[14]*Frontier Oil*, C.A. No. 20502 at 108 (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). Somewhat interestingly, the "total mix" standard was initially proposed by Holly Corp. in *Frontier Oil* in its post-trial brief to the court. Specifically, Holly Corp. was citing to the federal securities laws materiality standard when determining whether the potential cost of litigation could have been considered material. *See* Brief of Holly Corp. at 54. *Frontier Oil*, in its post-trial reply brief, agreed that the federal securities law standard was "instructive" but asserted that Holly Corp. went too far in claiming that such was the standard should be used when determining materiality. *See* Reply Brief of Frontier Oil at 23. Given the court's application of the "total mix" standard, it appears Holly Corp. convinced the court that not only was this standard instructive, but that it was *the* standard to apply.

[15]789 A.2d 14 (Del. Ch. Ct. 2001).

[16]As *Akorn* stated, the common law requires a material breach to go "to the root or essence of the agreement between the parties, or touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract."

[17]Decision at 48-49.

[18]Def.'s Post-Trial Brief, 2019 WL 2251019 at 57.

[19]Decision at 67.

[20]Decision at 68.

[21]As stated in *Akorn* and restated in *Channel*, "[a] buyer faces a heavy burden when it attempts to invoke a material adverse effect clause in order to avoid its obligation to close. A short-term hiccup in earnings should not suffice; rather the Material Adverse Effect should be material when viewed from the long-term perspective of a reasonable acquirer. In the absence of evidence to the contrary, a corporate acquirer may be assumed to be purchasing the target as part of a long-term strategy. The important consideration therefore is whether there has been an adverse change in the target's business that is consequential to the company's long-term earnings power over a reasonable period, which one would expect to be measured in years rather than months." Decision at 68 (quoting *Akorn*, 2018 WL 4719347, at *53).

[22]Decision at 67.

# WHAT YOU NEED TO KNOW ABOUT THE NEW FTC/DOJ VERTICAL MERGER GUIDELINES

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In January, the Federal Trade Commission ("FTC") and U.S. Department of Justice ("DOJ") (together "Agencies") jointly released for public comment draft vertical merger guidelines ("Guidelines"). We offer this article to answer the most frequently asked questions arising in response to their publication.

## What Did the Agencies Announce?

The Guidelines summarize theories of competitive harm from vertical mergers that antitrust enforcers consider when deciding whether to seek a remedy in or block a vertical merger. They replace the DOJ's 1984 Non-Horizontal Merger Guidelines, which do not reflect current economic learning or recent agency enforcement. Unlike DOJ's 1984 guidelines, the FTC had not issued guidelines on vertical mergers prior to this development. Although the Guidelines do not offer a great deal of specifics on the ultimate threshold for enforcement in this area, they are welcomed as greater insight into how the Agencies plan to evaluate vertical transactions.[1]

Although vertical mergers comprised about five percent of Agency merger enforcement over the last 25 years,[2] they have received increased attention in recent years. The Guidelines follow the first litigated vertical merger challenge by either agency since 1979.[3] In 2017, the DOJ unsuccessfully attempted to block AT&T's acquisition of Time Warner, Inc. Since then, senior officials at DOJ and FTC have identified vertical mergers as an enforcement priority. For example, in a September 2019 speech, FTC Chairman Joseph Simons cautioned that "anticompetitive vertical mergers are not unicorns, and there should not be a presumption that all vertical mergers are benign."[4] Chairman Simons further cautioned that anticompetitive vertical mergers "may not arise every day" but "are common enough that we need to pay careful attention to look for and challenge them." These developments signal incrementally aggressive enforcement in vertical mergers in the coming years as the Agencies will likely seek to test those theories, including perhaps through litigation.

The Agencies released the Guidelines as a draft for public comment and have announced two public workshops in March. The comment period ends February 26, 2020. The final Guidelines are unlikely to change significantly from the draft version. The draft Guidelines took more than a year to draft because of dissenting views about the proper level of enforcement in vertical mergers. For example, the FTC's two Democratic Commissioners, Rebecca Kelly Slaughter and Rohit Chopra, abstained from voting on the Guidelines: Commissioner Slaughter disagreed with the provision of a safe harbor and indicated the Guidelines should set a lower bar for enforcement; Commissioner Chopra stated the Guidelines were not comprehensive or reflective of past enforcement decisions. While the Guidelines largely enumerate the basic principles about which there is little disagreement, it is likely that the Agencies could not achieve consensus about much more.

## How Do the Agencies Define a "Vertical Merger"?

Vertical mergers combine two or more companies operating at different levels of the same supply chain. A classic supply chain has a manufacturer, distributor, and retailer. A vertical merger would involve, for example, a semiconductor chip foundry that merges with a device company or an OEM distributor. The stage of the supply chain closer to the ultimate consumer is "downstream" while the stage furthest from the consumer is "upstream." In the preceding example, the foundry is upstream while the device company or OEM distributor is downstream.

Vertical mergers are distinct from conglomerate mergers or mergers involving complementary products. Conglomerate mergers involve transactions between unrelated businesses, for example, a merger between a food delivery app company and a company that develops electronic health record software for hospitals. Complementary products exist where an increase in the price of one product decreases the demand for the other product, but not because the first product is an input to the other. For example, if the price of running shoes increases, consumers might purchase fewer wearable electronic exercise devices. The Guidelines do not apply either to conglomerate or to complementary mergers. As the Guidelines note, "vertical mergers combine firms or assets that operate at different stages of the same supply chain."

## How Can a Vertical Merger Harm Competition?

Historically, the Agencies recognized that vertical mergers were less likely to harm competition than mergers among competitors.[5] That assumption may no longer be the case as the new Guidelines have dropped that previous statement. The Guidelines identify a non-exhaustive list of competitive harm that may arise from vertical mergers. They characterize the main categories of harm as:

- Foreclosure
- Raising rivals' costs

- Access to competitively sensitive information
- Increased risk of marketplace coordination

### Foreclosure

A vertical transaction may provide the merged company with the ability and incentive either not to sell an input product to downstream customers (input foreclosure) or to stop purchasing inputs from competing suppliers (customer foreclosure).

***Input Foreclosure.*** If there are insufficient alternatives to supply an input, a competitor of the merged company may be unable to compete in the downstream market. For example, assume a bicycle tire manufacturer acquires a bicycle company. If the upstream manufacturer is the dominant tire manufacturer, it may be profitable to withhold entirely or reduce supply of tires to competing downstream bike makers. Without adequate tire supply, competing bike companies are completely or partially foreclosed from competing in the sale or distribution of bikes, which reduces competition, and could lead to fewer choices and higher prices. However, this is not always the case, even where there is an upstream monopoly. The key for the Agencies and parties alike will be separating those deals that are procompetitive versus those that are not.

***Customer Foreclosure.*** Similarly, the merged company may have the ability and incentive to cut off access to the downstream output market such that competitors of the merged company's upstream input would no longer find it profitable to continue to supply the input. There are few examples of Agency enforcement actions that allege a customer foreclosure theory of harm.

For example, assume an acquired bike company accounts for 80 percent of bikes sold, purchases 80 percent of all bike tires, and subsequently shifts all of its tire purchases to the merged upstream tire manufacturing division. The bike tire competitors, who have lost access to a large customer, may no longer find it profitable continue to supply tires to the marketplace. Competitive harm might result if the remaining bike companies are forced out of the marketplace or must pay higher prices to keep other tire manufacturers in the market.

### Raising Rivals' Costs

Even if a competitor is not completely foreclosed, a vertical merger may incentivize the merged company to raise its rivals' costs by selling an input to competitors at a higher price or decreasing the quality or level of services provided. This may harm consumers if the higher costs are passed in the form of higher prices or lower quality. DOJ tested the raising rivals' costs theory in its recent unsuccessful challenge of AT&T's acquisition of Time Warner.

Under this theory, if a bike company acquires a tire manufacturer, the combined company may be more willing to charge a higher tire price to the bike competitors. Although the combined company might lose some tire sales, it might make up for those losses with increased bike sales if rival bike companies pay higher tire prices to competing tire suppliers. Bike competitors might be more willing to agree to the merged company's higher tire prices if they fear lost sales, which may in turn harm consumers if bike prices go up.

### Information Sharing

The Guidelines explain that an unfair advantage may be conferred on merging parties if they gain access to competitively sensitive information (*e.g.*, prices, strategies, business plans, innovation) about upstream and/or downstream competitors.

For instance, following a vertical merger, a bike company may be able to obtain details about its rivals' pricing, demand projections, and strategies from its newly merged upstream tire manufacturing division that also sells tires to competing bike companies. The merged company could use this information to thwart its rivals' competitive strategies (*e.g.*, development of an innovative bike design) or reduce price competition. In some cases, a bike competitor might be forced to choose between buying higher priced or lower quality tires from another supplier or continuing to buy from the merged firm, risking that competitive strategies are leaked to the competing bike division.

### *Increasing the Likelihood of Industry Coordination*

The Guidelines state that access to competitively sensitive information at different stages of the supply chain in a vertical merger may facilitate coordination by making it easier for competitors to reach and enforce a tacit agreement. For instance, in the GrafTech/Seadrift Coke transaction, the DOJ was concerned that Seadrift, an upstream petroleum needle coke manufacturer, would obtain competitor output and pricing information from downstream GrafTech, which, through a most-favored nations clause, had audit rights over its petroleum needle coke supplier, also Seadrift's competitor. The DOJ alleged the information flow could facilitate tacit coordination among suppliers of petroleum needle coke. DOJ permitted the merger to proceed subject to a settlement that required GrafTech to give up its audit rights and an MFN in its supply contract with Seadrift's competitor.

Vertical mergers may enhance the likelihood of coordination if the merger eliminates or otherwise harms a so-called "maverick" competitor. A "maverick" is a competitor that plays a disruptive role in a market to the benefit of consumers, which also serves to make coordination difficult. If a vertically-merged firm could achieve leverage over a maverick, such as the ability to increase input prices, the merger could weaken the maverick's continued ability to disrupt prices in the downstream market.

## So How Will the Agencies Decide Which Vertical Deals Are Anticompetitive?

While helpful at describing the theoretical framework underlying potential competitive concerns in vertical mergers, the Guidelines are a bit light on practical guidance to businesses (and courts). Although that is understandable given the complexity of the area and the challenges presented by reaching dual-agency consensus, it also leaves companies in unpredictable territory.

The draft Guidelines note that the types of evidence described in Section 2.1 of the Horizontal Merger Guidelines can be informative in assessing the effects of a vertical merger. Using the Horizontal Merger Guidelines and drawing upon recent Agency investigations and challenges of vertical mergers, merging parties should note that the following factors will likely be key to any analysis of the effects of a vertical merger.

***Market share:*** The merged firm's market shares in both the input and output markets are important to assess risk. Historically, the Agencies have been most concerned about foreclosure when the merged firm has a significant share in at least one relevant market. Unlike the Horizontal Merger Guidelines, the draft vertical Guidelines do not establish any presumptive level of competitive harm but do point to a 20 percent market share threshold as being unlikely to result in harm, described more fully below. Merging companies with high share in related vertical markets face more risk.

***Newness or potential growth of a product***: If one of the relevant products is a new product and its share of use in the other relevant market is growing, the Agencies will consider that growth in determining the potential for harm. For example, if one of the merging parties supplies a newly-developed product that outperforms current technologies to downstream users of that technology, even though the new component may compete with similar inputs, the Agencies will consider whether the new technology is likely to supplant existing technologies and could provide the merged firm the incentive and ability to raise downstream rivals' costs.

***Competitor/customer reaction***: In horizontal mergers, the Agencies place significant weight on customer reactions to a transaction because they are likely to feel the deal's impact, positive or negative. However, in a vertical merger, the customer (and often the potentially aggrieved party) also is a competitor and may have an incentive to act opportunistically when competition is not really at risk. Merging parties should consider the pros and cons of addressing legitimate competitor concerns, such as with a firewall or a supply agreement, and develop a strategy to neutralize unfounded opposition.

***Comparison based on past market experiences***: The Agencies will consider past market behavior to help determine if a vertical merger may result in competitive harm. For example, if there are a number of similarly situated vertically-integrated firms in a market that currently supply rivals, such evidence may show that the merged firm would lack the incentive or ability to foreclose or raise rivals costs. Alternatively, evidence that the acquiring company (or others) foreclosed rivals in markets with similar characteristics (similar market shares, types of products, etc.) could be used as a basis to challenge a vertical transaction in a related industry.

***Economic analyses:*** Economic analysis plays an important role in vertical merger review. The Agencies run economic models to estimate the likelihood of harm based on data from the parties and data gathered in response to third-party subpoenas. Those data include margins, diversion ratios (*i.e.*, the amount of sales that would divert between competitors or products based on changes in price), and other financial or sales data. Known as a "simulation," the economic models attempt to quantify what might happen if the merged company's pursue a foreclosure or raising rivals' cost strategy.

***Existing contractual relationships***: The draft Guidelines state that "pre-existing contractual relationships may affect a range of market characteristics." Although the statement is not further described, existing contracts may provide protection against anticompetitive conduct by the combined company. For example, if there is an exclusive contract between the merging parties, foreclosure is not likely to occur because downstream competitors cannot buy inputs from that supplier today. Another relevant contractual relationship would be whether the merging parties currently have long-term supply agreements with downstream producers that include supply and pricing guarantees. In such an instance, the contract may provide downstream competitors protection while they find a new input supplier. Alternatively, as described in the GrafTech/Seadrift example above, a contract with a competing supplier that features an MFN and/or audit rights may be found to facilitate coordination.

***Barriers to entry***: As in the horizontal merger context, the Agencies will look at potential barriers to entry and whether those barriers may allow the merged firm to foreclose rivals or profitably raise rivals costs without inducing entry. For example, according to the Guidelines under certain conditions, a bike manufacturer that buys the only tire supplier might deter a motorcycle manufacturer from entering the bicycle business.

As detailed elsewhere in this article, the Guidelines could be criticized as a bit light on practical guidance, and there is little vertical merger enforcement precedent compared to horizontal merger enforcement where there is ample case law and hundreds of detailed Agency settlements in numerous industries. Nevertheless, there are some characteristics to watch out for, and continuing with our hypothetical merger of tire and bike manufacturers:[6]

- The downstream market for tire manufacturing, the upstream market bike manufacturing, or both have few credible competitors.

- The merged tire and bike manufacturer will have a high share in the upstream tire market, the downstream bike market, or both. High share typically means more than 50 percent.

- The benefits from foreclosure (and gained sales in bikes) outweigh lost sales in another product (tires), which will naturally depend on product margins, among other facts.

- The merging tire manufacturer is a critical supplier to the bike manufacturer's competitors, or the merging bike manufacturer is a critical buyer of tires from the tire manufacturer's competitors, either of whom are likely to complain to the Agency.

- It would be costly or time consuming for competing bike manufacturers to substitute away from the merged company's tires, or for competing tire manufacturers to find alternative outlets for their products.

- There are few competing bike manufacturers and after the merger, and the merged company is not likely to sell tires to a new entrant.

- Tires and bikes are homogenous products for which there are few competitors, prices and output are transparent, and/or the upstream tire division supplies competing bike manufacturers, and/or the downstream bike division buys from competing tire suppliers.

- The company has foreclosed competition or raised its rivals' costs after past vertical mergers in similar markets.

## What Defenses Are Available for Vertical Mergers?

Under the Guidelines, there is no presumption that vertical mergers are at least benign or lead to procompetitive benefits in many cases. The new Guidelines do not include language contained in the 1984 Guidelines that highlighted the fact that "non-horizontal mergers are less likely than horizontal mergers to create competitive problems." While the Guidelines indicate increased skepticism of the benefits of vertical mergers, there are still many effective defenses to vertical mergers.

Demonstrating that the merged company will have neither the ability nor the incentive to foreclose rivals or raise their costs will continue to be key to a successful defense of a vertical transaction. Competitive markets for the upstream product can mean that rivals will be able to step in and take customers if the merged firm chooses to cut off its competitors. If the merged company's own demand for the input represent a small portion of that firm's sales of the input, then the merged firm will lack incentives to foreclose because it will stand to lose more revenue by cutting back supply than it could hope to make up through increased sales of the downstream product. Demonstrating that the merged firm's economic incentives will be to continue to sell products to its horizontal competitors, and that it stands to lose by cutting off rivals or increasing their prices, will be key to a successful defense.

In addition, there is much economic literature recognizing that vertical mergers can lead to procompetitive benefits in the form of greater efficiency and cost savings to the merged companies that can benefit consumers, a fact the DOJ acknowledged in challenge to the AT&T/Time Warner combination. Parties to a vertical merger should develop the evidence of these benefits.

### What Is Double Marginalization? When Can Eliminating Double Marginalization Be Procompetitive?

Double marginalization refers to the margins realized by two businesses, one selling an input, and the other selling a product incorporating the input to downstream customers, when each company realizes a margin on the sale of its products. A vertical merger can lower costs for the downstream company because post-merger, it will supply itself with the input at cost, eliminating the margin realized by the supplier pre-merger. For example, if a bike manufacturer acquires a tire manufacturer, its cost of manufactured goods will no longer include the margin that the previously independent supplier charged. If the market for the downstream manufactured product is competitive, post-merger the manufacturer should have the incentive to pass the cost savings on to its customers.

The Guidelines state that the elimination of double marginalization will not always be a defense. The Agencies will rely on the parties to identify and demonstrate how and whether the merger eliminates double marginalization. Where market conditions for the downstream product are competitive, the merged firm will have the incentive to pass on its reduced costs to customers rather than increase its own margins. Under the Guidelines, the Agencies "will not challenge a merger if the net effect of elimination of double marginalization means that the merger is unlikely to be anticompetitive in any relevant market." This is significant because it means that the Agencies will heavily weigh the benefits of eliminating double marginalization, as distinct from the skepticism with which they historically view other cost savings and operational efficiencies.

### Is There a Safe Harbor for Vertical Mergers?

No. While there is not a "safe harbor" the Guidelines state the "Agencies are unlikely to *challenge* a vertical merger" where the combined firm would have less than 20 percent market share in both the upstream and downstream markets. However, the Guidelines also note that "in some circumstances, mergers with shares below the [20 percent] thresholds can give rise to competitive concerns." As an example, the Guidelines contend that where a new product is rapidly growing, its use in the downstream market may understate its future significance and the potential for competitive harm. As drafted, the Agencies will not use 20 percent as a rigid screen to separate potentially problematic transactions from benign deals. Instead, the Guidelines propose 20 percent to be an indication that, absent other facts that might suggest a competitive problem, a vertical deal is unlikely to harm competition.

It is also important to understand that the 20 percent screen applies to an Agency *challenge*, meaning a settlement or litigation. Unlike the Agencies' guidelines for mergers among competitors, there is no screen below which the Agencies are unlikely to investigate or require further analysis. Perhaps the most surprising part of the vertical guidelines is how low the bar is that the Agencies were willing to adopt. Traditionally, the Agencies were concerned primarily when one of the merging parties had market power, often presumed to be above 50 or 60 percent, in a relevant market, at least for vertical foreclosure. By adopting such a low threshold the Agencies have added uncertainty rather than clarity.

#### *Does the 20 Percent Screen Also Apply to Information Sharing?*

The Guidelines do not limit the 20 percent screen to any particular harm (*e.g.*, just foreclosure or raising rivals costs). However, there is reason to believe that the Agencies will be less likely to apply a 20 percent threshold when the vertical merger raises concerns about the sharing of competitively sensitive information.[7] Obtaining a competitor's confidential business information can be problematic regardless of market share, and customers and competitors may express concern to the Agencies if a merger results in a merged firm gaining access to a rival's competitively sensitive information. Therefore, merging parties should not expect the Agencies to apply the 20 percent threshold to issues involving competitively sensitive information.

### *How Does the 20 Percent Screen Compare to Other Jurisdictions?*

The 20 percent screen in the Guidelines is lower and offers less clarity than the "safe harbor" provisions for vertical mergers in a number of foreign jurisdictions, such as the European Union and some member states. For example, both the European Commission and France have 30 percent market share thresholds for vertical mergers. In addition, the European Commission's guidelines provide more clarity around what facts may constitute "special circumstances" where the European Commission might investigate a merger where the shares fall below the 30 percent threshold.[8] Likewise, in China, although there is no safe harbor, vertical transactions involving share of 25 percent or less qualify for China's simplified procedure, which offers potential clearance one month after the agency deems a filing complete.

## Are Remedies Covered in the Guidelines?

No. Remedies in vertical mergers remain an area of uncertainty and the Guidelines do not address remedies. The Agencies have a strong preference for structural remedies, *i.e.*, the divestiture of an ongoing, standalone business to remedy competition concerns in horizontal merger cases. The Agencies disfavor behavioral or conduct remedies that necessitate ongoing contacts between competitors. However, in vertical mergers, the Agencies historically had allowed behavioral remedies such as supply agreements, firewalls, arbitration clauses, and other similar terms. Recent cases may reveal potential difference in approach between the DOJ and FTC.

***DOJ:*** For example, in its 2011 challenge to the Comcast-NBC Universal merger, the DOJ agreed to behavioral remedies designed to prevent the merged firm from raising its rival distributors costs in licensing content. The Trump Administration DOJ has opposed certain behavioral remedies because they are temporary, displace market forces, and place DOJ in the position of a regulator monitoring compliance. In its investigation of the AT&T/Time Warner transaction, the DOJ rejected a remedy similar to the Comcast-NBC Universal settlement, which led to litigation over the merger. In 2018, the DOJ also withdrew its 2011 remedies guidelines that indicated that behavioral remedies can effectively address competitive issues in vertical mergers.

***FTC:*** Although the FTC, like DOJ, prefers structural remedies, it has adopted behavioral remedies in recent vertical merger settlements. Additionally, the FTC's settlement guidance still indicate that a behavioral remedy "may be required to remedy the anticompetitive effects of a vertical merger." This includes potential side agreements with competitors/customers that may be complaining. Indeed, in a recent action accepting a behavior remedy, the Bureau of Competition noted that it "typically disfavors behavioral remedies and will accept them only in rare cases based on special characteristics of an industry or particular transaction."[9]

Vertical mergers with information sharing risks are prime candidates for behavioral remedies. Firewalls and effectively implemented and monitored confidentiality policies are commonplace and can safeguard competitively sensitive information, minimizing risk of improper information flows.

## Do These Guidelines Mean That the Agencies Are Going to Conduct a Thorough Investigation of Every Vertical Deal?

No. In recent years, the DOJ's (unsuccessful) litigation over the AT&T/Time Warner transaction and calls for more active vertical merger enforcement have led to increased scrutiny of vertical transactions, but there is no evidence to suggest a substantial increase in vertical merger enforcement. The Guidelines are likely to contribute to that incremental trend but not change it materially. There is still much economic literature evidencing that vertical mergers are at least competitively benign, or in many cases, procompetitive. That has not changed.

### How Can Parties to Vertical Transactions Address the Issues in Deal Documents?

Although it can be challenging, Parties should consider whether to address vertical risks in their transaction documents. Transactions that involve horizontal overlaps, vertical relationships, or both may require a variety of structural or behavioral remedies including divestitures, licenses, supply agreements, arbitration for supply disputes, or relinquishing certain contractual rights during contract negotiations. Dealmakers also may consider the following to influence buyer commitments: (1) efforts standards; (2) a provision that it must commit to remedies up to some dollar threshold impact on the benefits of the deal; and/or (3) concepts of material adversity. What a seller and buyer may agree to will depend on the level of vertical antitrust risk and the degree to which the buyer is willing to take on a structural or behavioral remedy to resolve the harm.

### Should We Alter Our Vertical Deal Timeline In Light of the New Guidelines (*i.e.,* Either Complete the Deal Before the Guidelines Are Finalized or Wait)?

No. There is no need to base any business decision on the timing of these Guidelines. The Guidelines largely summarize the Agencies' current enforcement thinking and they reflect how the Agencies conduct investigations of vertical transactions today. Although the Guidelines and recent speeches by DOJ and FTC leadership highlight the renewed focus on vertical transactions in recent years, the Agencies are not more or less likely to investigate a vertical deal before or after finalizing the Guidelines.

## ENDNOTES:

[1]Similar to the Horizontal Merger Guidelines, the vertical merger Guidelines are not legally binding. However, courts have considered the Horizontal Merger Guidelines in merger litigation.

[2]This figure likely overstates the amount of enforcement in vertical mergers. It represents the proportion of settlements with some vertical component. In a number of cases, a horizontal concern was the focus of an investigation and the Agency also added a vertical claim in the settlement documents.

[3]*Freuhauf Corp. v. FTC*, 603 F.2d 345 (2d Cir. 1979). Prior to AT&T/Time Warner, the DOJ's last litigated vertical merger challenge was in 1977. *United States v. Hammermill Paper Co*. 429 F. Supp. 1271 (W.D. Pa. 1977).

[4]FTC Chairman Joseph Simons, Fordham Speech on Hearings Output (Sept. 13, 2019), https://www.ftc.gov/system/files/documents/public_statements/1544082/simons_-_fordham_speech_on_hearings_output_9-13-19.pdf.

[5]As the DOJ's 1984 Guidelines noted: "non-horizontal mergers are less likely than horizontal mergers to create competitive problems. . . ."

[6]Of course, even these examples might not suggest a merger is likely to face competitive concerns.

[7]For example, in the GrafTech/Seadrift Coke transaction noted above, DOJ alleged that the merged firm's share in the upstream market was 19 percent.

[8] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:en:PDF.

[9]Statement of Bureau of Competition Deputy Director Ian Conner on the Commission's Consent Order in the Acquisition of Orbital ATK, Inc. by Northrup Grumman Corp., File No. 181-0005, at 2 (June 5, 2018).

 