



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

**PREPARED REMARKS OF COMMISSIONER REBECCA KELLY SLAUGHTER
REGARDING THE PROPOSED RESCISSION OF THE FTC'S APPROVAL OF THE
2020 VERTICAL MERGER GUIDELINES**

September 15, 2021

I have been beating the drum about the FTC's substantial under-enforcement of vertical mergers for years now, beginning with my dissents in Staples/Essendant and Fresenius/NxStage, and continuing through my dissents to the promulgation and adoption of the 2020 Vertical Merger Guidelines.¹ So it is no surprise that I support rescinding those Guidelines, which took a dangerous and incorrect approach toward the consideration of the purported benefits of vertical mergers. As Professor Steve Salop has written, the 2020 Guidelines provide myriad opportunities for gamesmanship by merging parties that could result in the clearing of harmful mergers or justification for weak remedies.²

Today's rescission is the right thing to do, and in particular should put to rest the notion that the agency will rely on the 2020 Guidelines analysis of purported benefits of vertical mergers. Nonetheless, I will confess anxiety about rescinding the 2020 Guidelines without a replacement proposed jointly by the Commission and DOJ. I do not want to give the impression that we intend to return to or be governed by the dead-letter of the 1984 Guidelines. Instead, as the Chair has made clear, the Commission will be guided by the law, expressed in statute and jurisprudence, as we investigate vertical transactions. And I want to be very clear to the markets that I believe the catalogue of harms in the 2020 Guidelines continues to be valid, though non-exhaustive, and that this understanding of harms continues to be critical to our analysis of vertical mergers. Our enforcement efforts and any future guidelines must build on that.

¹ Comm'r Rebecca Kelly Slaughter, Fed. Trade Comm'n, Dissenting Statement In the Matter of Sycamore Partners II L.P., Staples, Inc., and Essendant, Inc., File No. 181-0180 (Jan. 28, 2019), https://www.ftc.gov/system/files/documents/public_statements/1448321/181_0180_staples_essendant_slaughter_statement.pdf; Comm'r Rebecca Kelly Slaughter, Fed. Trade Comm'n, Dissenting Statement In the Matter of Fresenius Medical Care/NxStage, File No. 171-0227 (Feb. 19, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455740/171_0227_fresenius-nxstage_slaughter_statement_2-19-19.pdf; Comm'r Rebecca Kelly Slaughter, Fed. Trade Comm'n, Statement on the FTC-DOJ Draft Vertical Merger Guidelines, File No. P810034 (Jan. 10, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561721/p810034slaughtervmgabstain.pdf; Comm'r Rebecca Kelly Slaughter, Fed. Trade Comm'n, Statement on the FTC-DOJ Vertical Merger Guidelines, File No. P810034 (June 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577499/vmgslaughterdissent.pdf.

² Steven C. Salop, *Getting Your Deal Done Under the Vertical Merger Guidelines*, THE ANTITRUST SOURCE, (Oct. 2020), https://www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/2020/oct-2020/oct2020_salop_no_copyright.pdf.

Candidly, I weighed whether the agency should simply propose improved vertical guidelines based on the record that was developed during the consideration of the 2020 Guidelines. I think that record supports improved vertical guidelines that reflect a broader understanding of the range of harms these transactions can pose and a more skeptical eye toward claimed benefits, and such guidelines would be relatively easy to draft on that record.

However, I am also mindful and supportive of the announcement the Chair and DOJ made earlier this summer that they intend for both agencies to review both the Vertical and the Horizontal Merger Guidelines. This is a good idea, particularly because I am not convinced that it continues to make sense to have separate guidelines for horizontal and vertical transactions. In my experience, few transactions are purely horizontal or vertical. Some include components of both relationships; many also involve adjacent markets, or other patterns that cannot be cabined into narrow geometric relationships. By myopically treating transactions as vertical or horizontal, we may miss important details that a broader perspective can provide.

It is my hope that the agencies can work together quickly to develop and consider a single set of Merger Guidelines that accurately reflect contemporary market realities and economic literature. To be clear, I am not wed to this approach; my priority is that we have guidelines that provide clear guidance to both courts and markets, and reflect both our statutory obligation and market realities. But single guidelines certainly merits consideration, and I look forward to ongoing dialogue and public input on the topic.