at 1-3; Chopra Statement, *supra* note 5, at 1-4.
[7] Chopra Statement, *supra* note 5, at 2-4 (identifying harm to "upstream trading partners," "a strong incentive to rapidly increase margins," the possibility that Sycamore, as a private equity firm, "will operate assets much differently than a typical buyer," and potential "abuse of data").
[8] Slaughter Statement, *supra* note 5, at 1.

assumptions and predictions about how a vertically integrated firm will conduct itself and are too credulous about claimed procompetitive benefits unique to vertical integration."[9]

I view vertical mergers quite differently. My statement made several points, but I will focus on just one today. We are not making decisions based on a blank slate. Economic analysis has taught us much about the competitive effects of vertical mergers, and we continue to add to that body of knowledge. To date we have used, and going forward we should continue to use, this learning to shape our approach to vertical merger enforcement.

This principle applies to antitrust across the board. As Washington, D.C. debates whether to overhaul antitrust, I will continue to remind people that we have arrived at our current enforcement stance that maximizes consumer welfare through trial and error, incrementally, based on advancements in economic analysis. Any proposed overhauls first need to address this history. Our body of antitrust law and the way that we enforce was not handed to us *deus ex machina*. We have arrived at our current position for a reason. And if we're going to overhaul antitrust, we need to address the underlying facts and data points about how we got to where we are.

One of the significant conclusions we can draw from economic literature is that integrating operations at different levels of production often yields clear economic benefits.[10] Perhaps the most commonly cited benefit in the economic literature is the elimination of double marginalization (EDM), which is simply to say that a firm has an economic incentive to reduce the total profit margin it charges customers when it operates at successive levels of production.[11]

Vertical mergers also generate other procompetitive benefits.[12] For example, these mergers allow firms at successive levels to coordinate their production, design, or innovation activities, thereby reducing costs, increasing quality, and speeding the introduction of new products.[13] Vertical integration also incentivizes greater investment by harmonizing upstream and downstream

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[9] *Id.* at 4.
[10] For the seminal work, see R.H. Coase, *The Nature of the Firm*, 4 ECONOMETRICA 386 (1937).
[11] *See, e.g.*, Francine Lafontaine, Vertical Mergers: Presentation at the FTC Hearings on Competition and Consumer Protection in the 21st Century, at 86 (Nov. 1, 2018), *available at* https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_5_georgetown_slides.pdf ("Eliminating 'double markups'"); D. Bruce Hoffman, Director, FTC Bureau of Competition, Vertical Merger Enforcement at the FTC: Remarks at the Credit Suisse 2018 Washington Perspectives Conference, Washington D.C., Jan. 10, 2018, at 3 ("Due to the elimination of double-marginalization and the resulting downward pressure on prices, vertical mergers come with a more built-in likelihood of improving competition than horizontal mergers."); Paul Yde, *Non-Horizontal Merger Guidelines: A Solution in Search of a Problem?*, ANTITRUST, at 74, 75-76 (Fall 2007) (seeking to categorize the circumstances under which the net competitive effects of a vertical merger, including the elimination of double marginalization, "will benefit consumers" or "might be anticompetitive").
[12] Roger D. Blair, Christine S. Wilson, D. Daniel Sokol, Keith Klovers, & Jeremy Sandford, *Analyzing Vertical Mergers: Accounting for the Unilateral Effects Tradeoff and Thinking Holistically About Efficiencies*, 27 GEO. MASON L. REV. 761 (2020).
[13] *See, e.g.*, Steven C. Salop, Revising the Vertical Merger Guidelines: Presentation at the FTC Hearings on Competition and Consumer Protection in the 21st Century, at 13 (Nov. 1, 2018), available at https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_5_georgetown_slides.pdf.

incentives and by reducing transaction costs, free-riding, and the risk of hold-up.[14] Moreover, the economic evidence regarding completed transactions indicates that the typical vertical merger does not harm competition.[15]

This fundamental disagreement regarding the likely competitive effects of vertical mergers has played out in other cases. Just a month after the Commission issued the consent for public comment in the *Staples/Essendant* matter, the Commission considered the proposed acquisition of NxStage Medical by Fresenius Medical Care Holdings. The transaction presented both horizontal and vertical issues. The Commission found that, as initially proposed, the transaction would reduce substantially competition in the market for hemodialysis bloodlines, a product that both firms manufacture and sell. To resolve this horizontal competitive concern, the parties agreed to divest all of NxStage's hemodialysis bloodlines business.[16]

The proposed transaction also vertically integrated NxStage, the largest supplier of in-home hemodialysis machines, and Fresenius, one of the two largest providers of in-clinic outpatient dialysis treatments. Although thoroughly examined, the investigation found that possible vertical concerns were not supported by the evidence. Specifically, the evidence did not support a finding that Fresenius would employ either a foreclosure or a raising rivals' costs strategy over inputs sold to rivals. Rather, it showed that Fresenius likely would continue to sell the in-home machines to competitors. The evidence also did not support concerns with customer foreclosure where *Fresenius/NxStage* would make entry more difficult for potential in-home hemodialysis machine manufacturers by purchasing in-home hemodialysis machines exclusively from itself.

The case led to more Commissioner statements.[17] Commissioners Slaughter and Chopra again expressed their concerns with vertical mergers, and Chairman Simons, Commissioner Phillips,

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[14] *See, e.g.*, Lafontaine, Vertical Mergers, at 86.

[15] *See, e.g.*, Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629, 680 (2007) (conducting a broad study of past vertical integrations and concluding "even in industries that are highly concentrated . . . , the net effect of vertical integration appears to be positive in many instances"); James C. Cooper, Luke M. Froeb, Dan O'Brien, & Michael G. Vita, *Vertical Merger Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 658 (2005) ("Most studies find evidence that vertical restraints/vertical integration are procompetitive" and "[t]his efficiency often is plausibly attributable to the elimination of double-markups or other cost savings."); Global Antitrust Institute, Antonin Scalia Law Sch., Geo. Mason Univ., Comment Submitted in the Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers, at 5-9 (filed Sept. 6, 2018) (summarizing the available empirical studies and concluding that either nine or ten of the eleven studies "indicated vertical integration resulted in positive welfare changes" or "no change" in welfare); David Reiffen and Michael Vita, *Is There New Thinking on Vertical Mergers? A Comment*, 63 ANTITRUST L.J. 917 (1995) (arguing the economics suggests the vast majority of vertical mergers are efficiency-enhancing); Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: Reply to Reiffen and Vita Comment*, 63 ANTITRUST L.J. 943, 944 (1995) (agreeing with Reiffen and Vita that "efficiency benefits provide the rationale for many vertical mergers, can lead to increased competition and consumer welfare, and are sufficient to offset potential competitive harms in many cases").

[16] Press Release, FTC Requires Fresenius Medical Care AG & KGaA and NxStage Medical, Inc. to Divest Bloodline Tubing Assets to B. Braun Medical, Inc. as a Condition of Merger, Feb. 19, 2019, https://www.ftc.gov/news-events/press-releases/2019/02/ftc-requires-fresenius-medical-care-ag-kgaa-nxstage-medical-inc.

[17] Statement of Chairman Simons, Commissioner Phillips, and Commissioner Wilson Concerning the Proposed Acquisition of NxStage Medical, Inc. by Fresenius Medical Care AG & Co. KGaA, No. 171-0227, Feb. 19, 2019;

and I issued a joint statement explaining that the evidence did not support a claim of vertical harm.

A few months later, in June 2019, the Commission considered the proposed acquisition of DaVita Medical Group by United Health Group. UnitedHealth Group is a vertically integrated health insurer that employs physicians and markets and sells health insurance plans. DaVita Medical Group employed or affiliated with many primary care physicians and a diverse set of specialists. Health insurers need to contract with physician groups, like those of United or DaVita, to create a network of healthcare providers, particularly for Medicare Advantage plans. Here, the evidence supported both horizontal and vertical concerns.

In the Las Vegas area, the transaction would have eliminated direct, horizontal competition between the parties' physician groups treating Medicare Advantage members, which would harm insurers creating networks of healthcare providers. The proposed combination also raised vertical concerns because United marketed and sold health insurance plans, including Medicare Advantage plans. Post-transaction, United would control a critical input – physician groups serving Medicare Advantage members – needed by rival Las Vegas area insurers. The evidence indicated that United likely would have charged rival Medicare Advantage insurers higher prices for services offered by the combined physician group. The Commission's Order required United to divest DaVita's Las Vegas area physician group, thereby addressing both the horizontal and vertical competitive issues.[18] The case triggered another round of competing statements by Commissioners.[19]

Vertical Merger Guidelines

Preceding this group of merger cases, the Commission launched a series of hearings on Competition and Consumer Protection in the 21st Century.[20] During the panel in November 2018 on vertical mergers, several presenters called for the agency to craft new vertical merger guidelines. There was widespread agreement that the 1984 Non-Horizontal Merger Guidelines that had been issued by the Antitrust Division of the Department of Justice were outdated.

Statement of Commissioner Chopra in the Matter of Fresenius Medical Care AG & Co. KGaA and NxStage Medical, Inc., No. 171-0227, Feb. 19, 2019; Statement of Commissioner Slaughter in the Matter of Fresenius Medical Care AG & Co. KGaA and NxStage Medical, Inc., No. 171-0227, Feb. 19, 2019.

[18] Press Release, FTC Imposes Conditions on UnitedHealth Group's Proposed Acquisition of DaVita Medical Group, June 19, 2019, https://www.ftc.gov/news-events/press-releases/2019/06/ftc-imposes-conditions-unitedhealth-groups-proposed-acquisition.

[19] *See* Statement of Commissioner Noah Joshua Phillips and Commissioner Christine S. Wilson, In the Matter of UnitedHealth Group and DaVita, https://www.ftc.gov/system/files/documents/public_statements/1529366/181_0057_united_davita_statement_of_cmmrs_p_and_w.pdf; Statement of Commissioners Rebecca Kelly Slaughter and Rohit Chopra, In the Matter of UnitedHealth Group and DaVita, https://www.ftc.gov/system/files/documents/public_statements/1529359/181_0057_united_davita_statement_of_cmmrs_s_and_c.pdf.

[20] Press Release, FTC Announces Hearing on Competition and Consumer Protection in the 21st Century, June 20, 2018, https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st (quoting Chairman Simons and setting out a detailed agenda).

Similarly, reports from the American Bar Association's Antitrust Section[21] and the Antitrust Modernization Commission[22] had called for additional and updated guidance on the analysis of vertical mergers.

In part as a result of those hearings, and also as a result of the FTC's discussions with the Antitrust Division, the U.S. antitrust agencies released Draft Vertical Merger Guidelines for public comment in January 2020. These Draft Guidelines embodied both economic learning and agency practice in the decades following enactment of the 1984 Guidelines.

To be honest, I had some concerns about that first draft, and issued a statement requesting comment on several key issues. In particular, I was concerned that the first draft understated the benefits of EDM; failed to recognize the close correlation between procompetitive effects (EDM) and anticompetitive effects (raising rivals' costs, or RRC); and attempted to establish definitive structural safe harbors untethered to economic analysis. Each of these concerns was addressed in the final Vertical Merger Guidelines issued by the agencies in June, and I was able to vote to support the issuance of those final guidelines. The vote at the FTC was 3-2, with Commissioners Slaughter and Chopra dissenting.

III. Merger Enforcement During the COVID-19 Pandemic

It would be hard to reflect on the past two years of merger enforcement without acknowledging the impact of the COVID-19 pandemic in the U.S. over the past eight months.

At the outset of any discussion of the Commission's response to the pandemic, it is essential to acknowledge FTC staff for their dedication and adaptation to working from home. Also, the support systems at the Commission – including IT – that enabled the immediate transition to remote work performed without disruption. Everything and everyone deserves recognition.

Regarding merger enforcement, there was an initial short-term impact on the process of merger investigations. The FTC announced in mid-March that it was implementing an electronic filing system for Hart-Scott-Rodino ("HSR") premerger filings and that it would not grant early terminations of the 30-day HSR waiting period.[23] By the end of March, the FTC announced that early terminations would again be granted in appropriate circumstances but noted that early terminations would be available "on a more limited basis than has historically been the case" –

[21] AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, PRESIDENTIAL TRANSITION REPORT: THE STATE OF ANTITRUST ENFORCEMENT (January 2017), available at https://www.govinfo.gov/content/pkg/CHRG-115shrg35459/pdf/CHRG-115shrg35459.pdf ("Non-horizontal merger enforcement is one particular area that would benefit from agency guidance, given the recent increase in industry consolidation and vertical mergers.").

[22] ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 68 (Apr. 2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[23] Press Release, Premerger Notification Office Implements Temporary e-Filing System, Mar. 13, 2020, https://www.ftc.gov/news-events/press-releases/2020/03/premerger-notification-office-implements-temporary-e-filing ("While this temporary system is in place, early termination will not be granted for any filing.").

meaning granted in fewer cases and more slowly.[24] At this time, early terminations are back to normal.

Investigations were proceeding regularly, but there were challenges as staff and the antitrust bar navigated conducting depositions and investigational hearings remotely. The conditions created by the pandemic did not alter the Commission's ability to investigate, and if necessary challenge, mergers. We saw the regular flow of consents and merger challenges. During the first six weeks of working remotely, the Commission addressed consents in Danaher's acquisition of GE's biopharmaceutical business and AbbVie's acquisition of Allergan and voted out the Part 3 challenge of Altria's acquisition of a 35% stake in JUUL and associated agreements.[25]

Early in the pandemic, some people in Washington called for a moratorium on mergers.[26] They argued that the agencies couldn't possibly do their jobs adequately while working remotely, and that without proper agency oversight, a tsunami of anticompetitive deals would ensue.[27] But imposing a merger moratorium was unjustified, both factually and as a policy matter.

As a factual matter, Commission staff immediately adjusted to working remotely and investigations continued without a substantial slowdown. As I noted, even the first six weeks of telework saw numerous Commission votes on significant merger matters. Moreover, the number of transactions notified to the Premerger Office plummeted.[28]

And as a policy matter, it would have been folly to foreclose M&A activity during this economic downturn. With mandated closures and reduced demand, it was clear that some businesses might need to turn to M&A as an alternative to bankruptcy or permanent closure. To preserve business continuity – and to prevent unnecessary job losses – it was important to keep HSR operations running. This is not to say that our merger review process focuses on maximizing employment, but why implement a merger moratorium that would risk further job loss when unemployment was already rising?

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[24] Ian R. Conner, *Resuming early termination of HSR reviews*, Competition Matters blog (Mar. 27, 2020), https://www.ftc.gov/news-events/blogs/competition-matters/2020/03/resuming-early-termination-hsr-reviews.

[25] Press Release, FTC Imposes Conditions on Danaher Corporation's Acquisition of GE Biopharma, Mar. 19, 2020, https://www.ftc.gov/news-events/press-releases/2020/03/ftc-imposes-conditions-danaher-corporations-acquisition-ge; Press Release, FTC Imposes Conditions on AbbVie Inc.'s Acquisition of Allergan plc, May 5, 2020, https://www.ftc.gov/news-events/press-releases/2020/05/ftc-imposes-conditions-abbvie-incs-acquisition-allergan-plc; Press Release, FTC Sues to Unwind Altria's $12.8 Billion Investment in Competitor JUUL, Apr. 1, 2020, https://www.ftc.gov/news-events/press-releases/2020/04/ftc-sues-unwind-altrias-128-billion-investment-competitor-juul.

[26] *See, e.g.*, Press Release, Cicilline Leading Push for Moratorium on Unnecessary Corporate Mergers in Next Relief Package; Ocasio-Cortez, Jayapal, Raskin, Pocan, Neguse, Schakowsky co-leading effort to protect workers, consumers during global pandemic, May 5, 2020, https://cicilline.house.gov/press-release/cicilline-leading-push-moratorium-unnecessary-corporate-mergers-next-relief-package; Press Release, Warren, Ocasio-Cortez to Introduce Pandemic Anti-Monopoly Act, April 28, 2020, https://www.warren.senate.gov/newsroom/press-releases/warren-ocasio-cortez-to-introduce-pandemic-anti-monopoly-actread-one-pager-here.

[27] Chris Mills Rodrigo, *Merger moratorium takes center stage in antitrust debate*, THE HILL, May 20, 2020, https://thehill.com/homenews/498665-merger-moratorium-takes-center-stage-in-antitrust-debate.

[28] Premerger Notification Program, HSR Transactions by Month, https://www.ftc.gov/enforcement/premerger-notification-program (November 2019 – 209; December 2019 – 172; January 2020 – 162; February 2020 - 140; March 2020 – 138; April 2020 – 79; May 2020 – 73).

During the first two months of working remotely, the Commission saw precisely this circumstance with respect to Danaher's acquisition of GE's biopharmaceutical business. The FTC staff employed its normal analytical process to identify potential harms to competition but requested prompt Commission action on their recommendation to prevent the layoff of thousands of employees. Like many of our votes these days, that one was three to two.[29]

Despite any changes regarding process, substantively, the Commission has not changed the standard it applies when reviewing proposed mergers. In a March 27 blog post about merger reviews, Bureau Director Ian Connor wrote that "[c]ompetitive concerns will be fully investigated in every case" and "[n]either the legal standards that apply to transactions nor the Bureau's investigational standards have been relaxed in light of the coronavirus pandemic."[30] Based on every recommendation to the Commission that I have reviewed, I can confirm that there has been no change in the standard regarding the review of proposed mergers.

Failing Firm Defense

One issue that you may expect to be prominent during the pandemic is the assertion that one of the merging parties is a failing or flailing firm. There is no question that the economic downturn that has accompanied the pandemic negatively affected many firms. And we have seen failing firm claims during the past six months.

Yet failing firm claims have not been limited to the pandemic.[31] Last November and December, several merger matters before the Commission involved failing or flailing firm claims.

- In *Jefferson Health/Einstein Healthcare*, Einstein's Answer to the Part 3 Complaint "asserts the weakened competitor and failing firm defenses" and argues that the acquisition "will provide much needed financial support for Einstein's healthcare facilities, which serve patients in some of the most vulnerable areas of the greater Philadelphia region."
- In *Axon/Vievu*, the Part 3 Complaint alleges that "Respondents cannot demonstrate that Respondent Safariland was a failing firm under the criteria set out in the Horizontal Merger Guidelines," while the Answer to the Complaint asserts that "Vievu was a failing or flailing firm" as a defense.
- In *Post Holdings/TreeHouse Foods*, each defendant's Answer to the Part 3 Complaint denies the Complaint's assertion that "Respondents also cannot establish that TreeHouse's private label RTE cereal business will fail and its assets will exit the market absent the Proposed Acquisition."

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[29] Press Release, FTC Imposes Conditions on Danaher Corporation's Acquisition of GE Biopharma, Mar. 19, 2020, https://www.ftc.gov/news-events/press-releases/2020/03/ftc-imposes-conditions-danaher-corporations-acquisition-ge.

[30] *See supra* note 24.

[31] Ian R. Conner, *On "Failing" Firms – and Miraculous Recoveries*, Competition Matters blog, (May 27, 2020) https://www.ftc.gov/news-events/blogs/competition-matters/2020/05/failing-firms-miraculous-recoveries ("Over the past few years, the Bureau has faced a surprising number of failing firm claims by merging parties. Even when the economy was booming, we heard many iterations of the same argument.")

- In *Illumina Inc./Pacific Biosciences of California*, no public documents in the U.S. describe the parties' posture on this issue. But according the provisional findings report by the U.K. Competition and Markets Authority, "PacBio has submitted it is a failing firm."

Similar to other issues in substantive merger analysis, the Commission's evaluation of failing firm and flailing firm claims has not changed during the pandemic.[32] This decision not to modify the standard for the failing firm defense is the same way that the FTC and Antitrust Division handled the defense during the Great Recession in 2008 and 2009.[33]

The Horizontal Merger Guidelines explain the rationale of the failing firm defense: "[A] merger is not likely to create or enhance market power or to facilitate its exercise, if imminent failure . . . of one of the merging firms would cause the assets of that firm to exit the relevant market."[34] A down economy does not change the fundamental analysis, which seeks to ascertain the likely impact of the merger on competition. Although failing firm defenses may be asserted more frequently during an economic downturn, the analysis remains the same. We consider whether the acquisition will harm competition, and whether the acquisition is the only way to keep the firm's assets in the market.

This is not to say that the Commission does not take the financial circumstances of a company into account in its analysis. Financial distress at the industry or company level is certainly *relevant* to antitrust analysis. Antitrust enforcement takes account of real-world economic conditions. Thus, enforcement decisions consider the competitive significance of industry participants, both in the immediate term and the long-run. Specifically, if a firm is in significant financial distress, its ability to compete effectively will be muted. A company spiraling downward will not have the funds to invest in R&D, or send armies of salespeople to visit customers, or maintain service quality. So even if a deal fails to satisfy the stringent conditions of the failing firm framework, the financial condition of the parties may well factor into the competitive effects analysis.

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[32] *Id.*
[33] *See* Delegation of the United States to the Competition Committee of the Organisation for Economic Co-operation and Development, Roundtable on Failing Firm Defence (Oct. 6, 2009), https://www.oecd.org/competition/mergers/45810821.pdf; Note by the United States submitted to the Competition Committee of the Organisation for Economic Co-operation and Development, Competition and Financial Markets (Feb. 11, 2009), https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/09financialcrisis.pdf.
[34] Horizontal Merger Guidelines § 11 (Aug. 19, 2010).

IV. Market Definition

I'd like to switch to the topic of market definition but continue with the theme of Covid-19 for a minute.

Pandemic as an Exogenous Shock

At the outset, let me be clear that this discussion is not the product of any particular case that been presented to the Commission. Instead, this discussion reflects my thoughts as I consider the impact of the COVID-19 pandemic on antitrust analysis.

The pandemic imposed an exogenous shock to numerous markets. The stay-at-home orders and concerns about exposure to COVID-19 have led to the increased use of technology. For example, many of us to do far more online shopping, and far less in-person shopping, than we used to.

In many retail markets, parties have historically encouraged the Commission to view online sellers as relevant market participants. Normally, the agencies' acceptance of an expanded group of market participants occurs slowly, mirroring gradually evolving trends in the economy. If the trend toward online banking, shopping, etc., becomes permanent, we as enforcers will need to consider whether online providers now exercise more of a competitive constraint in areas like grocery shopping.

As an example, consider the case of supermarkets. At one time, only grocery stores were included in the product market. Eventually, Wal-Mart and other superstores were added to the list of market participants. Now, as a result of the pandemic, perhaps online ordering and delivery should lead to an expanded list of market participants.[35] To further complicate the analyses, brick-and-mortar retailers such as Walmart and Target also have seen large increases in online sales, as consumers increasingly have turned to curbside pickup instead of waiting for delivery.[36] Sorting out the actual competitive dynamics may not be easy.

We may also need to reassess traditional market definitions in the health care sector. Concerns about exposure to COVID-19 have increased the use of telemedicine.[37] Depending on the

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[35] Some grocers such as Fresh Direct and Good Eggs operate solely through online ordering and delivery. *See, e.g.*, Sara Harrison, *To win the grocery delivery wars, companies may need to stay small; Good Eggs is keeping to the West Coast and looking for a big payoff*, PROTOCOL (Feb. 19, 2020), https://www.protocol.com/good-eggs-grocery-delivery-wars. For brick-and-mortar retailers offering online ordering and delivery, the effect may be on the geographic market definition. See Contribution from United States submitted to the Competition Committee of the Organisation for Economic Co-operation and Development, Latin American Competition Forum, Session I - Structural Issues in the Groceries Sector: Merger and Regulatory Issues (Aug. 24, 2015), ¶14, https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/structural_issues_in_the_groceries_sector-lacf_2015.pdf ("Over the years, the FTC's definition of the relevant geographic market in supermarket merger cases has evolved.")

[36] Steven Bertoni, *Why Target, Walmart, And Best Buy Are Booming Amid The Pandemic*, FORBES, Nov. 2020, *available at* https://www.forbes.com/sites/stevenbertoni/2020/10/14/why-these-retail-giants-are-booming-amid-the-pandemic-and-being-hailed-as-heroes.

[37] Ateev Mehrotra, Bill Wang, and Gregory Snyder, *Telemedicine: What Should the Post-Pandemic Regulatory and Payment Landscape Look Like?* Commonwealth Fund Issue Brief, Aug. 5, 2020,

identities of the participating physicians, perhaps broader geographic markets will be drawn in the future.

In a similar manner, the pandemic may cause us to reconsider what we think we know about barriers to entry and network effects in the tech space. Our rapid transition to living our lives online led to the rapid growth of various tech companies, including Zoom and TikTok.[38] These two companies demonstrate how people's preferences and needs can arise or shift very quickly. Moreover, as Zoom demonstrates, the firms that meet the new demand are not necessarily the entrenched incumbents.

As we consider market definition and the list of market participants, we will need to assess whether changes induced by the pandemic continue after the pandemic ends. In short, we will need to consider the durability of any changes.

Role of Regulation

In addition to the effect of the pandemic on market definition, I would like to highlight one other point on market definition.

When reviewing the list of enforcement actions from the past two years, I was struck by the number of matters in which a regulatory regime affected market definition or the analysis of competitive effects. Antitrust analysis is a fact-intensive inquiry. The structure and impact of regulations constitute an important part of the fact set that describes the operation of markets. I submit that the impact of regulation too frequently fails to receive well-warranted attention.

Consider several examples from FTC cases.

In *Evonik/PeroxyChem*, the Commission challenged Evonik's proposed $625 million acquisition of PeroxyChem, which involved the production and sale of hydrogen peroxide. The FTC alleged that the merger would substantially reduce competition in the Pacific Northwest and the Southern and Central United States for this chemical, which is used for oxidation, disinfection, and bleaching. Notably, the industry had a history of price fixing, including guilty pleas before DOJ. Based on my review of the record, including the history of the industry, I voted in support of the challenge.

https://www.commonwealthfund.org/sites/default/files/2020-08/Mehrotra_Medicare_Telemedicine_ib.pdf ("Because these benefits were widely recognized, Medicare, states, and private insurers made numerous changes to encourage use of telemedicine. Providers responded immediately, with use of telemedicine rising sharply in mid-March.").

[38] Press Release, Zoom Reports Second Quarter Results for Fiscal Year 2021, Aug. 31, 2020 ("At the end of the second quarter of fiscal year 2021, Zoom had: Approximately 370,200 customers with more than 10 employees, up approximately 458% from the same quarter last fiscal year; 988 customers contributing more than $100,000 in trailing 12 months revenue, up approximately 112% from the same quarter last fiscal year."); Complaint, Tiktok Inc. and ByteDance Ltd. v. Donald J. Trump, et al., No. 2:20-cv-7672 (Aug. 24, 2020), at ¶ 19 ("By October [2019], TikTok's total number of U.S. monthly active users had climbed to 39,897,768. And by June 2020, TikTok's total number of U.S. monthly active users had soared to 91,937,040.").

That said, I was concerned about how we characterized the relevant market. Certain uses for hydrogen peroxide are subject to extensive regulatory regimes, including wastewater treatment and personal care applications like teeth whitening. On the front end, a customer must ensure that a potential supplier can meet specific regulatory requirements with respect to purity, stability, and so on. And on the back end, a customer that wants to switch suppliers must notify and/or seek the approval of regulatory authorities. But the complaint alleged the relevant product market to be hydrogen peroxide, excluding electronics-grade hydrogen peroxide, and further alleged that hydrogen peroxide was a commodity product.

The district court denied the Commission's motion for a preliminary injunction.[39] Key to its decision was its conclusion that hydrogen peroxide suppliers compete for customers that use this chemical for countless end uses, some of which are subject to regulatory constraints, which accounts for the product's variations in purity, concentration, and stabilizer chemicals. Unfortunately, the relevant market the Commission alleged in our complaint was too broad.

Now let me turn to two cases in which I dissented because I believe our analysis failed to account for the ways in which regulatory regimes shape competition.

In *Peabody/Arch Coal*, the complaint alleged that the proposed combination would eliminate competition between Peabody and Arch Coal, the two major competitors in the market for thermal coal in the Southern Powder River Basin.[40] Regulatory considerations were important when defining the market – either to define a narrow relevant product market limited to SPRB coal (rather than all coal) or to define the relevant market broadly to include all fuels for power plants because regulatory considerations have increasingly incentivized power plants to move away from coal.

The complaint alleged a relevant market in SPRB coal, and asserted that Peabody and Arch Coal produced more than 60 percent of all SPRB coal mined. SPRB coal is attractive to electric power producers because the deposits are relatively inexpensive to extract and because SPRB coal typically has relatively low sulfur content, enabling plants that generate electric power to more easily comply with local, state, and federal regulations that limit emissions of certain pollutants, including sulfur dioxide.

In contrast, the parties argued that, either because of regulations or economics that discouraged the use of coal in favor of other fuels, the market should be defined broadly to include alternative fuels such as natural gas. The federal district court found in favor of the FTC regarding the relevant market and granted a preliminary injunction against the joint venture; the parties abandoned their deal.[41]

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[39] FTC v. Rag-Stiftung, 436 F. Supp.3d 278 (D.D.C. 2020).

[40] Complaint, Federal Trade Commission v. Peabody Energy Corp., et al., 4:20-cv-00317, Feb. 26, 2020 (E.D. Mo.).

[41] Memorandum Opinion, Federal Trade Commission v. Peabody Energy Corp., et al., 4:20-cv-00317, Sept. 29, 2020 (E.D. Mo.); Press Release, Statement of FTC Bureau of Competition Director Ian Conner on Peabody Energy Corporation and Arch Coal's Abandonment of Their Proposed Joint Venture, Sept. 29, 2020, available at

In *Fidelity National Financial, Inc./Stewart Information Services*, the FTC issued an administrative complaint charging that Fidelity's proposed acquisition of Stewart would significantly reduce competition for title insurance underwriting for large commercial transactions in 45 states and the District of Columbia.[42] Post-merger, Fidelity would have controlled more than 40 percent of title insurance sales for large commercial transactions in most state-level markets.

Every state regulates insurance, employing one of four regulatory approaches. The appropriate analysis of competitive effects in each of the 45 states and the District of Columbia would require accounting for the particular regulatory structure in place for that state. This issue was not litigated, however, as the parties abandoned the merger shortly after the FTC sued to block it.[43]

V. CONTINUAL REASSESSMENT AND REFINEMENT

My remarks thus far have focused on issues regarding merger enforcement. But the Commission also thinks about merger enforcement *policy* to ensure that it is approaching and evaluating cases correctly, and obtaining the inputs necessary to make informed merger enforcement decisions. On the merger policy front, the Commission is using a variety of tools to achieve this goal.

In February, the Commission launched a study under Section 6(b) of the FTC Act, which authorizes the Commission to conduct wide-ranging studies that do not have a specific law enforcement purpose.[44] The FTC issued Special Orders to five large technology firms, requiring them to provide information about prior acquisitions not reported to the antitrust agencies under the HSR Act. The orders require Alphabet (including Google), Amazon, Apple, Facebook, and Microsoft to provide information and documents on the terms, scope, structure, and purpose of transactions that each company consummated between Jan. 1, 2010 and Dec. 31, 2019. The orders will help the FTC deepen its understanding of large technology firms' acquisition activity, including how these firms report their transactions to the federal antitrust agencies, and whether large tech companies are making potentially anticompetitive acquisitions of nascent or potential competitors that fall below HSR filing thresholds and therefore do not need to be reported to the antitrust agencies.

In September, the FTC's Bureau of Economics announced a revamped Merger Retrospective Program, which will expand and formalize the Bureau's retrospective research efforts that have already produced studies analyzing the effects of a range of consummated mergers over the last

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https://www.ftc.gov/news-events/press-releases/2020/09/statement-ftc-bureau-competition-director-ian-conner-peabody.

42 Complaint, In the Matter of Fidelity Nat'l Financial, Inc., et al., Docket No. 9385, Sept. 5, 2019.

43 Press Release, Statement of Bruce Hoffman, Director of FTC's Bureau of Competition, on Fidelity National Financial, Inc.'s Decision to Drop Proposed Acquisition of Stewart Information Services Corporation, Sept. 10, 2019.

44 Press Release, FTC to Examine Past Acquisitions by Large Technology Companies, Feb. 11, 2020, https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

35 years.[45] Although the FTC's earlier Merger Retrospective Program provided many insights that have informed the FTC's enforcement decisions, the Bureau of Economics seeks to expand the program by (1) addressing antitrust questions that have not been extensively studied in previous retrospectives – such as whether mergers create labor market monopsony power – and expanding the analysis to industries not already studied; (2) more fully explaining the lessons that can be drawn for enforcement; and (3) communicating to the broader community of antitrust scholars and practitioners the program's conclusions about the effects of mergers and the performance of different tools.

Also in September, the FTC, with the concurrence of the Antitrust Division, published in the Federal Register a Notice of Proposed Rulemaking and an Advance Notice of Proposed Rulemaking regarding proposed changes to the rules and interpretations implementing the HSR Act.[46] Both Notices invited public comments. The Notice of Proposed Rulemaking proposes two changes to existing rules, including a proposed change that would require filers to disclose additional information about their associates and to aggregate acquisitions in the same issuer across those entities. The Advance Notice of Public Rulemaking seeks to gather information on seven topics that will help determine the path for future amendments to the HSR rules and interpretations of those rules. These topics include: the size of transaction; real estate investment trusts; non-corporate entities; acquisitions of small amounts of voting securities; influence outside the scope of voting securities; transactions or devices for avoiding the HSR Act requirements; and issues pertaining to the HSR filing process.

Thanks again to GCR and Ilene for inviting me to speak at this event. I look forward to hearing from my fellow panelists.

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[45] Press Release, FTC's Bureau of Economics to Expand Merger Retrospective Program, Sept. 17, 2020, https://www.ftc.gov/news-events/press-releases/2020/09/ftcs-bureau-economics-expand-merger-retrospective-program.

[46] Press Release, FTC and DOJ Seek Comments on Proposed Amendments to HSR Rules and Advanced Notice of Proposed HSR Rulemaking, Sept. 21, 2020, https://www.ftc.gov/news-events/press-releases/2020/09/ftc-doj-seek-comments-proposed-amendments-hsr-rules-advanced.