Comments of

TechFreedom

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I. Introduction

On Friday, January 10, 2020, the Department of Justice (DOF) and the Federal Trade Commission (FTC) jointly released new Draft Vertical Merger Guidelines (the "Guidelines" or "Draft Guidelines"),[3] and sought public comment.[4] On February 3, 2020, the FTC and DOJ extended the comment period until February 26, 2020.[5] The Draft Guidelines are the first time DOJ and the FTC have sought to update their approach to vertical mergers since 1984, and come on the heels of the DOJ's failure to stop the merger between Time Warner (a video programmer) and AT&T (a pay-TV distributor) in the first merger review to be decided by the courts in four decades.[6]

TechFreedom is a non-partisan think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

We study how the law governs information technologies across media, both new and old. Since launching in 2011, we have filed comments in multiple transaction reviews before the Federal Communications Commission.[7] We are equally concerned with competition issues involving Internet companies.[8] Our work involves industries being reshaped by the Digital

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[3] U.S. Dep't of Justice & Fed. Trade Comm'n, Draft Vertical Merger Guidelines at 5-6 (Jan. 10, 2020) (hereinafter *Draft Guidelines*), https://www.ftc.gov/system/files/documents/public_statements/1561715/p810034verticalmergerguidelinesdraft.pdf.

[4] *See DOJ and FTC Announce Draft Vertical Merger Guidelines for Public Comment*, U.S. Dep't of Justice (Jan. 10, 2020), https://www.justice.gov/opa/pr/doj-and-ftc-announce-draft-vertical-merger-guidelines-public-comment.

[5] *See* Press Release, Fed. Trade Comm'n, FTC and DOJ Extend Deadline for Public Comments on Draft Vertical Merger Guidelines, Announce Two Related Public Workshops (Feb. 3, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-doj-extend-deadline-public-comments-draft-vertical-merger?utm_source=govdelivery.

[6] *United States v. AT&T, Inc.*, 916 F.3d 1029 (D.C. Cir. 2019). The government fared no better in its last prior attempt to stop a vertical merger in *United States v. Hammermill Paper Co.*, 429 F. Supp. 1271 (W.D. Pa. 1977).

[7] *See, e.g.*, Comments of TechFreedom concerning the merger of T-Mobile and Sprint, filed Sept. 17, 2018 in WT Docket No.18-197, https://techfreedom.org/wp-content/uploads/2018/09/REVISED_FINAL_TechFreedom-Reply-to-Oppositions-to-T-Mobile-Sprint-Merger.pdf; Joint Comments of TechFreedom and others concerning the merger of Charter and Time Warner Cable, filed Oct. 15, 2015 in MB Docket 15-149, http://docs.techfreedom.org/CEI_ICLE_TF_comments_charter-twc.pdf; Comments of TechFreedom concerning the merger of Comcast and Time Warner Cable, filed Aug. 25, 2014 in MD Docket 14-57, http://docs.techfreedom.org/Comcast-TWC_TF_Comments.pdf.

[8] *See, e.g.*, TechFreedom statement on "Key Issues Facing FTC on Consumer Protection in the Digital Age," Aug. 21, 2018, https://techfreedom.org/key-issues-facing-ftc-consumer-protection-digital-age/; Testimony of TechFreedom in hearings before the Subcommittee on Consumer Protection, Product Safety, Insurance, &

Revolution—characterized by creative destruction, constant paradigm shifts, and the near-constant introduction of disruptive technologies.

Vertical integration is an essential aspect of the Digital Revolution. In the constant tumult to manage new paradigms of using technology and doing business, firms are perpetually looking both to acquire technology, talent, business relationships and other inputs of the competitive process through acquisition—and other firms, especially smaller firms, are always looking to be acquired.[9] Among economists, there is a clear consensus that technology-related vertical mergers are generally efficiency-enhancing, for two reasons. First, as Prof. Daniel Sokol notes, "[v]ertical acquisitions involving technology start-ups are "largely complementary, combining the strengths of the acquiring firm in process innovation with the product innovation of the target firms."[10] Second, "[e]ntrepreneurial exit is critical to a well-functioning entrepreneurial ecosystem, as the possibility of entrepreneurial exit via vertical merger is now the most usual form of liquidity event/exit for founders and venture capitalists. Vertical merger policy that would unduly restrict large tech firms from undertaking [vertical] acquisitions … would hurt incentives for innovation in the economy by chilling business formation in start-ups."[11] As such, increased antitrust scrutiny of vertical transactions may ultimately harm consumers. While that is particularly true of decisions to actually block such transactions, it may also be true of antitrust scrutiny that does not result in litigation because the *threat* of litigation may deter transactions that increase efficiency and benefit consumers.

We are concerned with both forms of "over-enforcement"—with the expansion of scope of antitrust law as well as the shadow cast by the law. We fear that the proposed Vertical Merger Guidelines, as worded, may actually make consumers worse off by making the law more uncertain in precisely the area where markets themselves are most uncertain—where lines

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Data Security of the U.S. Senate Committee on Commerce, Science, & Transportation Tuesday, Sept. 26, 2017, http://docs.techfreedom.org/Szoka_FTC_Reform_Testimony_9-26-17.pdf; "FTC's Competition Policy Statement is Long Overdue," TechFreedom Statement, Aug.13, 2015, https://techfreedom.org/ftcs-competition-policy-statement-is-long-overdue/; TechFreedom statement on proposed sale of Yahoo to Verizon, July 25, 2016, https://techfreedom.org/verizons-yahoo-buyout-shows-fcc-broadband-privacy/.

[9] As we discuss more fully below in Section II.C, the M&A market for startups is even more important than it was two decades ago because the ability of a startup to mature to become publicly traded company today is far more expensive and difficult. *See* Written Testimony of Patricia Nakache General Partner, Trinity Ventures before the U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, "Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms," Sept. 24, 2019 (hereinafter *Nakache Testimony*), https://www.judiciary.senate.gov/imo/media/doc/Nakache%20Testimony.pdf.

[10] D. Daniel Sokol, *Vertical Mergers and Entrepreneurial Exit*, 70 Fl. L. Rev. 1357, 1372 (2018), http://www.floridalawreview.com/wp-content/uploads/Sokol.pdf.

[11] *Id.*

between markets are especially difficult to define, where products change faster than regulators and courts can change the mental models they use to understand the real world, and where business model innovation is no less vital than technological innovation. We worry that this double uncertainty will deter innovation in what has been the most dynamic part of the American economy—which remains the envy of the world, despite the so-called "Techlash."

We also worry that antitrust law is increasingly being weaponized—both by competitors and political actors. This can take the form of the government extracting concessions out of the merging parties that have little to do with the competitive impact of the merger. It can also take the form of competitors using the full weight and slow inertia of government review to so stall a decision that the deal dies, or becomes far less beneficial to either merging party.

The very real potential for the weaponization of the antitrust laws by competitive rivals has long been TechFreedom's greatest concern about merger review. In recent years, we have seen increasing reason for concern about political weaponization of the antitrust laws. This is not limited to vertical mergers, but for the reasons noted above, it is particularly problematic in the context of vertical mergers. And the companies at greatest risk for being targeted for their vertical transactions for political reasons are the speech industries we study—companies that are in the business of carrying information to users, be they broadcast news channels, social networks, chat tools, search engines, media aggregators, or any number of other services.

II. Mergers in the Tech Sector May Require a Different Analysis from Traditional Mergers

"First, do no harm," is a good starting point for this exercise. We question the need for "vertical guidelines" at all. As Former FTC Commissioner Josh Wright and his colleagues note, "the horizontal merger guidelines have a spillover effect to vertical merger analysis" and "[t]hese conceptual overlaps reduce the need for a separate set of vertical merger guidelines."[12] Indeed, "This notion of a spillover is consistent with the legacy of the 1984 Vertical Merger Guidelines—they were inserted (as "Section 4") along with the 1984 Horizontal Merger Guidelines to form the larger 1984 Merger Guidelines." It would be better for the agencies not to issue any new guidelines at all than to issue new guidelines whose wording is used to justify antitrust enforcement that harms consumers by reducing the dynamism of America's technology sector—or that increases antitrust law being weaponized by competitors or to

[12] Comment of Global Antitrust Institute, Fed. Trade Comm'n Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers (Sept. 6, 2018) (hereinafter *GAI Comments*), https://gai.gmu.edu/wp-content/uploads/sites/27/2018/09/GAI-Comment-on-Vertical-Mergers.pdf.

serve political interests. We believe there is good reason to worry about both possibilities, as we discuss more fully below.

A. The Life Cycle of Technology Behemoths Is Short

For the last quarter century, the digital world has been uniquely dynamic, with tech giants *appearing* dominant for regularly brief periods, but eventually struggling to avoid seeing their dominance disrupted just as they themselves disrupted the companies they once displaced. The title of Clayton Christensen's 1997 classic book sums up the problem aptly: *Innovator's Dilemma: When New Technologies Cause Great Firms to Fail*.[13]

In early 2000, Internet darling America Online (AOL), with its then-impressive 30 million subscribers, announced it was acquiring media giant Time Warner, Inc., in a $182 billion deal that the parties claimed would result in a $350 billion mega-corporation.[14] Time Warner would gain access to AOL's subscribers and feed them the stable of almost 100 years of Time Warner content—the perfect vertical merger. It took the FTC almost a full year to approve the deal, and only after the parties made significant concessions following the filing of a complaint by the FTC predicting all manner of anticompetitive horrors.[15] The FTC described AOL as "the nation's leading ISP," and "is positioned and likely to become the leading provider of broadband internet as well."[16] The merger proved to be a total disaster, AOL never made the transition from dial-up Internet service to becoming a major broadband provider, AOL's model of offering a curated "walled garden" simply disappeared in favor of the World Wide Web, and the company was eventually spun out of Time Warner in 2009 after losing over ***$200 billion*** in market cap in 2002 alone.[17]

AOL isn't alone as a once-giant tech company that either no longer exists, or limps along in some deep backwater of the Internet ecosystem. In 2007, Forbes magazine bemoaned

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[13] *See* Clayton Christensen, *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail* (1997).

[14] History.com Editors, *AOL-Time Warner formed*, HISTORY (Nov. 13, 2009), https://www.history.com/this-day-in-history/aol-time-warner-formed.

[15] *See* Press Release, Fed. Trade Comm'n, FTC Approves AOL/Time Warner Merger with Conditions (Dec. 14, 2000), https://www.ftc.gov/news-events/press-releases/2000/12/ftc-approves-aoltime-warner-merger-conditions. For a full list of documents available in that proceeding, *see* https://www.ftc.gov/enforcement/cases-proceedings/0010105/america-online-inc-time-warner-inc.

[16] *See* Complaint at 1, 3, In the Matter of America Online, Inc., and Time Warner, Inc., (No. C-3989), https://www.ftc.gov/sites/default/files/documents/cases/2000/12/aolcomplaint.pdf.

[17] *See* Rita Gunther McGrath, *15 years later, lessons from the failed AOL-Time Warner merger*, Fortune (Jan. 10, 2015), https://fortune.com/2015/01/10/15-years-later-lessons-from-the-failed-aol-time-warner-merger/.

Nokia's one billion customers and decried, "Can Anyone Catch the Cell Phone King?"[18] Well, the market did, and Nokia was dead within 10 years, when Microsoft wrote off its 2014 $7.2 billion acquisition of Nokia—another vertical merger gone bad.[19] Nokia failed to see the coming wave of smartphones, and never realized that what would drive the market was not better hardware form factors, but software that could handle larger data uses and provide easier access to the growing assets of the Internet.[20]

In 2010 Apple's iTunes was declared by some as a "monopoly," with calls for its dismantling.[21] But that was before the emergence of music streaming services such as Spotify and Pandora. Today, Apple's share of the market today is around 20 percent—very far from a monopolist position.[22]

Then there was MySpace. Those under 40 might ask "WhoSpace?" MySpace was (technically it still is an "is," as it had 50 million registered users in 2015 and 15 million monthly subscribers in 2016)[23] a social media sharing platform that experts deemed a "natural monopoly" in 2007.[24] Critics warned of the dangers of allowing media mogul Rupert Murdoch to acquire such a platform in 2005 for $580 million. "[A]s the MySpace generation goes into employment, [the platform] could eventually extend Murdoch's influence in ways that would make his grip on satellite television seem parochial."[25] According to these same critics, only Bebo.com (who?) or Cyworld.com (who?) had a chance to catch this runaway train. And that would be next to impossible, according to experts at the time:

> It is common knowledge that a fax machine is worthless until others have one too. That is what is happening in social networking except that, unlike a fax machine, it can't be instantly swapped for another. It is easy to change search

[18] James Waterworth, *Lessons From Nokia's Demise – The Cost of a Fragmented Developer Experience*, Disruptive Competition Project (Aug. 3, 2016), http://www.project-disco.org/european-union/080316-lessons-nokias-demise-cost-fragmented-developer-experience/.

[19] Pankaj, *Microsoft Closes Its Mobile Phone Facility, No More Lumia Phones Will Reach the Markets Now*, MobiPicker (July 12, 2016), https://www.mobipicker.com/microsoft-closes-mobile-phone-facility/.

[20] *See id.*

[21] Talia Soghomonian, *Who Will Break iTunes' Monopoly?*, NME (May 28, 2010), https://www.nme.com/blogs/nme-blogs/who-will-break-itunes-monopoly-778081.

[20] Adam Levy, *How Streaming Has Affected Apple's Share of the US Music Industry*, The Motley Fool (Mar. 5, 2019), https://www.fool.com/investing/2019/03/05/how-streaming-has-affected-apples-share-of-the-us.aspx.

[23] Craig Smith, *20 Interesting MySpace Statistics and Facts Then and Now (2020)*, DMR (Feb. 1, 2020), expandedramblings.com/index.php/myspace-stats-then-now/.

[24] Victor Keegan, *Will MySpace ever lose its monopoly?*, The Guardian (Feb. 8, 2007), https://www.theguardian.com/technology/2007/feb/08/business.comment.

[25] *Id*.

> engines, even if it is Google. But if you change social networks you not only have to move all your videos, audios, messages, photos elsewhere but you also lose your network of friends unless they migrate with you. MySpace won't make that easy. Its massive user base will help maintain its dominance, according to co-founder Chris DeWolfe. "In social networking, there is a huge advantage to have scale. You can find almost anyone on MySpace and the more time that has been invested in the site, the more locked in people are."[26]

History, of course, proved these pundits wrong. Murdoch ended up selling MySpace for $35 million in 2011,[27] a decline in value of 94% in six years. In hindsight, we know why this happened: something called "Facebook" came along.

The moral of this story is clear: in the tech sector, success is fleeting. Disruptive innovation is relentless, changing paradigms both for how people use technology and how business works. Companies that stay on top through iterating on the technologies that vaulted them atop the pack in the first place—what Christensen called "*adaptive* innovation"—usually struggle to maintain their lead as the world shifts around them by developing new ways of using technology and doing business—"*disruptive* innovation." How to deal with this reality, with the challenges that large successful firms face to constantly reinvent themselves or even realizing that they need to and how to do so, *this* is the "Innovator's Dilemma."[28] The average life cycle of the examples above is barely a decade (or less) from dominance to destruction. The tech sector provides the best evidence to support economist Joseph Schumpeter's theory of "creative destruction," that small innovative companies can, and do, find ways to disrupt and reshape markets, dethroning incumbents that experts deemed forever monopolists.[29]

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[26] Victor Keegan, *Will MySpace ever lose its monopoly?*, The Guardian (Feb. 8, 2007), https://www.theguardian.com/technology/2007/feb/08/business.comment.

[27] Jennifer Saba, *News Corp sells Myspace, ending six-year saga*, Reuters (June 29, 2011), https://www.reuters.com/article/us-newscorp-myspace-idUSTRE75S6D720110629.

[28] *See supra* note 13.

[29] Joseph A. Schumpeter, *Can Capitalism Survive? Creative Destruction and the Global Economy* (2009) (Originally published as Capitalism, Socialism, and Democracy). For an excellent analysis of Schumpeter, see "Is This Time Different? Schumpeter, the Tech Giants, and Monopoly Fatalism," https://www.cato.org/publications/policy-analysis/time-different-schumpeter-tech-giants-monopoly-fatalism?utm_campaign=Sponsor%20ebriefing&utm_source=hs_email&utm_medium=email&utm_content=83021037&_hsenc=p2ANqtz-_9k3z1tw0Mr6c8JNWUWXnT2Nj1GHpiFrBU5_sMpFKRdNsp7jfWvwT7iZG0HIP-SAqZYktALr2bh5ir35YYA8oLSA0Gv8Q&_hsmi=83021037#null (Schumpeter "recognized that the most important long‐term competitive pressure comes from new products cannibalizing incumbent businesses through marked product quality improvements. An antitrust policy that second‐guesses the future based on the present ignores this unpredictable margin of competition, to the detriment of consumers.").

A report recently leased by the President's Council of Economic Advisors reaches the same conclusion:

> In markets with network effects or other types of economies of scale, firms may compete for the entire market, rather than for shares in the market. ***The resulting monopolies may not be permanent***. Bourne (2019) gives many examples of firms that achieved dominance through network effects or production economies of scale, only to eventually lose out to competition from innovative rivals. His examples range from the Great Atlantic & Pacific Tea Company in the 1920s to MySpace and Nokia in the early part of this century.[30]

Yet, if we believed the rhetoric of the current "Techlash" and the so-called "hipster antitrust" movement, one would think that time has stopped, the Internet has fully matured,[31] and the process of technological disruption has ceased. WYSIWYG—"what you see is what you get," and we must analyze markets, and assess consumer welfare, based on the assumption that markets will never change going forward. We must ignore the fundamentally disruptive technologies of artificial intelligent (AI), virtual reality (VR), augmented reality (AR), and the Internet of Things (IOT) just over the horizon. We must ignore the revolution in mobile applications and services that the giant "pipes" of 5G communications will make possible. Approaching antitrust law from this perspective, and writing the Vertical Merger Guidelines accordingly, risks jeopardizing the dynamism of the entire U.S. economy, which is increasingly driven by its technology sector.[32]

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[30] Economic Report of the President Together with the Annual Report of the Council of Economic Advisers at 218 (Feb. 2020) (hereinafter "2020 Economic Report of the President") (citing Ryan Bourne, *Is This Time Different? Schumpeter, the Tech Giants, and Monopoly Fatalism*, CATO Institute (June 17. 2019)), https://www.cato.org/publications/policy-analysis/time-different-schumpeter-tech-giants-monopoly-fatalism), https://www.whitehouse.gov/wp-content/uploads/2020/02/2020-Economic-Report-of-the-President-WHCEA.pdf.

[31] This approach is manifest in Commissioner Chopra's statement accompanying the release of the draft Vertical Merger Guidelines. "First, enforcers need to be more thorough about assessing each firm's existing dominance. A rigorous investigation must rely on a full inventory of the means by which each company has achieved, maintains, or exercises market power in all its respective lines of business. This means broadening and deepening the overview of each firm's operations to identify all of the elements that would allow the combined entity to increase profitability by unfairly exploiting any advantages from a merger to lessen or eliminate competition." Statement of Commissioner Rohit Chopra, Regarding the Request for Comment on Vertical Merger Guidelines, Commission File No. P810034, 5, (Jan. 10, 2020) (hereinafter *Chopra Statement*), https://www.ftc.gov/system/files/documents/public_statements/1561727/p810034chopravmgabstain.pdf.

[32] *See, e.g.,* statistics published by CompTIA, https://www.cyberstates.org/ (the tech sector generates $1.8 trillion in direct economic output, representing 10.2% of the national economy and growing rapidly).

B. The Draft Guidelines Will Greatly Increase the Discretion of the Government, Particularly in High-Tech Cases.

Commissioner Chopra argues that "there should not be a presumption that all vertical mergers are benign."[33] While the draft guidelines do not appear to go quite this far, they would give too much discretion to regulators in policing vertical transactions. As Herb Hovenkamp, author of the leading treatise on antitrust law[34] notes, "[w]hile the new draft Guidelines leave the overall burden of proof with the challenger, they have clearly weakened the presumption that vertical mergers are invariably benign, particularly in highly concentrated markets or where the products in question are differentiated."[35] The limited safe harbor afforded by the draft Guidelines comes in the following form:

> The Agencies are unlikely to challenge a vertical merger where the parties to the merger have a share in the relevant market of less than 20 percent, and the related product is used in less than 20 percent of the relevant market."[36]

Like Jan Rybnicek, former Attorney Adviser to FTC Commissioner Wright, we fear that this supposed safeguard will, in practice, mean "that agency staff will soon interpret (despite language stating otherwise) the 20% market share as the minimum necessary condition to open an in-depth investigation and to pursue an enforcement action."[37] As Jonathan Nuechterlein, former General Counsel of the FTC, complains, "This anodyne assurance, with its arbitrarily low 20 percent thresholds phrased in the conjunctive, seems calculated more to preserve the agencies' discretion than to provide genuine direction to industry." He continues:

> Quoting then-Judge Breyer, the Supreme Court once noted that "antitrust rules 'must be clear enough for lawyers to explain them to clients.'" That observation rings doubly true when applied to a document by enforcement officials purporting to "guide" business decisions. **Firms contemplating a vertical merger need more than assurance that their merger will be cleared two years hence if their economists vanquish the government's economists in litigation about the fine details of Nash bargaining theory. Instead, firms need true limiting principles, which identify the circumstances where any theory of harm would be so attenuated that litigating to block the merger is not worth the**

[33] *Chopra Statement*, *supra* note 31 at 1.

[34] Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (Phillip E. Areeda ed., 2019).

[35] Herbert Hovenkamp, *The Draft Vertical Merger Guidelines Are an Important Step for the Economic Analysis of Mergers*, Truth on the Market (Feb. 14, 2020).

[36] *Draft Guidelines*, *supra* note 3 at 3.

[37] Jan Rybnicek, *The Draft Vertical Merger Guidelines Would Do More Harm Than Good*, Truth on the Market (Feb. 7, 2020), https://truthonthemarket.com/2020/02/07/rybnicek-vmg-symposium/.

> **candle, particularly given the empirically validated presumption that most vertical mergers are pro-consumer**.[38]

Nowhere is Justice Breyer's advice more important than in the context of technology markets. Here, the draft guidelines fail doubly: not only do they fail to offer sufficient clarity overall, what little clarity they *do* offer (in the sentence about the dual 20 percent thresholds quoted above) is immediately undermined by the very next sentence , which grants broad discretion to regulators in rapidly evolving markets:

> In some circumstances, mergers with shares below the thresholds can give rise to competitive concerns. For example, the share of the relevant market that uses the related product may understate the scope for material effects ***if the related product is relatively new***, and its share of use in the relevant market is rapidly growing.[39]

This caveat would seem to apply to *all* of the tech-related transactions we care most about. Shortly thereafter the above, the Guidelines similarly invites highly conjectural speculation about the harms that might justify antitrust intervention in high-tech markets:

> In identifying whether a vertical merger is likely to result in unilateral harm to competition through foreclosure or raising rivals' costs, the Agencies may consider whether:
>
> (1) The merged firm's foreclosure of, or raising costs of, one or more rivals would cause those rivals to lose sales (for example, if they are forced out of the market, if they are ***deterred from innovating***, entering or expanding, or cannot finance these activities, or if they have incentives to pass on higher costs through higher prices), or to otherwise compete less aggressively for customers' business;

Notably, while the Guidelines provide four examples of fact patterns intended to illustrate how the four enumerated principles might be applied in practice, none concern innovation—and *all* involve apparently static and mature markets. Thus, having created great uncertainty about how the Guidelines will be applied in high-tech markets, the guidelines do nothing to resolve that uncertainty.

Other notable examples of the draft guidelines offering significantly increased discretion to the regulator include:

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[38] Jonathan E. Nuechterlein, *Guidelines without Guidance on Vertical Mergers*, Truth on the Market (Feb. 6, 2020) (emphasis original) (citing *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438, 453 (2009)), https://truthonthemarket.com/2020/02/06/nuechterlein-vmg-symposium/.

[39] *Draft Guidelines*, *supra* note 3 at 3 (emphasis added).

- The new guidelines would dramatically reduce the weight that will be given to **claimed efficiencies** in vertical transactions. The 1984 guidelines recognize that: "An extensive pattern of vertical integration may constitute evidence that substantial economies are afforded by vertical integration. Therefore, the Department will give relatively more weight to expected efficiencies in determining whether to challenge a vertical merger than in determining whether to challenge a horizontal merger."[40] The new guidelines declare that "The Agencies will evaluate efficiency claims by the parties using the approach set forth in Section 10 of the Horizontal Merger Guidelines."[41]
- Instead of defining upstream and downstream markets, as the government attempted to do in the AT&T/Time Warner merger,[42] under the draft guidelines, it would suffice for the government (or a private plaintiff) merely to identify "**related products**" connected with a single defined relevant market.[43] As noted in Commissioner Wilson's concurring statement, this is a "looser requirement" than in the past, as illustrated by the challenges the DOJ encountered in suing to block the AT&T/Time Warner merger.[44]
- The draft guidelines would introduce a new basis for scrutiny: a firm's ability to gain access to **competitively sensitive information**, and which "used by the merged firm to moderate its competitive response to its rival's competitive actions" or which may cause rival firms "to become less effective competitors."[45]

Ultimately, while the burden of proof in vertical transaction review would, formally, remain with the government, we fear that the government may gain so much discretion under the new guidelines that the effect may be essentially equivalent to shifting the burden of proof—at least in situations where merging parties are reluctant to endure the delay associated with litigation because the pressures of rapidly changing marketplaces make it imperative that

[40] U.S. Dep't of Justice Merger Guidelines, 4.24 Efficiencies (1984), https://www.justice.gov/archives/atr/1984-merger-guidelines.

[41] *Draft Guidelines*, *supra* note 3 at 9.

[42] *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 196 (D.D.C. 2018) ("examining the importance of Turner's content to distributors in the upstream programming market is a necessary (but not sufficient) step in evaluating the Government's increased-leverage theory" of harm in the proposed downstream product market for the "distribution of live-TV content to consumers").

[43] *Draft Guidelines*, *supra* note 3 at 2.

[44] Concurring Statement of Christine S. Wilson, Publication of FTC-DOJ Draft Vertical Merger Guidelines for Public Comment, File No. P810034 at 1 (Jan. 10, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561709/p810034wilsonvmgconcur.pdf.

[45] *Draft Guidelines*, *supra* note 3 at 7.

they conclude their transactions quickly. Firms considering vertical integration may abandon efficiency-enhancing transactions simply because, contrary to Justice Breyer's urging, "antitrust rules" are *not* "clear enough for lawyers to explain them to clients."[46]

This would represent a significant a significant shift in the viability of vertical integration even if one assumed that enforcement decisions were made without any political bias. We have an additional, deeper concern: that, when the government brings, or threatens to bring, litigation, either to favor a rival company or for purely political reasons, it can use a combination of vagueness in the law and the cumbersomeness of the litigation process to coerce merging parties to make concessions beyond what antitrust law properly applied would support, *i.e.*, changes to its business practices that cannot be justified as remedies to merger-specific harms. This is essentially how the FCC has operated in its transaction review.[47] For companies that handle speech, both traditional media and new media, this may mean changes to the company's its *editorial* policies. Such coercion would not only exceed the scope of antitrust law, it would also be offensive to the First Amendment.[48]

C. Even Signaling Potential Greater Scrutiny of Vertical Mergers Will Necessarily Affect Startups and Early-Stage Capital Investment.

The pathway for success for a tech startup today looks very different from what it did during the "tech bubble" in the 1990s. Then, opportunities abounded to take a company, even one with little or no products, to the public financing markets via an Initial Public Offering (IPO). In the 1990s, almost 450 IPOs were launched per year.[49] All that changed when the tech bubble burst. 2008 saw a mere 21 IPOs.[50] While that number has steadily increased over the past decade, 2018's 134 IPOs is barely 20% of the peak of 677 IPOs in 1996.[51] As Patricia Nakache, General Partner, Trinity Ventures, recently noted in testimony before the Senate Committee on the Judiciary:

> It has become more expensive and significantly more challenging to manage public companies; much of the infrastructure that supported small companies going public has disappeared, and the markets have become more short-term in nature. A 2017 presentation by Cowen showed that 61% of U.S. listed companies below

[46] 555 U.S. at 453.

[47] *See infra* at 20-22.

[48] *See infra* at 22-24.

[49] *See Nakache Testimony, supra* note 9 at 6.

[50] *Id.*

[51] *Id.*

> $100 million in market capitalization did not have any research coverage. The result is alarming: the United States now averages less than half the number of IPOs per year than in either decade before 2000. The lack of IPOs has been particularly glaring for companies attempting to go public with market capitalizations under $1 billion. As a result, there are now roughly half the total number of public companies than there were twenty years ago.[52]

Contributing to this new added expense is the legislation enacted following the Enron disaster (Sarbanes-Oxley, 2002), and the "Great Recession" (Dodd-Frank 2010).[53]

But whatever the cause, the natural result of the slowdown in IPOs is that the only viable exit strategy for start-ups is through an acquisition by a larger company, often an incumbent provider somewhere within the vertical chain of products and services occupied by the startup. Impeding the vertical merger market could have a devastating impact on the tech economy. Nakache's testimony continues:

> It is certainly appropriate for policymakers to pose questions about market power and examine abuses and, of course, to periodically ask whether various laws must be modernized for our times. In undertaking examination of this policy area, I encourage policymakers to recognize that the public markets are not nearly as welcoming to small companies as they once were, and indeed that many young companies cannot realistically achieve the scale necessary to become standalone public companies, which means that often M&A is the most viable pathway for a startup. If the government makes it more challenging for incumbents to acquire these companies, this will have the devastating effect of making it less attractive to launch a new enterprise and for people like myself to fund and partner with those companies. The end result will be harm to the American innovation economy.[54]

The chilling effect on the startup innovation economy is triggered not only by DOJ or FTC actually challenging vertical transactions. The chill sets in the moment entrepreneurs and venture capitalists lose confidence that acquisition is both a viable exit strategy and can be accomplished with minimal friction — undo delay, need to make concessions to regulators, and/or political blowback, all of which have occurred far often in recent years.

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[52] *Id.* at 6.

[53] *See* Patrick A. Reardon, *Look in the Mirror: Why the Number of Public Companies & IPOs are in Decline*, Crowdfund Insider (July 27, 2017), https://www.crowdfundinsider.com/2017/07/119615-look-mirror-number-public-companies-ipos-decline/.

[54] *Nakache Testimony, supra* note 9 at 5.

III. The Potential for Abuse and Weaponization of Antitrust Law

The master strategist Carl von Clausewitz famously said that "war is the continuation of politics by other means."[55] The potential has always existed for antitrust law to be used by competitors as the continuation of competition "by other means." That always-lingering possibility grows into a real problem in high-tech markets, where technological complexity makes regulators and courts far more dependent upon competitors to understand the changing nature of the industry than they would be in normal markets. Ronald Coase aptly summarized the problem of "ununderstandability" nearly a half century ago:

> [I]f an economist finds something—a business practice of one sort or another—that he does not understand, he looks for a monopoly explanation. And as in this field we are very ignorant, the number of ununderstandable practices tends to be very large, and the reliance on a monopoly explanation, frequent.[56]

Naturally, it is the other companies in the field who will be best situated to try to explain the "ununderstandable." This problem is significantly worse in vertical integration cases than horizontal cases, because it will be more difficult to distinguish harmful conduct from beneficial conduct—and, likewise, too difficult to distinguish between consumer welfare and the welfare of competing firms.

The pace of technological change creates a further problem: in the topsy-turvy tech sector, transactions, to be worth doing at all, must be concluded *quickly*. It is often asserted that the Microsoft litigation created space for other innovative companies to emerge, but the most important effect of the government's years-long litigation against what was then the greatest tech giant in the world was to so hamstring the company for so long that it has never recovered its competitive edge. (The initial case, first filed in May 1998, took just over two years to litigate, but legal action over the scope of the resulting settlement dragged on for another four years.) During and after the litigation, Microsoft repeatedly failed in venture after venture beyond its core competencies: the Windows operating system and the Office suite.[57]

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[55] Carl von Clausewitz, *On War*, trans. Col. J.J. Graham. New and Revised edition with Introduction and Notes by Col. F.N. Maude, in Three Volumes (London: Kegan Paul, Trench, Trubner & C., 1918). Vol. 1. Chapter: Chapter I: What Is War?

[56] Ronald Coase, *Industrial Organization: A Proposal for Research, in Policy Issues and Research Opportunities in Industrial Organization,* 59, 67 (Victor R. Fuchs ed., 1972).

[57] Larry Downes, *How More Regulation for U.S. Tech Could Backfire*, Harvard Business Review (Feb. 09, 2018), https://hbr.org/2018/02/how-more-regulation-for-u-s-tech-could-backfire ("Microsoft, similarly, was so distracted by its multi-year fight to avoid break-up both by U.S. and European regulators that it lost essential momentum. It mostly missed out on the mobile revolution, and hesitated in responding to open-source alter-

However mighty they may seem, no company struggling to avoid the "Innovator's Dilemma"[58] can today afford anything like the ordeal Microsoft endured. This desperation for speedy approval, even from positions of apparent strength, makes such firms vulnerable to extortion through the merger review process, both by their rivals, who demand either that the deal be blocked or be conditioned in ways that advantage them, or by politicians with an ax to grind against the firm. The need to get the deal done, the time, expense and negative publicity associated with litigation, and the fact that the FTC may choose to pursue a case through its internal administration process, means that merging parties must slog through trial before an administrative law judge, and then another layer of review by the full Commission before having access to a federal court—these factors all combine to give the government enormous power to punish companies by challenging their mergers, or to demand conditions for merger approval. As former Commissioner Josh Wright notes:

> Occasionally, there are attempts to defend the FTC's perfect win rate in administrative adjudication by attributing the Commission's superior expertise at choosing winning cases. And don't get me wrong – I agree the agency is pretty good at picking cases. But a 100% win rate is not pretty good; Michael Jordan was better than pretty good and made about 83.5% of his free throws during his career, and that was with nobody defending him. One hundred percent isn't Michael Jordan good; it is Michael Jordan in the cartoon movie "Space Jam" dunking from half-court good.[59]

Merger review can also become a political weapon. Among President Nixon's many abuses of power, his use of the regulatory state as a weapon for his personal vengeance deserves more attention than it has received. Some of this was purely political. Nixon "considered using [the FCC's] Fairness Doctrine complaints to force the major television networks to give his administration's policies more favorable coverage by, for example, being less critical of the slow pace of withdrawal from the Vietnam War. In the end, however, Nixon used other means to get what he wanted…"[60] For example, Nixon retaliated against *The Washington Post* for its critical coverage of his administration (Woodward and Bernstein, who cracked the Watergate case worked for *The Post*) by directing "his" FCC Chairman to hold up renewal of

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natives to operating systems, desktop applications, and other software apps that seriously eroded the company's once-formidable competitive advantage. (The company is now growing a cloud services business, but is still far behind Google and Amazon.)").

[58] *See supra* note 13.

[59] Joshua D. Wright, Commissioner, Fed. Trade Comm'n, Remarks at the Global Antitrust Institute Invitational Moot Court Competition,16-17 (Feb. 21, 2015), https://www.ftc.gov/system/files/documents/public_statements/626231/150221judgingantitrust-1.pdf.

[60] Paul Matzko, *The Fairness Doctrine Was Terrible for Broadcasting and It Would Be Terrible for the Internet*, Cato Institute (June 12, 2019), https://www.cato.org/blog/internet-regulation-fairness.

broadcast licenses owned by *The Post*—exploiting the FCC's limits on newspaper/broadcaster cross-ownership—in an attempt to transfer the licenses to a Nixon crony.[61] That Nixon's efforts to pressure *The Post* appear to have failed, and may even have backfired, should not reassure anyone.

Nixon's corruption of the Department of Justice was thorough-going, extending to the Antitrust Division. In the best-known case, Nixon used an antitrust case against International Telephone & Telegraph Co. to extort a pledge of up to $400,000 to finance the 1972 Republican National Convention.[62] The public ultimately learned of this abuse of power only because Nixon was foolish enough to record the conversation. If anything, these examples may be only the tip of a much larger iceberg.

Today, the way in which new media companies may be pressured to change their practices may be far more subtle than retaliating directly against critical journalism or extorting donations to a political war chest. We have previously noted one example of how political pressure appears to have succeeded in pressuring—or "jawboning"—a private company to make changes to how users interact on social media, with consequences that were not at all obvious at the time. These consequences likely were not even intentional, but the example nonetheless illustrates how much greater the potential for political pressure is today to shape media in ways that can be difficult to understand:

> in May 2016, after the first round of allegations that Facebook was biased against conservatives, Sen. John Thune (R-SD), Chairman of the Senate Commerce Committee, sent Facebook a letter interrogating the company about how it decided to

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[61] Brooks Boliek & Katy Bachman, *Nixon's newspaper war*, Politico (Aug. 8, 2014), https://www.politico.com/story/2014/08/another-nixon-reminder-media-ownership-rules-109825. The viciousness of the Nixon administration's vendetta against *The Post*, and its connection to the editorial content of the newspaper, is made particularly vivid by a 1972 memo written by Nixon Special Counsel Charles Colson, who had earlier compiled Nixon's "enemies list" to White House Deputy Director of Communications Ken Clawson, a former *Post* reporter:

> I thought you might be interested that the quote in the Washington Post attributed to [Attorney General] John Mitchell, "if you print that crap, Katherine [sic] Graham will find herself in a wringer" was not exactly accurate. What Mitchell said was that she would find her tit in a wringer. Apparently McGovern was told about this story and the actual quote on the airplane this week and his response was "based on Katherine Graham's figure, there's no danger in that". I just thought you might like to pass this along to her at the appropriate time.

Jack Shafer, *Boob Job*, Slate (Aug. 7, 2007), https://slate.com/news-and-politics/2007/08/the-nixon-gang-s-obsession-with-katharine-graham-s-breasts-continued.html.

[62] George Lardner Jr., *On Tape, Nixon Outlines 1971 'Deal' to Settle Antitrust Case Against ITT*, Wash. Post (Jan. 4, 1997), https://www.washingtonpost.com/archive/politics/1997/01/04/on-tape-nixon-outlines-1971-deal-to-settle-antitrust-case-against-itt/246628a9-8abf-47f3-80ec-379569e0f350/ Seehttps://www.nytimes.com/1973/12/16/archives/whats-good-for-a-corporate-giant-may-not-be-good-for-everybody-else.html.

> feature content in the "Trending" section at the top corner of its homepage. Facebook responded to concerns about the left-wing slant of the employees who screened content suggested as "Trending" by algorithms on a rolling basis by simply ending human involvement in the process. This significant change in how Facebook operated its site was troubling enough as a roadmap for how to circumvent the First Amendment; it also had disastrous consequences, making it far easier for Russian and other foreign actors to manipulate Facebook's algorithms to get their misinformation content featured prominently on Facebook — thus favoring those candidates and causes [which] foreign interference was intended to aid.[63]

The very murkiness of how social media work makes political meddling easier and less detectable.

A. Recent Politicization of the DOJ and the Antitrust Division.

Since Watergate, the Antitrust Division has rebuilt its reputation for integrity. The necessary prerequisite for this rehabilitation was, of course, the lack of interference—or, at least the lack of the *appearance* of interference—from subsequent administrations in antitrust matters in particular, and in DOJ's decision-making more generally. (After all, the politicization of other parts of DOJ affected the reputation of the entire department.) But given the opacity of DOJ's decision-making, and the lack of any transparency into the White House's contacts with DOJ leadership about pending or potential enforcement actions—the combination of these two factors makes it difficult for the public or even watchdogs to detect abuse—those on the outside can only *hope* that the decisions of the Antitrust Division, like the rest of the DOJ, are being made based on a careful, economically driven analysis of consumer welfare, not to suit the agenda of a politically influential, aggrieved competitor or a politician. Thus, even more than the absence of any scandal like those of the Nixon era, the essential ingredient in DOJ's success at rebuilding its reputation has been the shift in antitrust doctrine towards evidence-based decision-making. The more that cases turn on dueling models presented by economists, the more that courts have been seen to resolve antitrust cases on their merits, the more that antitrust has been seen as a purely technocratic (in the best sense) enterprise divorced from politics, the more trust has been built in antitrust as a body of *law*, not merely another tool of political vengeance.

[63] TechFreedom, Letter to Attorney General Jefferson Sessions III, at 4 (Sept. 21, 2018) https://techfreedom.org/wp-content/uploads/2018/09/Letter_-to-Jeff-Sessions-re-Social-Media-Bias-v2.pdf.

Everyone who has worked at the DOJ and the FTC should take pride in what antitrust law has become—not without its flaws, to be sure, but at least the product of a process that inspires confidence. Or such was the situation before the current administration.

In recent years, the Department of Justice has been politicized in ways unprecedented since the Nixon administration. President Trump made a public sport over excoriating former attorney general Jeff Sessions on Twitter. He attacked the DOJ's sentencing recommendation for his former confidant Roger Stone for lying to Congress: "This is a horrible and very unfair situation. The real crimes were on the other side, as nothing happens to them. Cannot allow this miscarriage of justice!"[64] Attorney General Bill Barr promptly complied, ordering DOJ prosecutors to revise their recommendation to propose a much lighter sentence—a shocking development that prompted all the four career prosecutors who prosecuted Stone to ask to withdraw from the case, and one to resign from DOJ altogether in protest.[65]

Two cases that emerged out of the 2008 financial crisis, involving banks accused of misleading buyers of residential-mortgage-backed securities, also seem to illustrate our concern that the DOJ may have become highly amenable to influence wielded by companies politically well-connected with the Trump administration:

> In the waning months of the Obama administration, the DOJ unsuccessfully sought a settlement with Barclays in the high single digits of billions of dollars, according to sources who were granted anonymity to discuss confidential talks. After Trump took office, lawyers for Barclays contacted political appointees in the associate attorney general's office. Career prosecutors in Brooklyn then got a directive from Washington to resolve the case for about $2 billion. Ultimately, the case was settled for exactly $2 billion.
>
> In the RBS case, career prosecutors in Boston initially wanted to bring criminal charges, rather than just civil counts. But they were overruled by then–Deputy Attorney General Rod Rosenstein after he met with the bank's lawyers. The career prosecutors subsequently discussed seeking a settlement in the $9 billion to $10 billion range, but were instructed by DOJ officials in Washington to go no higher than $6.6 billion. The RBS case was eventually settled for $4.9 billion.[66]

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[64] Sean Collins, *"Cannot allow this miscarriage of justice!": Trump suggests a Roger Stone pardon may be coming*, Vox (Feb. 11, 2020), https://www.vox.com/policy-and-politics/2020/2/11/21132921/roger-stone-trump-pardon-prison-sentence.

[65] Katie Benner, Sharon LaFraniere & Adam Goldman, *Prosecutors Quit Roger Stone Case After Justice Dept. Intervenes on Sentencing*, N.Y. TIMES (Feb. 11, 2020), https://www.nytimes.com/2020/02/11/us/politics/roger-stone-sentencing.html.

[66] Kevin Wack, *American Justice Isn't Impartial Anymore*, The Atlantic (Feb. 12, 2020), https://www.theatlantic.com/ideas/archive/2020/02/gradual-politicization-doj/606469/.

These are just a few examples of a much larger, troubling pattern that has caused many to lose confidence in the DOJ's current leadership. Unfortunately, there is also good reason to think this pattern extends to the Antitrust Division: after years of relentless public complaints from Trump about CNN—Trump's bête noire, just as *The Washington Post* was Nixon's—the DOJ sued to block AT&T's acquisition of Time Warner, the first suit to block a vertical merger case since 1977.[67] Jonathan E. Nuechterlein, counsel for AT&T, provides a concise summary of the weakness of DOJ's case—and rightly complains that the DOJ seems to have learned the wrong lesson from losing a case that clearly should never have been brought:

> DOJ ultimately conceded that Time Warner was unlikely to withhold programming from ("foreclose") AT&T's pay-TV rivals. Instead, using a complex economic model, DOJ tried to show that the merger would increase Time Warner's bargaining power and induce AT&T's pay-TV rivals to pay somewhat higher rates for Time Warner programming, some portion of which the rivals would theoretically pass through to their own retail customers. At the same time, DOJ conceded that post-merger efficiencies would cause AT&T to *lower* its retail rates compared to the but-for world without the merger. DOJ nonetheless asserted that the aggregate effect of the pay-TV rivals' price increases would exceed the aggregate effect of AT&T's own price decrease. Without deciding whether such an effect would be sufficient to block the merger—a disputed legal issue—the courts ruled for the merging parties because DOJ could not substantiate its factual prediction that the merger would lead to programming price increases in the first place.
>
> ***It is unclear why DOJ picked this, of all cases, as its vehicle for litigating its first vertical merger case in decades***. In an archetypal raising-rivals'-costs case, familiar from exclusive dealing law, the defendant forecloses its rivals by depriving them of a critical input or distribution channel and so marginalizes them in the process that it can profitably raise its own retail prices (*see, e.g.*, <u>*McWane*</u>; <u>*Microsoft*</u>). *AT&T/Time Warner* could hardly have been further afield from that archetypal case. Again, DOJ conceded both that the merged firm would not foreclose rivals at all and that the merger would induce the firm to *lower* its retail prices below what it would charge if the merger were blocked. **The draft Guidelines appear to double down on this odd strategy and portend more cases predicated on the same attenuated concerns about mere "chang[es in] the terms**

[67] *See supra* note 6.

> **of … rivals' access" to inputs, unaccompanied by any alleged structural changes in the competitive landscape.**[68]

"Unclear," indeed! But there is good reason to suspect that, whatever DOJ staff handling the case might have thought at the time, the decision to bring the case was made for essentially political reasons. As investigative reporter Jane Mayer explains:

> The Justice Department, meanwhile, went to court in an effort to stop A. T. & T.'s acquisition of Time Warner, which owns CNN. Time Warner saw the deal as essential to its survival at a time when the media business is increasingly dominated by giant competitors such as Google and Facebook. Murdoch understood this impulse: in 2014, 21st Century Fox had tried, unsuccessfully, to buy Time Warner. For him, opposing his rivals' deal was a matter of shrewd business. Trump also opposed the deal, but many people suspected that his objection was a matter of petty retaliation against CNN. Although Presidents have traditionally avoided expressing opinions about legal matters pending before the judicial branch, Trump has bluntly criticized the plan. The day after the Justice Department filed suit to stop it, he declared the proposed merger "not good for the country." Trump also claimed that he was "not going to get involved," and the Justice Department has repeatedly assured the public that he hasn't done so.
>
> However, in the late summer of 2017, a few months before the Justice Department filed suit, Trump ordered Gary Cohn, then the director of the National Economic Council, to pressure the Justice Department to intervene. According to a well-informed source, Trump called Cohn into the Oval Office along with John Kelly, who had just become the chief of staff, and said in exasperation to Kelly, ***"I've been telling Cohn to get this lawsuit filed and nothing's happened! I've mentioned it fifty times. And nothing's happened. I want to make sure it's filed. I want that deal blocked!"***
>
> Cohn, a former president of Goldman Sachs, evidently understood that it would be highly improper for a President to use the Justice Department to undermine two of the most powerful companies in the country as punishment for unfavorable news coverage, and as a reward for a competing news organization that boosted him. According to the source, as Cohn walked out of the meeting he told Kelly, "Don't you fucking dare call the Justice Department. We are not going to do business that way."
>
> A spokesperson for Cohn declined to comment, and Kelly did not respond to inquiries from *The New Yorker*, but a former White House official confirmed that

[68] Jonathan E. Nuechterlein, *Nuechterlein: Guidelines without Guidance on Vertical Mergers*, Truth on the Market (Feb. 6, 2020) (emphasis added), https://truthonthemarket.com/2020/02/06/nuechterlein-vmg-symposium/.

> Trump often “vented” in “frustration” about wanting to block the A. T. & T.-Time Warner merger. “The President does not understand the nuances of antitrust law or policy,” the former official says. “But he wanted to bring down the hammer.” (Last month, a federal court ruled against the Justice Department.)[69]

As with Nixon, it may take years for reporters and historians to develop a full accounting of what really happened in the AT&T/Time Warner case. For now, there is ample evidence to believe that it was *not* a coincidence that the DOJ brought the very case the President demanded for the ugliest of political motives, or that a case that broke with four decades of practice by both the DOJ and the FTC was ultimately tossed out in a complete loss for the government. But on some level, whether Cohn and Kelly succeeded in preventing Trump from actually transmitting his commands to the DOJ—and whatever else might or might not have happened behind closed doors—is beside the point: the *appearance* of influence has now caused all companies in America, particularly those contemplating a vertical merger, to wonder if the same sort of thing might happen to them. Most at risk are those companies that have drawn the ire of the President or his fellow Republicans.

B. Extortion through Transaction Review at the FCC

The way the Federal Communications Commission has handled merger review illustrates how the any merger transaction process can be weaponized to coerce companies into making concessions, often completely unrelated to the harms alleged to flow from the merger and that the Commission could not directly require through regulation (in some cases, because doing so would be unconstitutional).

While examples of the FCC’s abuse of its authority are too numerous to cite, one particularly clear example is the FCC’s 2006 approval of the AT&T-BellSouth merger conditioned upon the companies’ “voluntary” compliance with the FCC’s 2005 Open Internet Policy Statement.[70] It would be troubling enough that the FCC used merger review to coerce one of the largest players in the industry to accepting as binding regulation something that the FCC issued as purely a hortatory policy statement. This itself is a short-circuiting of the most basic safeguards of administrative law. The example becomes even more troubling considering that, when the FCC attempted to treat the Policy Statement as the basis for an enforcement action, the D.C. Circuit ruled that, if accepted, this argument would “virtually free the Commission from its congressional tether.”[71] And yet, even after this decision, AT&T remained

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[69] Jane Mayer, *The Making of the Fox News White House*, The New Yorker (Mar. 4, 2019) (emphasis added), https://www.newyorker.com/magazine/2019/03/11/the-making-of-the-fox-news-white-house.

[70] Memorandum Opinion and Order, WC Docket No. 06-74 (rel. Mar. 26, 2007), https://apps.fcc.gov/edocs_public/attachmatch/FCC-06-189A1.pdf.

[71] *Comcast Corp. v. FCC*, 600 F.3d 642, 655 (2010).

bound by its "voluntary" commitment to treat the Policy Statement as, effectively, binding regulation.

Indeed, the FCC has imposed conditions that may not even be constitutional, had they been imposed as direct requirements, most refusing to approve the merger of the Sirius XM satellite radio companies until they "volunteered" to offer race-based set-asides of channel capacity[72]—something demanded by the Congressional Black Caucus.[73] The fact that the FCC later amended this merger condition in no way resolves the problem, that this kind of thing could happen again, and, if anything further illustrates the political nature of the FCC's transaction review process.[74]

Of course, there are significant differences between the FCC's transaction review authority and process and the antitrust laws. Most critically, parties to a transaction that involves the transfer of FCC licenses or authorization bear the burden of proof. Technically, the recipient of any new license or authorization bears the same burden they would be upon applying for a *new* license: they must convince the FCC that the transaction would be "in the public interest."[75] In practice, this means the FCC holds all the cards: the agency does not even need to litigate to extort parties to a transaction to make significant "voluntary" concessions. In theory, a shot-clock limits the time the FCC can drag out its review, but in practice, the Commission can extend the clock indefinitely—and the ability to do so often brings companies to their knees. For example, in the FCC's review of the Sirius-XM merger, the FCC dragged out the process for a staggering 412 days[76]—which was all it took to get the companies to cave to political pressure for race-based set-asides of their channel capacity.

[72] Jeffrey H. Birnbaum, Radio Merger Under Fire From Black Lawmakers, *The Washington Post* (June 17, 2008), https://www.washingtonpost.com/wp-dyn/content/article/2008/06/16/AR2008061602470.html.

[73] *See, e.g.*, Sirius-XM Merger, Memorandum Opinion and Order and Report and Order, MB Docket No. 07-57 (rel. Aug. 5, 2008), https://apps.fcc.gov/edocs_public/attachmatch/FCC-08-178A1.pdf.

[74] *See* SiriusXM Merger, Memorandum Opinion and Order, MB Docket No. 07-57 (rel. Oct. 19, 2010), https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-184A1.pdf.

[75] 47 U.S.C. § 310(d) ("No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.")

[76] FCC Orders & Public Notices, XM And Sirius, MB Docket 07-57, https://www.fcc.gov/proceedings-actions/mergers-transactions/xm-and-sirius.

But even this apparently vital difference between the FCC's review process and antitrust merger review process may not be as large as it appears on paper. If parties to a transaction feel enough pressure to conclude their deal, especially if the law is sufficiently vague, and if the government can drag out the process of merger review and litigation long enough, the same dynamic may result under antitrust review, even though the burden of proof remains with the government. The chief difference would remain: the FCC would essentially never have to sue to hold a company hostage, because the deal could not be consummated until the Commission granted approval. By contrast, the DOJ or FTC could only drag out the review process so long and would eventually have to sue to block the deal. But if the antitrust agencies can drag out the process long enough, both the filing of the suit and the litigation process, the result may be precisely the same: using the threat of litigation to coerce companies and extract concessions from them. There is good reason to fear that the government's decision to sue may, itself, be fatal to a transaction. For example, all the government had to do to cause AT&T to abandon its acquisition of T-Mobile in 2011 was to file suit to block the deal.[77]

C. How Antitrust Law Can Be Weaponized to Control Media and Punish Critical Speech

The industries are concerned with are not hospitals, baby food producers, or widget makers—but forms of *media*, which the First Amendment is supposed to shield from government meddling. Of course, media companies are not immune from antitrust enforcement, but such suits—regardless of the degree of market power allegedly held by a company—must be grounded in economic harms to competition, not the exercise of editorial discretion. As Prof. Eugene Volokh explains:

> [I]t is constitutionally permissible to stop a newspaper from "forcing advertisers to boycott a competing" media outlet, when the newspaper refuses advertisements from advertisers who deal with the competitor. *Lorain Journal Co. v. United States*, 342 U.S. 143, 152, 155 (1951). But the newspaper in *Lorain Journal Co.* was not excluding advertisements because of their content, in the exercise of some editorial judgment that its own editorial content was better than the proposed advertisements. Rather, it was excluding advertisements solely because the advertisers—whatever the content of their ads—were also advertising on a competing

[77] Tom Schoenberg, Sara Forden & Jeff Bliss, *T-Mobile Antitrust Challenge Gives AT&T Little Recourse*, Bloomberg (Sept. 1, 2011), https://www.bloomberg.com/news/articles/2011-08-31/u-s-files-antitrust-complaint-to-block-proposed-at-t-t-mobile-merger.

> radio station. The *Lorain Journal Co.* rule thus does not authorize restrictions on a speaker's editorial judgment about what content is more valuable to its readers.[78]

Such is the theory of the First Amendment. In practice, government has used antitrust law to retaliate against media for the content of their coverage. In the far simpler media landscape of 1972, *The Washington Post* was vulnerable to political retaliation by the White House even though the First Amendment has always protected newspapers from government licensure because *The Post* also owned broadcast stations, which were licensed by the government. When it came time for those licenses to be renewed, Nixon attempted to wield power through his pliant FCC Chairman.

Today, such cross-media integration is more common, more important and more complicated. A few examples illustrate just how difficult it is to distinguish "new" from "old" media or to pigeon-hold companies into narrow product markets:

- Most obviously, *The Post* is now owned by Jeff Bezos, who also owns Amazon, a company that began by selling books online then expanded into selling pretty much any consumer good, bought one of America's leading grocery stores along the way, built a network of servers relied upon by many businesses in America, launched a streaming service that's free to anyone who pays for a subscription mainly marketed as a way to get free two-day shipping, and started a studio to produce film and television shows—just to name a few highlights.
- The AT&T case involved America's second largest wireless carrier, which also owns America's largest satellite television distributor, and which serves millions of Americans with broadband, buying one of the largest conglomerates of traditional video programming, including CNN, one of America's most influential media channels.
- Comcast, America's largest broadband network, also owns NBC Universal, including traditional NBC broadcast stations and the content produced by stations affiliated with NBC, as well as MSNBC, and a host of other media properties.
- Facebook has become the place many Americans get their news and share their thoughts about current events, and the sites' decisions about how to moderate objectionable content, police coordinated inauthentic activity intended to game the site's algorithms, and deal with misinformation have become hotly contested.
- Google plays similar roles through different user experiences—not only the search engine the company started with but also a news aggregation tool and, of course, the Internet's leading platform by which anyone can distribute video for free.

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[78] *See* Eugene Volokh and Donald Falk, First Amendment Protection for Search Engine Search Results at 22 (April 20, 2012). UCLA School of Law Research Paper No. 12-22, https://ssrn.com/abstract=2055364.

These complicated services were largely formed through the kind of vertical transactions that would be subject to review under the draft guidelines—and each will, doubtless, continue to evolve through vertical transactions. The list barely begins to mention the many smaller companies that each of these larger companies acquired along the way. This is simply how large companies attempt to avoid the "Innovators Dilemma," to stay relevant as technological change disrupts paradigms of how people use technology and how business is done.

Even the most strident critic of such transactions, and of today's increasingly complicated media landscape, must recognize that the sprawling interconnectedness of these companies, makes them vulnerable to extortion through regulatory pressure—and that their need for continued vertical combinations creates a vulnerability that can be exploited both by their rivals and by politicians, and especially by the two acting in concert.

It is impossible to say exactly how that pressure might be exerted, but it suffices for now to note that all of the companies mentioned above have come under direct public attack by President Trump for the same thing: perceived liberal bias against him. We believe there is real reason to worry that Trump's reported explosion at Gary Cohn and John Kelly about the AT&T/Time Warner deal—*"I've been telling Cohn to get this lawsuit filed and nothing's happened! I've mentioned it fifty times. And nothing's happened. I want to make sure it's filed. I want that deal blocked!"*[79]—may be the tip of a much larger iceberg.

But even if you doubt this to be true, even if you, dear reader—perhaps an employee of the Antitrust Division—truly believe that *you* would never be party to such an abuse of the antitrust laws, Trump's hysterical, incessant ranting about his all-too-public "Enemies' List" has made it impossible to tell why administration makes the decisions it makes. At this point, that is no less true of the Antitrust Division than it is of any other part of DOJ: all are subject to direct orders from the President via the Attorney General.

Every antitrust suit brought by this administration against companies that have raised the ire of the President or his allies will be tainted by a cloud of suspicion. Given this, it is vital that antitrust decisions be as well-grounded as possible in legal precedents and evidence-based analysis of the facts of the case. Everything the DOJ does now to increase the discretion it can claim in the future will contribute to this problem, leaving the agency's decision-making more and more subject to question.

[79] *See supra* note 69.

The Vertical Merger Guidelines offer the antitrust agencies an opportunity to remove at least some of this cloud of suspicion—by focusing the guidelines on well-developed law, and by avoiding vague phraseology that increases the discretion the agencies can claim in the future.

IV. Theories of Antitrust Harm that Are Not Sufficiently Well-Developed to Merit Inclusion in the Guidelines.

In their dissents from issuing the draft guidelines, FTC Commissioners Chopra and Slaughter raise three possible theories of antitrust harms that they want to see addressed in the guidelines. All three are conjectural. Perhaps the government may muster the evidence and economic models needed to win such a case in the future. But that possibility does not require that these be mentioned in the Guidelines now.

A. Big-Data-Related Mergers

The idea that increased data holding should be grounds for blocking (or conditioning) a merger is not new. In 2007, then-FTC Commissioner Pamela Jones Harbour dissented from the Commission's decision to approve Google's acquisition of a leading ad network:

> In many ways, the acquisition of DoubleClick by Google is a case of first impression for the Commission. The transaction will combine not only the two firms' products and services, but also their vast troves of data about consumer behavior on the Internet. Thus, the transaction reflects an interplay between traditional competition and consumer protection issues. The Commission is uniquely situated to evaluate the implications of this kind of data merger, from a competition as well as a consumer protection perspective. The Commission should maximize its opportunity to do so, especially where the merged firm will be capable of dominating the "Database of Intentions."[80]

In his dissent from the issuance of the draft guidelines, Commissioner Chopra channels the concerns expressed by former Commissioner Harbour in 2007:

> Today, many mergers are motivated by a thirst for data. [8] But deals animated by the acquisition and combination of different data streams are often difficult to characterize within the traditional boundaries of "horizontal" or "vertical" integration.

[80] Dissenting Statement of Commissioner Pamela Jones Harbour, In the matter of Google/DoubleClick, F.T.C. File No. 071-0170 (Dec. 20, 2007), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf.

> [8] In terms of non-horizontal transactions, more mergers are motivated by a firm's desire to expand its data estate. According to the OECD, 'big data related' mergers and acquisitions rose from 55 in 2008 to 134 in 2012. This desire for analytic capabilities and new data, particularly when used to feed and train artificial intelligence, can impact the competitive landscape in ways that limit new entry. This is not limited to internet platforms or consumer-facing businesses.[81]

Chopra goes on to claim that:

> The merging parties' *non-replicable assets*, including control of essential intellectual property, infrastructure, and even data, may provide dominance, especially if they offer unique advantages or key leverage over competitors and new entrants.[82]

Chopra vastly overstates how the consolidation of data might pose a cognizable antitrust concern. As the Council of Economic Advisors reports notes:

> Data can also be a barrier to entry in the digital economy. Because dominant platforms have more users, they often have access to much more data than new entrants, and this can give them an insurmountable advantage (Rubinfeld and Gal 2017). For example, dominant platforms may be better able to target advertising at their users and so earn more revenues from advertising. However, a lack of access to data does not always deter entry. Lambrecht and Tucker (2015) observe that Airbnb, Uber, and Tinder entered markets where established firms (e.g., Expedia) had better data. They were able to succeed because of their innovative products. Lambrecht and Tucker (2015) also observe that data are nonrivalrous, in the sense that data can be shared and consumed by many users, in contrast to rivalrous goods such as food, which are consumed only once. Because of this, entrants can sometimes buy data as a substitute for collecting them internally from their users. However, this is not always the case, and the role of data as a barrier to entry depends on the facts and context of each market.[83]

Ultimately, data is a raw material not an output. *Some* data might be a uniquely valuable input, but in the case of many, if not most, digital services, there may be multiple sources of data on which to build a product. Chopra is not necessarily wrong. It is certainly conceivable that the FTC and DOJ could well bring and win antitrust cases based on the consolidation of data—just as they could for any input. But our understanding of this potential application of

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[81] *Chopra Statement, supra* note 31 at 5 (citing European Data Protection Supervisor, Report of Workshop on Privacy, Consumers, Competition and Big Data, at 1-2 (June 2014)), https://edps.europa.eu/sites/edp/files/publication/14-07-11_edps_report_workshop_big_data_en.pdf).

[82] *Id*. at 5-6.

[83] *2020 Economic Report of the President, supra* note 30 at 219.

antitrust law remains little better developed than it was in 2007: while academics have certainly written about the topic, there does not exist the kind of case law that would justify including something about this topic in the Vertical Merger Guidelines.

B. Increased Incentive to use "Government-Granted Benefits"

Cmr. Chopra proposes to add an additional level of analysis to merger review:

> [E]nforcers need to be realistic about predicting the likely ways that the merger will incentivize or allow firms to distort competition by extending or enhancing their existing dominance. Understanding the deal rationale is key here, as it is likely to be linked to new ways to leverage market power. This requires a careful inquiry into all the incentives and opportunities that can lead to harm. … Will the merged firm have an incentive to gain an upper hand using government-granted benefits such as intellectual property rights or legal immunity?[84]

We share his concern about crony capitalism, *i.e.*, the potential for powerful firms to manipulate the government to their own advantage. But we do not see how the theoretical possibility that a merged company might gain a greater ability to "gain an upper hand using government-granted benefits" would mean in practice. It is particularly unclear what Chopra is referring to with his mention of "legal immunity."

C. "Regulatory Evasion"

Commissioner Slaughter is "particularly concerned that the Guidelines … fail to mention regulatory evasion as a theory of harm."[85] Her use of the term "regulatory evasion" may confuse many readers. As her footnote makes clear, the kind of regulation this refers to is *rate* regulation, not regulation generally:

> In 2008, the FTC brought a vertical merger action based on this theory—that a firm can evade rate regulations by acquiring an upstream input and raising the cost of that input, which can lead to a regulator to authorize a higher downstream regulated rate based on that higher input cost.[86]

There is no recognized theory by which a merged firm's increased ability to "evade regulation" generally should constitute grounds for blocking or conditioning that merger—and for

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[84] *Chopra Statement, supra* note 3130 at 6.

[85] Statement of Commissioner Rebecca Kelly Slaughter at 4, FTC-DOJ Draft Vertical Merger Guidelines, Commission File No. P810034, 5, (Jan. 10, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561721/p810034slaughtervmgabstain.pdf.

[86] *Id*. note 12 (citing Press Release, Fed. Trade Comm'n, FTC Challenges Vertical Agreement Between Fresenius and Daiichi Sankyo (Sept. 15, 2008)).

good reason. Such a theory would introduce far too much uncertainty into the antitrust laws and give far too much discretion to regulators.

V. Conclusion & Specific Recommendations

In 2018, Josh Wright's Global Antitrust Institute provided the clearest statement of what the vertical merger guidelines should do: "[t]he lack of consensus on specific applications when it comes to vertical economic relationships suggests that successful guidelines should be limited to articulating high-level concepts and an overarching framework."[87] We agree—and add that that overarching framework should:

1. Recognize that increased scrutiny of vertical transactions may, ironically, retard investment in the startups and earlier-stages companies essential to the dynamism of the tech sector. By reducing the potential for disruptive entry into the market, increased scrutiny of vertical transactions could have the ironic result of *entrenching* the dominance of largest, best established incumbents and protecting them from competition.
2. Recognize the potential for abuse of antitrust laws by competitors and political actors, especially the President, and that the ability to delay—and, in fast-paced industry sectors, effectively block—mergers can create the opportunity to extort companies to make "voluntary" concessions that are not tailored to transaction-specific harms, and that might even be unconstitutional if mandated directly.

It would be impossible to fully resolve our concerns about the weaponization of antitrust law purely by wordsmithing Vertical Merger Guidelines. We ask only the guidelines not make the problem *worse*—by making the law more unclear or increasing the discretion of the antitrust agencies to apply the law. Unnecessarily broad wording or mentions of additional lines of potential inquiry beyond what the case law recognizes could well provide a pretext, a rhetorical excuse, for politically motivated enforcement actions.

In addition to the changes we propose above to the draft guidelines, we believe three further measures would help to restore confidence that the antitrust laws will be enforced neutrally—and, indeed, actually reduce the potential for the antitrust laws to be used as a tool by which the government may attempt to meddle with free speech.

First, all contacts between the White House and Department of Justice pertaining to specific cases or investigations that the DOJ might undertake should be logged and regularly disclosed to Congress—as proposed by the Security from Political Interference in Justice Act of

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[87] *GAI Comments supra* note 12 at 11.

2019 (S.1915), legislation introduced by Sen. Sheldon Whitehouse (D-RI).[88] Indeed, such a requirement should be extended to the FTC and other law enforcement agencies. No such system will be foolproof and, of course, a Nixonian White House will doubtless find ways to circumvent these requirements, but the existence of such a system will go a long way to protect DOJ (and FTC) officials and staff from the appearance of impropriety. We do not doubt the integrity of the vast majority of the staff of the agency. Indeed, the safeguards we propose will protect them from political meddling and from suspicion.

Second, our core concern remains the manipulation of speech for political purposes, be that the editorial decision-making of CNN or *The Washington Post* or whether Facebook and Google are sufficiently "fair" to one side of the political spectrum. The most effective safeguard against such Nixonian meddling would be to remove these matters from the direct control of the White House. We cannot trust this Attorney General *or any future Attorney General of either party* with the power to retaliate against American media—either traditional or new media— because the Attorney General answers directly to the President. Moreover, there is simply no need to trust the AG, or the Antitrust Division, with such powers, when Congress has already created another agency, the Federal Trade Commission, with the same legal authority to protect consumers, and which has developed essentially the same expertise in the application of that law.

Thus, we propose that the FTC, rather than the Antitrust Division, handle all antitrust cases connected to media companies. To that end, the DOJ and FTC should renegotiate their standing agreement allocating responsibility for industry sectors[89] such the FTC would have sole jurisdiction over media-related companies. We recognize that the Antitrust Division has developed expertise in specific media sectors and with respect to specific companies—presumably, all or mostly located within the DOJ's Media, Entertainment, and Professional Services Section (MEP). These staff should be transferred to the FTC's Bureau of Consumer Protection. In exchange, BCP staff with expertise in other areas could be transferred to the Antitrust Division.

We are not blind to the potential that the FTC may itself become politicized, despite being an independent agency, just as President Nixon's FCC Chairman did his bidding, and just as the

[88] Security from Political Interference in Justice Act of 2019, 116 H.R. 3380, 2019 H.R. 3380, 116 H.R. 3380, https://www.congress.gov/bill/116th-congress/senate-bill/1915/text. *See also Whitehouse, Jeffries, Blumenthal, Harris Introduce Bill to Protect Justice Department from White House Meddling*, Sheldon Whitehouse (June 20, 2019), https://www.whitehouse.senate.gov/news/release/whitehouse-jeffries-blumenthal-harris-introduce-bill-to-protect-justice-department-from-white-house-meddling.

[89] *See* Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations (March 5, 2002), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/17/10170.pdf.

FCC has, more recently, acted for political reasons. Nonetheless, we believe that the independence of the FTC, and the presence of other Commissioners to scrutinize the decision-making of the agency and sound the alarm about abuse make the FTC a far safer choice for enforcing the antitrust laws in the media sector. To provide further safeguards against abuse of the antitrust laws by the FTC, we would urge Congress to enact three further reforms:

- Extend the safeguards required by the Security from Political Interference in Justice Act to the FTC—to minimize the possibility for the administration to bring political pressure to bear on FTC Commissioners, officials or employees
- Pass the SMARTER Act,[90] which would remove the FTC's ability to challenge mergers through its administrative process—a process in which the Commission wins 100% of the time, as former Commissioner Wright has documented[91]—and ensure that, like the DOJ, the FTC must bring its cases in court.
- Increase the ability of Commissioners other than the Chairman to scrutinize the agency's decision-making, particularly by reforming the ironically named Sunshine Act.

The last of these three is more important than it may seem, as TechFreedom has explained:

> Overall, the Sunshine Act contributes significantly to the problem of the Imperial Chairmanship—by which the Chairman, bureau directors, and staff, may run the agency largely according to the will of the Chairman. In general, it is difficult for Commissioners even to discuss the work of the agency. This is a particular problem for the investigation stage of the FTC's work, when the staff may not only investigate a case but also negotiate for the settlement of that case, thus presenting the non-Chairman Commissioners with a *fait accompli*—a draft complaint and proposed settlement—the very first time they have heard of the case. This denies other Commissioners the ability to voice their concern about such cases and may leave them in the awkward position of being able to negotiate merely on the margins.[92]

Of course, relying on the FTC's independence only works if Congress carefully vets those it appoints as Commissioners, conducts regular oversight of the agency's activities, and asks Commissioners directly about political interference in enforcement decision-making.

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[90] Standard Merger and Acquisition Reviews Through Equal Rules Act (S. 2847), https://www.congress.gov/bill/115th-congress/senate-bill/2847/all-info.

[91] *See supra* note 59.

[92] Comment of TechFreedom at 12, Fed. Trade Comm'n Hearings on Competition and Consumer Protection in the 21st Century (Aug. 20, 2018), http://techfreedom.org/wp-content/uploads/2018/08/ftc-august-2018-workshop-comments-topic-11.pdf.

We recognize that completely transferring responsibility for media-related companies to the FTC will seem radical to some and raises thorny problems regarding personnel. We believe it is essential to protect free speech from political meddling as the Digital Revolution continues to transform the media landscape, making media companies more vulnerable than ever to pressure from the government through the selective application of antitrust law. As second-best reform, it would be beneficial to clarify the clearance process by which the two agencies resolve disputes over which agency will handle a particular case. Greater predictability as to that question would at least help to reduce the potential for political gamesmanship through the selection of the DOJ as the agency more willing to do the bidding of the Administration.

In closing, we emphasize that while the last three years of the Trump Administration have raised significant concerns about the potential for the antitrust laws to be abused, these concerns are not unique to this administration, nor will they be resolved simply by a change in partisan control of the White House. Our concerns are systemic and could arise under a president of either party. There is simply no way to tell what the future will bring, but we do expect that the susceptibility of media companies to political pressure through, among other tools, the antitrust law—and, in particular, the potential for extortion through the merger review process—will only grow. Just as the 1984 Non-Horizontal Merger Guidelines have survived for 36 years, any new Vertical Merger Guidelines the DOJ and FTC might issue could survive unaltered for decades. It is essential that they be crafted with the potential for abuse in mind. Of course, antitrust law will continue to evolve and develop, but let that be through litigation decided on the economic merits of specific cases, not by attempts to make policy through subtle changes in wording of the Vertical Merger Guidelines.