Office of Commissioner
Rohit Chopra

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

# DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA

*Regarding the Publication of Vertical Merger Guidelines*
*Commission File No. P810034*
*June 30, 2020*

Today, the Federal Trade Commission and the U.S. Department of Justice have published new Vertical Merger Guidelines ("Vertical Merger Guidelines" or "Guidelines"). I respectfully dissent, because they are incomplete and rely too heavily on unproven assumptions.[1] First, they do not directly address the many ways that vertical transactions may suppress new entry or otherwise present barriers to entry. Second, the guidelines make assumptions based on contested economic theories and ideology rather than historical, real-world facts and empirical data in line with modern market realities.

One of the most troubling trends of the U.S. economy over the last 40 years has been the persistent decline of new firm formation as a proportion of business activity and employment.[2] Entrepreneurship is in retreat, as it becomes more difficult to break in to concentrated, vertically integrated markets.

The digital economy is a stark example of this decline. The internet in its infancy was heralded as a platform for new ideas and innovation because barriers to entry were practically nonexistent. Anyone with a connection could launch a blog, a new business, or the next big idea. Success was determined by skill and strategy. These highly competitive conditions were not by accident or an intrinsic feature of the technology; they were the result of government policies that prevented incumbent phone and cable companies from using their market power to dominate a nascent industry.[3]

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[1] I also share many of the concerns raised by Commissioner Rebecca Kelly Slaughter. I believe it was imprudent not to seek additional comment on this new iteration, which is drastically different from the original draft released for public comment. In addition, public forums to discuss the project were canceled and never rescheduled or replaced with an online format.

[2] *See* ECON. INNOVATION GROUP, DYNAMISM IN RETREAT: CONSEQUENCES FOR REGIONS, MARKETS, AND WORKERS (Feb. 2017), https://eig.org/wp-content/uploads/2017/07/Dynamism-in-Retreat-A.pdf; Ian Hathaway & Robert E. Litan, THE BROOKINGS INSTITUTION, *Declining Business Dynamism in the United States: A Look at States and Metros*, at 1 (May 2014), https://www.brookings.edu/wpcontent/uploads/2016/06/declining_business_dynamism_hathaway_litan.pdf; Stacy Mitchell, INST. FOR LOCAL SELF-RELIANCE, MONOPOLY POWER AND THE DECLINE OF SMALL BUSINESS: THE CASE FOR RESTORING AMERICA'S ONCE ROBUST ANTITRUST POLICIES (Aug. 2016), https://ilsr.org/wp content/uploads/2018/03/MonopolyPower-SmallBusiness.pdf.

[3] Lina M. Khan, *The Separation of Platforms and Commerce* 119 COLUM. L.J. 973, 1045-51 (2019) (identifying how regulators and enforcers prohibited certain dominant intermediaries from entering adjacent markets in order to safeguard competition).

Today's internet bears little resemblance to its infancy. The government held the incumbents at bay long enough for the startups to grow and then watched as both old and new giants entrenched and consolidated control. Now startups launch with the express goal of being bought and subsumed by one of the Big Tech incumbents. Killer apps quickly become killer acquisitions.[4] Immeasurable innovation has been lost because the government stopped preventing dominance from blocking disruption.

The same economic calcification has happened in virtually every sector.[5] It is hard to quantify the benefits our society has lost from the discoveries and breakthroughs that never saw the light of day. Public policy choices, like narrowing the scrutiny of vertical mergers to allow mass consolidation, likely contributed to the startup slump. One of the many side effects of this decline has been the deterioration of supply-chain resilience and the reduction in productive capacity – both of which have become increasingly evident as the COVID-19 pandemic has unfolded.[6] If we don't change course on concentration, these economic failings are likely to further hamper our pandemic response and our economy recovery.

Unfortunately, the newly released Vertical Merger Guidelines support the status-quo ideological belief that vertical mergers are presumptively benign, and even beneficial. These benefits often accrue to incumbents at the expense of the competitive market,[7] a fact frequently overlooked by the theories underpinning this economic worldview. While the Guidelines state that the "Agencies are concerned with harm to competition, not to competitors,"[8] they rely on economic models that focus on changes to competitors' behavior instead of changes to the market or market structure. These speculative models are based on the often-inaccurate theoretical presumption that vertical mergers only change the relationships among market participants, not the number of market participants. Therefore, they assume that a merger's impact on competition can be measured by weighing the likely occurrence of certain abusive conduct against the potential for efficiencies that lower consumer prices.

But this balancing theory doesn't capture the ways that vertical mergers can restructure the market to make it difficult or impossible for other companies to compete with a merged firm. Indeed, mergers that reduce the actual or potential number of competitors are likely to create serious competitive concerns.[9] This should have been a central theme of the new Guidelines; but instead, they largely ignore the harms that result from merger-induced changes to market

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[4] Open Markets & Am. Econ. Liberties Project, Comment Letter No. 31 on #798: Draft Vertical Merger Guidelines [hereinafter "Draft VMGs"], Matter No. P810034 at 15 (quoting Fiona Scott Morton) ("[S]mall competitors might "not have a lot of share, but that is where the competition is coming from. That 99 percent guy is afraid the [little] epsilon is going to become one and attract all the teenagers and there is going to be a flip"), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/comment_to_ftc-doj_re_vertical_merger_guidelines.pdf.

[5] James Pethokoukis, *America suffering from 'economic calcification' – JP Morgan*, AM. ENTERPRISE INST. (Sept. 2, 2014), https://www.aei.org/economics/america-suffering-from-economic-calcification-jp-morgan/.

[6] Tom Linton and Bindiya Vakil, *Coronavirus Is Proving We Need More Resilient Supply Chains*, HARVARD BUS. REVIEW (Mar. 5, 2020), https://hbr.org/2020/03/coronavirus-is-proving-that-we-need-more-resilient-supply-chains.

[7] Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1974 (2018).

[8] U.S. DEP'T OF JUST. & THE FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES at 2 (released June 30, 2020).

[9] John E. Kwoka, *Non-Incumbent Competition: Mergers Involving Constraining and Prospective Competitors*, 25 CASE W. RES. L. REV. 173, 192–96 (2001).

structures. In reality, these structural effects are often a primary source of harm.[10] Their absence from the Guidelines is a fatal flaw.

## Entry Suppression

Among the many structural effects that the Vertical Merger Guidelines fail to adequately address, I am particularly concerned about their silence on the ways in which vertical mergers suppress entry. Entry suppression extends beyond direct barriers to new competitors and includes the indirect disincentives that dissuade people from starting new businesses. At a time when small businesses are facing extinction due to the economic fallout of the pandemic, new business formation must be top of mind for every government agency that shapes economic policy.[11] Unfortunately, the Vertical Merger Guidelines dramatically miss the mark.[12] They problematically push the evaluation of entry to the discussion in the Horizontal Merger Guidelines, disregarding the distinct considerations that merit increased scrutiny in the vertical merger context. Moreover, the discussions of related topics such as raising rivals' costs, input foreclosure, and two-stage entry do not rigorously analyze and detail how these issues might specifically or disproportionately impact prospective new entrants.

*Diminished access to capital*
A vertical merger may reduce the ability of new entrants to attract the financing necessary to enter the market and effectively compete. Eliminating a potential customer from the market can dampen future sales forecasts for would-be entrants, and with that, the appetite for investing in new entry.[13] Investors are unlikely to allocate capital to firms that stand no chance of gaining any market share. Investment in new entrants may also dry up or become cost-prohibitive when a

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[10] For example, the Campaign for Family Farms and the Environment stated in their comment that "[t]he issue of consolidation in agriculture markets is at the center of most of the challenges [their] members face as they struggle to maintain economically viable farming operations." The Campaign for Family Farms and the Environment, Comment Letter No. 51 on #798: Draft VMGs, Matter No. P810034 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger guidelines/cffe_vertical_merger_guideline_comment.pdf.

[11] Heather Long, *More than 100,000 small businesses have closed forever as the nation's pandemic toll escalates*, WAPO (May 12, 2020), https://www.washingtonpost.com/business/2020/05/12/small-business-used-define-americas-economy-pandemic-could-end-that-forever/; *see also* Annie Lowrey, *The Small-Business Die-Off Is Here*, THE ATLANTIC (May 4, 2020), https://www.theatlantic.com/ideas/archive/2020/05/bridge-post-pandemic-world-already-collapsing/611089/.

[12] *See* Int'l Center for Law & Economics, Comment Letter No. 24 on #798: Draft VMGs, Matter No. P810034 at 15 (Feb. 2020) ("[T]he Commission must . . . assess the extent to which a vertical merger may raise barriers to entry, a criterion that is also found in the 1984 DOJ non horizontal merger guidelines but is strangely missing from the DOJ/FTC draft guidelines").

[13] Mitchell L. Stoltz, Electronic Frontier Foundation, Comment Letter No. 67 on #798: Draft VMGs, Matter No. P810034 at 3 (Feb. 24, 2020) (noting that "[t]he market for high-tech startup capital is… being directed towards growing the incumbents while diminishing competition. This effect transcends individual product and geographic markets"), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/eff_comments_on_draft_vertical_merger_guidelines_022620.pdf; *see also* Dissenting Statement of Fed. Trade Comm'r Rohit Chopra, In the Matter of Fresenius Medical Care AG & Co. KGaA and NxStage Medical, Inc., FTC File No. 171-0227 (Feb. 19, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455733/171_0227_fresenius_nxstage_chopra_statement_2-19-19.pdf.

large or dominant firm enters a new market, as investors take stock of the overwhelming advantage afforded by its size and resources.

*Conflicted gatekeepers*
A vertical merger may allow a company to seize gatekeeper control of the market in which it participates. This creates a conflict of interest that gives the merged firm both the motive and the means to deter new entry. Investors gravitate toward companies that can extract rents from participants across a sector, so when a market participant vertically merges with a firm that controls a bottleneck, new entrants face dim prospects. There are myriad avenues through which such gatekeeper control can suppress entry and blunt competitive intensity. In digital markets, a platform company can impose arbitrary technical specifications that stifle disruptive innovation, require market participants to use the platform's proprietary systems and pay for the privilege, levy taxes on disruptors that the platform's own competitive offerings do not incur, or otherwise condition access to the market on any number of one-sided, onerous contract terms.

This problem is not unique to digital markets. The reality is that when gatekeepers participate in the markets they control, they have the incentive and ability to inflict harm to competition. Indeed, commenters provide a wide array of examples – from healthcare[14] to food[15] to media,[16] music,[17] and live entertainment[18] – where that harm has materialized because of the

[14] Thomas E. Menighan, Am. Phar, Assoc., Comment Letter No. 61 on #798: Draft VMGs, Matter No. P810034 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/apha_comments_-_ftc.pdf; Alliance for Pharm. Compounding et al., Comment Letter No. 46 on #798: Draft VMGs, Matter No. P810034 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/02-26-20_joint_pharmacy_stakeholder_comments_-_ftc_doj_draft_vertical_merger_guidelines.pdf.

[15] Darin Von Ruden, Wisconsin Farmers Union, Comment Letter No. 49 on #798: Draft VMGs, Matter No. P810034 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/wfu_comments_on_vertical_merger_guidelines.pdf; Roger Johnson, Nat'l Farmers Union, Comment Letter No. 34 on #798: Draft VMGs, Matter No. P810034 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/02_26_20_nfu_comments_on_doj_ftc_draft_vertical_merger_guidelines.pdf; Dale McCall, Rocky Mountain Farmers Union, Comment Letter No. 33 on #798: Draft VMGs, Matter No. P810034 (Feb. 26, 2020), https://www.ftc.gov/policy/public-comments/draft-vertical-merger-guidelines; Doug Sombke, South Dakota Farmers Union, Comment Letter No. 64 on #798: Draft VMGs, Matter No. P810034 (Feb. 26, 2020), https://www.ftc.gov/policy/public-comments/draft-vertical-merger-guidelines; Mark Watne, North Dakota Farmers Union, Comment Letter No. 63 on #798: Draft VMGs (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/ndfu_comments_on_draft_vertical_merger_guidelines_022620.pdf; The Campaign for Family Farms and the Environment, *supra* note 10.

[16] Laura Blum-Smith & Stephen Michael Benavides, Writers Guild of Am. West, Comment Letter No. 60 on #798: Draft VMGs, Matter No. P810034 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/wgaw_comment_on_draft_vertical_merger_guidelines_2262020.pdf; Comm. Workers of Am. et al., Comment Letter No. 30 on #798: Draft VMGs, Matter No. P810034 (Feb. 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/labor_unions_comment_to_draft_2020_vertical_merger_guidelines.pdf.

[17] Dr. Richard James Burgess, Am. Assoc. of Independent Music, Comment Letter No. 69 on #798 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/a2im_comments_on_draft_vertical_merger_guidelines_022620.pdf.

[18] Center for Democracy & Tech., Comment Letter No. 19 on #798: Draft VMGs, Matter No. P810034 (Feb. 24, 2020), https://www.ftc.gov/policy/public-comments/draft-vertical-merger-guidelines; Open Markets & Am. Econ. Liberties Project, *supra* note 4.

government's permissive vertical merger enforcement regime. The conflicts of interest created by vertical mergers are largely ignored in the Guidelines, which continue to champion the reigning theory that prioritizes cost savings over ease of entry.[19]

*Insurmountable disadvantages*

A dominant company that enters a new market by way of a vertical merger can create insurmountable disadvantages for other potential entrants into that market.[20] The resources, relationships, and other capabilities that dominant companies bring to bear when competing in a new market dramatically increase entry requirements. This goes well beyond the two-stage entry discussion in the Vertical Merger Guidelines, particularly with respect to digital markets.

Digital markets are often "winner take all" due to network effects, the self-reinforcing advantages of data, and other market characteristics. Companies that succeed in capturing winner-take-all markets have durable dominance that can be leveraged to dictate the terms of – or even block – entry in the other markets in which they participate.[21] For example, these dominant firms can use the rents they collect in a concentrated market to subsidize their activities in new markets. They can integrate acquired products into an existing suite or leverage their participation in multi-sided markets in ways that require a minimum viability that is nearly impossible to achieve.

In the data economy, vertical mergers can allow dominant firms to integrate and enhance data inventories and collection capabilities in ways that new entrants cannot replicate. The dynamism of data-based markets means that products that might initially appear unrelated could quickly become related or relevant in unanticipated ways.[22] Many commenters suggested that the agencies adopt a presumption against vertical transactions by dominant platforms based on these market realities.[23] Yet, the Guidelines do not even address these digital issues, let alone include any such presumption.

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[19] Khan, *supra* note 3 at 976 - 77.

[20] *See* Nicholas Economides et al., Comment Letter No. 14 on #798: Draft VMGs, Matter No. P810034 at 4 -5 (Feb. 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg14_economides_comment.pdf.

[21] Open Markets & Am. Econ. Liberties Project, *supra* note 4 at 14 -15 ("In markets defined by network effects and vulnerable to monopolistic control... [a] new firm can quickly attract users in one market (for example, photo sharing) and, on the strength of this user base, enter an adjacent market (for instance, general social media). Under these circumstances, vertical mergers can combine the traditional risks of vertical mergers with the added concern about tipping and nascent competitors. In the presence of network effects, dominant firms have powerful motivations to buy out and neutralize emerging competitors").

[22] *See* Comm. Workers of Am. et al., *supra* note 16 at 4 ("Network effects are particularly strong in data-heavy markets like ecommerce, search, and social media. And, once data has been collected in one market, it can be leveraged for advantage even in an apparently unrelated market. Data shared vertically on a supply chain can be used to inform product development and improvement, but can also facilitate market foreclosure to rivals, appropriation of intellectual property, and price discrimination").

[23] *See* Jonathan B. Baker et al., Comment Letter No. 21 on #798: Draft VMGs, Matter No. P810034 at 24 (Feb. 24, 2020) ("[T]he presumption [of competitive harm] is important because firms participating in vertically-adjacent or complementary markets are often potential entrants, so the presumption would reach nascent threats to dominance created by potential entrants that would be eliminated by the acquisition. The presumption also recognizes that a dominant platform's market power would give it the ability to substantially disadvantage firms in adjacent markets by choosing not to interoperate"), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg21_baker_rose_salop_scott_morton_comments.pdf.

*Increased customer-acquisition costs*
Vertical mergers can significantly increase the cost of acquiring new customers. High customer-acquisition costs are a key metric that can deter investment in new businesses. The Vertical Merger Guidelines do not adequately address the ways that a vertical transaction, particularly those involving dominant platforms, may make it difficult, expensive, or otherwise unappealing to switch to a new entrant. The switching costs created by referrals, bundling, cross-product subsidization, below-market or zero-cost pricing, early termination charges, exclusive add-on deals, and other unfair advantages of vertical integration can obstruct new entry and should have received due consideration in the Guidelines.

## Market Realities

Beyond the failure to capture the wide range of structural market changes that can harm competition, the theoretical models in the Vertical Merger Guidelines are based on an antiquated view of the economy that has little basis in modern market realities.[24] The Guidelines' continued reliance on these unproven theories reflects a lack of humility as to their efficacy.[25] And it comes despite numerous public comments that cast serious doubts about the accuracy of the theoretical predictions and expressed concerns about the significant weight that they are afforded.[26] In addition to their general inability to predict changes in merger-induced entry and exit, existing models struggle to capture how vertical mergers reduce resilience to economic shocks and increase the likelihood of shortages and outages. The Guidelines should have clearly acknowledged the limited utility and application of these economic models, especially when there has been little recent effort by the agencies to look back and test previous assumptions against real-world results.

*Contested economic theories*
The theories advanced in the Vertical Merger Guidelines on the procompetitive benefits of efficiencies are of special concern, given the lack of evidence that such benefits have come to pass in the real world. One of the more contentious theories is that "vertical mergers often benefit consumers through the elimination of double marginalization, which tends to lessen the risks of competitive harm."[27] This theory presumes that vertical mergers produce cost savings that are then passed on to customers through price decreases.

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[24] Burgess, *supra* note 17 at 3 ("The [VMGs] rest on theoretical assumptions that companies will behave in ways that simply increase profits, but the rise of financialization, and the shift towards an emphasis on returns for Wall Street or private equity has upended many of the old assumptions about what animates decisionmaking").
[25] Sanjukta Paul & Marshall Steinbaum, Comment Letter No. 3 on #798: Draft VMGs, Matter No. P810034 at 2 (Feb. 2020) ("Little systematic effort has been made to study the effects of vertical mergers. Instead, the draft guidelines rely on theory in place of evidence, an approach that has led antitrust jurisprudence and enforcement astray in the past"), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger guidelines/vmg3_proposed_vertical_merger_guidelines_comment_final_2_2020.pdf.
[26] There were 74 public comments submitted by a diverse set of stakeholders. Unfortunately, the Guidelines do not include any supplemental analysis of the comments that articulate more specifically how the final version reflects these submissions.
[27] VERTICAL MERGER GUIDELINES, *supra* note 8 at 2.

Many commenters contested the elimination of double marginalization theory, calling it "controversial,"[28] "speculative," and "unproven," and suggesting that it "relies on a vertically integrated company to act in a way that defies reason."[29] These commenters noted that "in the case of significant market power and high entry barriers, efficiencies and the ability to eliminate margins could easily become the economic profit of a monopoly firm with an incentive to line the pockets of executives and investors."[30] Even those supportive of the theory raised a number of concerns about its treatment within the Guidelines.[31] Others raised concerns that the undue consideration of the theory will "weaken enforcement," give defendants legal avenues to exploit, and "reduce the transparency and predictability that the guidelines are intended to promote."[32] Commenters also cited studies showing that "few, if any, promised efficiencies from mergers in fact materialize" and suggested that "merger policy should seek to minimize and constrain efficiencies defenses, rather than expand and invite them" as these guidelines appear to do.[33] I agree.

*Evidence of real-world harms*

While the guidelines cite no empirical evidence that theoretical benefits have been realized, the public comments provide plenty of evidence that the predictions produced by economic models have performed poorly against real-world merger outcomes.[34] Commenters in response to the draft noted a number of instances where merged firms took actions that deviated significantly from pre-merger promises.[35] AT&T claimed that the efficiencies produced by its merger with DirecTV in 2015 would incentivize the deployment of new rural wireless broadband service to 13 million households by the end of 2019. But so far the company has deployed the service to fewer than 3 million households.[36] Meanwhile, AT&T has reportedly given DirecTV preferential treatment over third-party content providers.[37] Both AT&T-Time Warner and Comcast-NBCUniversal have imposed data caps that limited their customers' use of the internet, "despite

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[28] Diana L. Moss, Am. Antitrust Inst., Comment Letter No. 28 on #798: Draft VMGs, Matter No. P810034 at 7 (Feb. 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/aai_comments_draft_vm_guidelines_f.pdf.

[29] *See* Comment of the Am. Econ. Liberties Project et al., Comment Letter No. 32 on #798: Draft VMGs, Matter No. P810034 at 2 (Feb. 25, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/02252020_-_draft_vertical_merger_guidelines_comment_.pdf.

[30] *Id.* at 4.

[31] *See* Baker et al., *supra* note 23 at 34; *see also* Steven C. Salop, Comment Letter No. 74 on #798: Draft VMGs, Matter No. P810034 at 18 (Mar. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/salop_suggested_vertical_merger_guidelines.pdf.

[32] Diana L. Moss, *supra* note 28 at 7.

[33] Paul & Steinbaum, *supra* note 25 at 2.

[34] Blum-Smith & Benavides, *supra* note 16 at 6.

[35] Commenters note, for example, that when AT&T acquired Time Warner's television networks and the Warner Bros. film and TV studio in 2016, the company claimed that the merger would lead to the elimination of double marginalization and price decreases. Instead, fewer than a month after the merger, AT&T began repeatedly hiking prices on its products, and inflicted a variety of non-price harms on affected markets. *See* Charlotte Slaiman & Joshua Stager, Public Knowledge & Open Tech. Inst., Comment Letter No. 66 on #798: Draft VMGs, Matter No. P810034 at 8-9 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/pk_oti_comments_on_draft_vertical_merger_guidelines_022620.pdf; *see also* Center for Democracy & Tech, *supra* note 18 at 1.

[36] *Id.*

[37] *Id.*

a drastic reduction in marginal costs" and other alleged cost savings achieved through their respective vertical mergers.[38]

Commenters provided a variety of other real-world competition harms resulting from vertical mergers and vertical integration. In many of these instances, the harm inflicted related to choice, quality, and likelihood of new entry, rather than short-term price effects – a common problem with the current suite of economic models in use today. For example, grocery retailers have begun creating their own supply chains for certain agricultural products, giving them the ability to exclude competitors.[39] After Walmart built its own dairy processing plant in Indiana, its previous supplier Dean Foods had to declare bankruptcy and canceled over 100 contracts with farmer-suppliers, forcing many out of business.[40] The vertical merger between pharmacy giant CVS and the big health insurance firm Aetna has forced health care providers to close their doors as CVS announced its intention "to significantly integrate Aetna insureds into CVS Minute Clinics."[41] According to the AIDS Healthcare Foundation, these minute clinics "replace fundamental elements of the patient-physician relationship with 'cookie cutter' treatment," a cost-savings approach that can be dangerous for people with special conditions.[42]

*Other important omissions*

The Vertical Merger Guidelines ignore a whole host of other important issues raised by commenters. Critically, the Guidelines do not address in detail the labor competition issues that vertical transactions create.[43] They also do not touch on the perils associated with private equity involvement in vertical mergers, including their long-term viability as robust competitors and their under-the-radar regional roll-up strategies. And the Guidelines do not define or provide metrics for non-price effects like innovation and quality. As a result, these effects are likely to continue to be undercounted or overlooked while unproven, but measurable, predictions about prices are given significant weight.

The Guideline's silence on these issues is concerning. This disregard, combined with the lack of structural analysis and the absence of real-world data about the accuracy of modeled predictions, helps sustain support for an overly permissive status quo approach. If the agencies don't look for harms, they can claim these harms don't exist. Failure to fully account for all the competitive effects has led to behavioral remedies that do very little to stop the anticompetitive conduct

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[38] Stoltz, *supra* note 13 at 4.

[39] Von Ruden, *supra* note 15 at 1.

[40] Ben Gotschall, Organization for Competitive Markets, Comment Letter No. 39 on #798: Draft VMGs, Matter No. P810034 at 4 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/ocm_public_comments_on_doj_and_ftc_draft_vertical_merger_guidelines.pdf.

[41] Laura Boudreau, AIDS Healthcare Foundation, Comment Letter No. 52 on #798: Draft VMGs, Matter No. P810034 at 4-6 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/ftc_doj_vergical_merger_guidelines_comments_ahf_2-26-20.pdf; *see also* B. Douglas Hoey, National Community Pharm. Assoc., Comment Letter No. 11 on #798: Draft VMGs, Matter No. P810034 (Feb. 18, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg11_ncpa_comment.pdf.

[42] *Id.*

[43] As noted by the Writers Guild of America West, "[n]o merger has ever been blocked on the grounds of reduced labor market competition, and the FTC… has never even challenged a merger over such concerns. As a result of this neglect, wages are stagnant and workers change jobs at lower rates, while employers capture ever greater surplus from employees and enjoy record profits." Blum-Smith & Benavides, *supra* note 16 at 9. *See also.* Comm. Workers of Am. et al., *supra* note 22.

vertical mergers facilitate. After all, it is difficult to stop abusive behavior when the market is structured to produce it. We need to start recognizing the inherent inability to resolve the harms to competition that some vertical mergers impose. I believe rigorous, empirical, structural analysis would lead the agencies to challenge significantly more vertical transactions instead of attempting to remedy them.

**Conclusion**

Since the publication of the last iteration of the Vertical Merger Guidelines a generation ago, we have learned a great deal about the incentives of firms and the individuals operating them, as well as how our global capital markets shape those incentives. We have also experienced – and are currently witnessing – how diminished firm entry can reduce dynamism, innovation, and resilience.

I appreciate that the Federal Trade Commission and the U.S. Department of Justice rescinded the old, outdated 1984 Guidelines. I welcome the sentiment from my colleagues that they are likely to challenge more vertical mergers that might have otherwise not drawn scrutiny. However, for new Guidelines to gain acceptance by courts and the public, they must reflect the limitations of old approaches and economic learning of the last generation. If not, they will not stand the test of time.