PREPARED REMARKS

Opening Remarks
FTC Hearing #5: Competition and Consumer Protection in the 21st Century

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Good morning and thank you all for joining us today. I am pleased to be able to open this morning's hearings—originally set to be our second day in this series. Due to rescheduling, we have already had the opportunity to explore some fascinating topics, and today that trend will continue as we examine two critical competition issues: vertical mergers and the consumer welfare standard. Both have made headlines of late, including the attention devoted to the Department of Justice's ongoing litigation to block the merger of AT&T and TimeWarner, and to increasingly vocal criticisms of, and challenges to, the consumer welfare standard. That is the backdrop for what I expect will be very interesting discussions today.

Our first topic is vertical mergers, which combine two firms at different points in the supply chain. They are frequently juxtaposed with horizontal mergers, which combine direct competitors. In *The Antitrust Paradox*, building on work that went back decades, Robert Bork expressed skepticism of the likelihood of harm from foreclosure, and confidence in vertical efficiencies like eliminating double marginalization.[1] Vertical mergers may also mitigate free riding and align incentives between upstream and downstream firms. Studies have shown,

[1] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

consistent with this theory, that vertical integration is generally pro-competitive, or competitively neutral.[2] Accordingly, the Commission is, as a general matter, typically more skeptical of horizontal mergers than of vertical mergers.

But that is not to say vertical mergers never raise competitive concerns. We will hear today from, among others, Steve Salop, whose work from the 1980s concerning the "raising rivals' costs" theory of anticompetitive harm finds its expression in enforcement that remains ongoing today. In the vertical merger context, this theory posits that an integrated firm with sufficient market power may be able to exploit its preferred or exclusive access to critical inputs or customers and, thereby, to raise its rivals' cost of competing for those inputs or customers and potentially to harm the competitive process. Vertical mergers also raise the prospect of other anticompetitive harms, such as increasing the likelihood of collusion.

While U.S. antitrust authorities routinely review vertical mergers, neither the Commission nor the Department of Justice's Antitrust Division (collectively, the Agencies) has updated formal guidance on such mergers since 1984. The Antitrust

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[2] *See, e.g.*, James C. Cooper, et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639 (2005) ("Most studies find evidence that vertical restraints/vertical integration are pro-competitive[.]"); Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629, 680 (2007) ("[U]nder most circumstances, profit-maximizing vertical integration decisions are efficient, not just from the firms' but also from the consumers' points of view. . . . we have found clear evidence that restrictions on vertical integration . . . are usually detrimental to consumers."); Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, HANDBOOK OF ANTITRUST ECONOMICS 391, 408 (2008); Daniel P. O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, REPORT: THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 72-73, 76 (2008); *see also* February 2007 Submission of the U.S. Department of Justice and the U.S. Federal Trade Commission on Vertical Mergers DAF/COMP/WD2(2007)38, at 7-9 (Feb. 15, 2007), https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competitionfora/07RoundtableonVerticalMergers.pdf; Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2421-2422 (2013).

Modernization Commission and the ABA, repeatedly, have called for updating guidelines for vertical mergers. Critics note that the Agencies have updated the Horizontal Merger Guidelines (HMGs) a few times since then—most recently in 2010; that the HMGs have gained wide acceptance by the courts, and so today offer meaningful guidance for parties considering such transactions, as well as a tool for developing clear and consistent case law. They also note that the 1984 Non-Horizontal Guidelines are outdated and do not reflect current Agency practice. Echoing these concerns, Assistant Attorney General Makan Delrahim stated earlier this week that these guidelines are "not used" and do not "[r]eflect new evidence or case law."[3]

Today, I hope to hear about what we have learned about vertical mergers, and what that counsels for vertical merger guidance.

1. How have the theory and practice of vertical mergers changed since 1984?
2. What areas of vertical merger law are unclear to businesses or the courts, and could the Agencies offer meaningful clarity?
3. Do we have empirical support for the competitive benefits and costs alleged to flow from vertical mergers?
4. Would that support presumptions in the law regarding vertical mergers, and if so, which?
5. How reliable are the analytical tools used for vertical mergers?
6. What would updated guidelines include?

Our second topic today is antitrust's consumer welfare standard. This standard is the metric by which U.S. courts and the Agencies today judge allegedly

[3] *See* Aldrin Brown, *US DOJ Seeks to Issue New Vertical Merger Guidelines 'Within the Next Year,' Antitrust Chief Says*, PARR (Oct. 30, 2018).

anticompetitive conduct, and which agencies around the globe have followed. It is an economically grounded standard, which requires there be some harm to consumers for conduct to be condemned. Mere harm to competitors is considered insufficient, because a less efficient firm losing sales to a cheaper, more innovative, or more efficient rival can be—and often is—consistent with vibrant competition and with outcomes that benefit consumers. Courts and the Agencies have embraced this standard for decades.

Today, there two important discussions about the consumer welfare standard happening simultaneously. One is a continuing discussion regarding whether enforcement under the consumer welfare standard is at the appropriate level, and is properly targeted. This is an introspective question, which antitrust scholars, economists, and practitioners routinely ask. Are we bringing the right kinds of cases? Using the right kinds of evidence? Should we be doing more or less in certain places? The antitrust bar benefits from the ongoing and active analysis into these questions.

The second discussion happening now—and the one on which today's consumer welfare standard panels will focus—questions whether consumer welfare is, in fact, the proper metric by which antitrust enforcers should judge conduct. Some argue that enforcement under the consumer welfare standard has failed because of the law; and, accordingly, that we should reform the law. The FTC's hearings have addressed, and will continue to address, various assumptions underlying these claims. For instance, last month the FTC held a hearing on concentration and competition.

Today, our panelists will explore how the consumer welfare standard as we know it came to be, and will propose and consider alternatives. I am interested to hear how the proper goals of antitrust are articulated, and on what basis they are justified. Does the consumer welfare standard fail to achieve those goals, and if so, how? I want to understand the proposed alternatives, and how they would apply in practice to the day-in and day-out of antitrust enforcement. I am particularly curious about whether there is conduct that is illegal today that would be legal under an alternative standard—say, collusion by small sellers of labor facing a monopsonist. And, given the global implications antitrust, what would the implications be of adopting a new standard?

I suspect we will hear many interesting takes on these important questions throughout the day, and I am looking forward to lively discussion.