Writers Guild of America West Comment on DOJ-FTC Draft Vertical Merger Guidelines

The Writers Guild of America West ("WGAW") has previously urged the Federal Trade Commission ("FTC")[1] to update the 1984 Non-Horizontal Merger Guidelines ("1984 Guidelines")[2] through a public comment process, as those Guidelines reflect outdated economic theories and have failed to adequately protect and promote competition. WGAW is a labor organization representing more than 10,000 professional writers of motion pictures, television, radio, and online video programming, including news and documentaries. WGAW members have experienced the consequences of decades of vertical integration in media markets, and support efforts to reinvigorate U.S. antitrust policy through better guidelines, increased enforcement activity, and new legislation.

The Draft Vertical Merger Guidelines ("Draft Guidelines") issued by the Department of Justice ("DOJ") and FTC on January 10, 2020, however, fall short of the policy guidance necessary to promote effective antitrust enforcement and prevent harmful mergers. These Draft Guidelines fail to establish a structural presumption that vertical mergers in concentrated markets are harmful, give significant and unwarranted deference to company claims of merger "efficiencies" over analysis of market structure, and ignore the impact of mergers on labor markets.

In addition, the 45-day comment period allotted for the Draft Guidelines is inadequate for full consideration of consequential policy guidance last updated more than 35 years ago. The FTC and DOJ should revise these Draft Guidelines to better incorporate real-world outcomes of recent vertical mergers and the evolving understanding of vertical integration's capacity to control competition and markets, and to give adequate time for a full consideration of feedback from stakeholders and the public.

The Draft Guidelines Fail to Create a Structural Presumption Against Vertical Mergers in Concentrated Markets

As an initial matter, while the Draft Guidelines go further than the 1984 Guidelines in defining possible harms from vertical mergers, the Draft Guidelines continue to give significant deference to the pro-competitive possibilities of vertical integration, despite the growing body of evidence suggesting such deference to be unwarranted. The anti-competitive effects of vertical integration have been a focus of increasing attention in recent years, including in the context of dominant tech "platforms" Amazon, Apple, Google, and Facebook. In addition, WGAW and others have documented harms from vertical integration in numerous merger reviews and other

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[1] WGAW Comment in FTC Hearing "On Competition and Consumer Protection in the 21st Century," (Dec. 28, 2018) ("*WGAW 2018 FTC Comments*").

[2] US Department of Justice, *Non-Horizontal Merger Guidelines* (June 29, 1984) available at https://www.justice.gov/sites/default/files/atr/legacy/2006/05/18/2614.pdf (*"Non-Horizontal Merger Guidelines"*).

proceedings.[3] In particular, WGAW has documented the evolution and impacts of vertical integration in the media industry beginning with the early 1990s repeal of the Financial Interest and Syndication Rules ("Fin-Syn"), which had prevented television networks from owning the content they distributed in primetime. The repeal of Fin-Syn resulted in widespread vertical integration between television networks and production companies, or studios. This trend has continued with content production companies' integration downstream into cable and internet distribution, as in the mergers between Comcast and NBC Universal (2011) and AT&T and Time Warner, Inc. (2018). Through the decades, vertical integration has increased barriers to entry for independent producers that lack affiliated networks, constraining competition among buyers of content. The aftermath of the Comcast-NBCU and AT&T-Time Warner mergers provide ample evidence of vertical harms, including complaints of discrimination against competitors in streaming and traditional video production and distribution,[4] prioritization of affiliated content and services over competitors',[5] and reduced variety and choice for consumers.[6] Both companies now plan to withdraw affiliated content from competing distributors in order to fuel their own vertically-integrated streaming services,[7] to be bundled with other affiliated services.[8]

In short, there is a large and growing body of evidence documenting potential and realized harm to competition through price and non-price effects from vertical mergers, in addition to academic analysis suggesting vertical mergers should not be assumed pro-competitive.[9] Treating such mergers as beneficial by default has caused tremendous damage to competition. The new Vertical Guidelines must reflect this body of evidence by beginning with a presumption of harm from mergers in already-concentrated industries. Instead, the Draft Guidelines establish an

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[3] WGAW 2018 FTC Comments; Fed. Comm. Comm'n,*13th Annual Video Competition Report* (Jan. 16, 2019); Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses, Memorandum Opinion and Order, MB Docket No. 10-56, 26 FCC Rcd. 4238 (2011) ("*Comcast-NBCU Order*"); DOJ Competitive Impact Statement in *United States and Plaintiff States v. Comcast Corp., et al.*, No. 1:11-CV-00106 (Jan. 18, 2011) ("*DOJ Competitive Impact Statement*").

[4] Jasmin Melvin, *U.S. FCC sides with Bloomberg over Comcast Dispute,* Reuters (May 2, 2012), https://www.reuters.com/article/fcc-comcast-bloomberg/u-s-fcc-sides-with-bloomberg-over-comcast-dispute-idUSL1E8G2N8C20120502; Karl Bode, *Comcast Blocks HBO Go From Working on Playstation 4, Won't Coherently Explain Why,* techdirt (Mar. 5, 2015), https://www.techdirt.com/articles/20150303/12433530200/comcast-blocks-hbo-go-working-playstation-4-wont-coherently-explain-why.shtml; T.C. Sottek, *Is Comcast Prioritizing its Xfinity app over Competitors like Netflix?,* The Verge (May 15, 2012), https://www.theverge.com/2012/5/15/3021839/comcast-throttling-net-neutrality-xfinity-netflix-xbox.

[5] Dade Hayes, *HBO Goes Dark on Dish Network; Dish Rips AT&T For "Stacking the Deck,"* Deadline (Nov. 1, 2018), https://deadline.com/2018/11/hbo-dish-network-carriage-dispute-blackout-1202493744/.

[6] Michael Hiltzik, *The killing of FilmStruck shows that AT&T's defense of its Time Warner takeover was a lie,* Los Angeles Times (Nov. 2, 2018), https://www.latimes.com/business/hiltzik/la-fi-hiltzik-filmstruck-att-20181102-story.html.

[7] Jon Brodkin, *AT&T takes some Time Warner shows off Netflix, makes them Exclusive to HBO Max,* ArsTechnica (July 9, 2019), https://arstechnica.com/information-technology/2019/07/att-starts-restricting-time-warner-shows-to-its-own-streaming-service/.

[8] Edited Transcript, AT&T Inc. at Citi Global TMT West Conference (Jan. 8, 2020), https://investors.att.com/news-and-events/events-and-presentations.

[9] Salop, Steven C. and Culley, Daniel P., "Potential Competitive Effects of Vertical Mergers: A How-To Guide for Practitioners" (2014). *Georgetown Law Faculty Publications and Other Works* at 5; Adil Abdela, Kristina Karlsson, Marshall Steinbaum. 2019. "Vertical Integration and The Market Power Crisis." Roosevelt Institute. https://rooseveltinstitute.org/vertical-integration-and-themarket-power-crisis/.

effective safe harbor for firms with less than 20% market share and give insufficient regard to the state of overall competition in the relevant markets, or to market attributes that may impact competition. Netflix, for instance, had a 15% share of the exhibition market for television and online scripted series in the 2018-2019 season, in a market dominated by companies that produce, or self-supply, a majority of the content they exhibit. As illustrated by the charts below, the television and online scripted series market became more concentrated between 2016 and 2019, with the high level of vertical self-supply posing daunting barriers to entry for independent producers. In this context, any merger between Netflix and a firm in a related or complementary market would have a significant anti-competitive effect.[10]

<table>
<tr><th colspan="7">Television and Online Scripted Series by Market Share and HHI</th></tr>
<tr><th></th><th colspan="2">2016-2017</th><th colspan="2">2017-2018</th><th colspan="2">2018-2019</th></tr>
<tr><th></th><th>Market Share</th><th>HHI</th><th>Market Share</th><th>HHI</th><th>Market Share</th><th>HHI</th></tr>
<tr><td>Disney[11]</td><td>13%</td><td>172</td><td>13%</td><td>161</td><td rowspan="3">25%</td><td rowspan="3">625</td></tr>
<tr><td>Fox</td><td>11%</td><td>113</td><td>10%</td><td>92</td></tr>
<tr><td>Hulu[12]</td><td>3%</td><td>6</td><td>4%</td><td>16</td></tr>
<tr><td>ViacomCBS[13]</td><td>22%</td><td>475</td><td>20%</td><td>394</td><td>22%</td><td>463</td></tr>
<tr><td>Netflix</td><td>11%</td><td>119</td><td>12%</td><td>147</td><td>15%</td><td>229</td></tr>
<tr><td>AT&T/Time Warner[14]</td><td>12%</td><td>151</td><td>11%</td><td>130</td><td>13%</td><td>164</td></tr>
<tr><td>Comcast/NBCU</td><td>13%</td><td>158</td><td>13%</td><td>168</td><td>9%</td><td>87</td></tr>
<tr><td>Industry HHI</td><td></td><td>1240</td><td></td><td>1150</td><td></td><td>1606</td></tr>
</table>

<table>
<tr><th colspan="4">Television and Online Scripted Series Distribution by % of Series Self-Supplied</th></tr>
<tr><th></th><th>2016-2017</th><th>2017-2018</th><th>2018-2019</th></tr>
<tr><td>Disney</td><td>77%</td><td>64%</td><td rowspan="3">76%</td></tr>
<tr><td>Fox</td><td>87%</td><td>85%</td></tr>
<tr><td>Hulu[15]</td><td>56%</td><td>43%</td></tr>
<tr><td>ViacomCBS[16]</td><td>77%</td><td>79%</td><td>75%</td></tr>
<tr><td>Netflix</td><td>28%</td><td>37%</td><td>33%</td></tr>
<tr><td>AT&T/Time Warner[17]</td><td>80%</td><td>77%</td><td>83%</td></tr>
<tr><td>Comcast/NBCU</td><td>80%</td><td>83%</td><td>88%</td></tr>
<tr><td>All Other</td><td>62%</td><td>52%</td><td>48%</td></tr>
</table>

[10] It is unclear whether the Draft Guidelines are intended to apply to firms whose products or services may be complementary, if not straightforwardly vertically related. Subscription video on demand products from providers like Netflix may provide a complement to a traditional or virtual bundle of cable channels, while representing neither a clear vertical tie nor a horizontal substitute. The Draft Guidelines should take such complementary integration into account as well.
[11] Including Hearst-Disney series.
[12] Hulu series attributed to Disney-Fox starting in 2018-2019 when Disney-Fox gained majority ownership.
[13] Including 50% of CW series.
[14] Including 50% of CW series.
[15] Series from any of Hulu's owners (Disney, Fox, Comcast, AT&T) considered self-supplied.
[16] Series considered self-supplied if produced by either corporate owner.
[17] Series considered self-supplied if produced by either corporate owner.

The Draft Guidelines also use notably cautious language to describe the possibility of vertical merger enforcement, contributing to the perception that vertical mergers are often or usually pro-competitive. For instance, after outlining four factors for the Agencies to consider regarding unilateral foreclosure, the guidelines note, "Mergers for which *each* of these conditions are met *potentially* raise significant competitive concerns and *often* warrant scrutiny,"[18] rather than concluding that a merger that substantially lessens competition through increased profitability of foreclosure or raising rivals' costs should *always* be scrutinized. In addition, the Draft Guidelines incorporate potential positive impacts from consolidation even into the sections of the Guidelines regarding vertical harms, noting in the section on Coordinated Effects that elimination of double marginalization ("EDM") might reduce the risks of such coordination.[19] As the record developed through numerous approved mergers, and as academic discourse has illustrated,[20] vertical mergers pose significant harms to competition and should not be treated as exceptional.

<u>The Draft Guidelines' Deference to Efficiencies and Price Effects is Unsupported by Evidence</u>

The Draft Guidelines give unmerited validity and weight to price effects and so-called "efficiencies" when evaluating vertical mergers. For instance, the Draft Guidelines describe a process of evaluating the impact of unilateral conduct as follows: "Where sufficient data are available, the Agencies may construct economic models designed to quantify the likely unilateral price effects resulting from the merger…They also can incorporate the elimination of double marginalization (see Section 6) to give a likely net effect from changes to pricing incentives, as well as incorporate cognizable efficiencies…"[21] As noted above, the Draft Guidelines also state that EDM could reduce a vertical merger's risk of harm from coordinated effects. This description of a balancing test in which the likelihood of price increases from anti-competitive conduct is measured against likely price decreases from merger efficiencies and EDM is a key component of the "consumer welfare" standard.[22] However, the Draft Guidelines' acceptance of pricing models and company claims of efficiencies run counter to what academic study and years of real-world merger consequences have illustrated: merger after merger has promised efficiencies and lower prices but instead delivered *higher* prices and harm to existing and potential competition.

Economists increasingly dispute the notion of efficiencies as having legitimate merger-specific benefits. Studies have found, for instance, that "efficiencies of scale" commonly used to justify large mergers are not only elusive, but that merging firms have shown a consistent *decline* in efficiency post-merger.[23] The DOJ has also noted the difficulty of verifying and quantifying efficiencies "in part because much of the information relating to efficiencies is uniquely in the

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[18] US Department of Justice, *Joint Vertical Merger Guidelines* (Jan. 10, 2020) available at https://www.ftc.gov/system/files/documents/public_statements/1561715/p810034verticalmergerguidelines draft. (*"Joint Vertical Merger Guidelines"*). Emphasis added.
[19] *Id*. at 8.
[20] Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 Yale L. J. 1742 (2018) at 1969.
[21] *Supra* note 18, at 4.
[22] Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 Harv. L. Rev. 536 (2018) at 586.
[23] John Kwoka, *Do Mergers Improve Efficiency? Evidence from Restructuring the U.S. Electric Power Sector*, 28 Int. J. of Industrial Org. 645, (2007) at 647-646.

possession of the merging firms."[24] The theory of EDM, a "standard" benefit associated with vertical mergers, posits downward pricing pressure from two vertically-related firms who no longer each need to apply a markup on their products once merged.[25] However, economists have argued that numerous factors including product incompatibility and the ability to achieve similar benefits through private contracts may prevent realization of EDM benefits.[26] The DOJ and Federal Communications Commission ("FCC") themselves have questioned company claims of EDM benefits in numerous merger proceedings, including the Comcast-NBCU merger.[27] Moreover, evaluating efficiencies and EDM as merger benefits that can outweigh anti-competitive harms relies on the type of speculative economic models that have performed poorly when reviewed against real-world merger outcomes.

Two recent mergers illustrate the failure of such predictions. AT&T's $48.5 billion merger with satellite video company DirecTV (announced in 2014) and its $108.7 billion purchase of Time Warner Inc. several years later both purported to offer key consumer benefits associated with EDM. AT&T and DirecTV claimed that a key benefit of the merger would be the combined company's ability to offer integrated bundles of broadband, video, and wireless service, which DirecTV could not offer alone because of satellite technology's limitations. The companies argued that such a bundle would eliminate the double marginalization that occurred when each company separately applied its own markup to the respective components of the bundle. The FCC, which reviewed the merger, agreed that the merged company would be able to offer more competitive bundles that would put downward pressure on prices.[28] Instead of delivering on the promise of this economic theory, AT&T began to increase prices for DirecTV and broadband services almost immediately after the merger,[29] raising prices between $12 and $24 per year for video services.[30] In early 2019, the company announced that it would eliminate promotional discounts for millions of DIRECTV consumers, effectively increasing prices again.[31]

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[24] US Department of Justice, *1997 Merger Guidelines* at 28 (1997) available at https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11251.pdf.

[25] *United States v. AT&T Inc., DirecTV Group Holdings, LLC, and Time Warner, Inc.*, No. 1:17-cv-2511 (Memorandum Opinion of Hon. Richard J. Leon), at 6 (Aug. 13, 2018).

[26] Steven C. Salop & Daniel P. Culley, *Revising the U.S. Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners*, 4 J. of Antitrust Enforcement 1 (2016) at 14-15. https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2542&context=fac.

[27] DOJ Competitive Impact Statement at 30.

[28] Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, MB Docket No. 14-90, 30 FCC Rcd. 9131, ¶¶ 120-126 July 28, (2015) ("*AT&T-DIRECTV Order*").

[29] Philip Dampier, *AT&T Gets Stingy with DirecTV Promotions for Existing Customers; $100+ for TV-Only Service*, Stop the Cap (Jan. 27, 2016), https://stopthecap.com/2016/01/27/att-gets-stingy-with-directv-promotions-for-existing-customers-some-now-pay-100-for-tv-only-service/; Amit Chowdhry, *AT&T to Increase Grandfathered Unlimited Data Plans from $30 to $35*, Forbes (Dec. 2, 2015), https://www.forbes.com/sites/amitchowdhry/2015/12/02/att-to-increase-grandfathered-unlimited-data-plans-from-30-to-35/#151b004272a4; *How a DirecTV bill really works in 2016*, 404 TechSupport (June 6, 2016), https://www.404techsupport.com/2016/06/29/directv-bill-2016/.

[30] Drew Fitzgerald, *AT&T Wants to Be Big in Entertainment. First, It has a $49 Billion Problem to Fix*, The Wall Street Journal (Jan. 30, 2019), www.wsj.com/articles/at-t-wants-to-be-big-in-entertainment-first-it-has-a-49-billion-problem-to-fix-11548777413.

[31] Nicholas Jasinski, *AT&T Reports Earnings Wednesday. Here's what to expect.,* Barron's (Jan. 27, 2020), https://www.barrons.com/articles/att-reports-earnings-wednesday-what-to-expect-51580139772.

Next, when AT&T announced a plan to acquire Time Warner Inc.'s suite of valuable television networks and the Warner Bros. film and TV studio in 2016,[32] the companies claimed that the merger would lead to EDM and price decreases.[33] Though the DOJ was skeptical of the merger, noting the possible harms to competing MVPDs and vMVPDs, the agency conceded that the merger would result in cost savings to AT&T's video customers through EDM. Professor Carl Shapiro, testifying on behalf of the government, predicted that the EDM would result in a $1.20 per-subscriber, per-month decrease in the marginal cost of Turner content for DirecTV.[34] But instead of producing savings for customers, this merger has been followed by round after round of price increases on AT&T products. AT&T raised the base price for DirecTV Now streaming service by $5 less than a month after the transaction was completed,[35] raised administrative fees on wireless bills, rolled back promotional discounts, and ended the practice of pro-rated billing when customers cancel video or Internet service.[36] More prices hikes at DirecTV Now followed in 2019, along with decreases in the channel lineup.[37]

Predictive pricing models and claims of EDM were given significant consideration when the relevant agencies and courts weighed these mergers' supposed benefits against their potential harms, yet these pricing predictions failed to bear out. Beyond the negative price effects, the affected markets also witnessed non-price harms including decreased competition, variety, and choice, considerations that were under-weighted compared to the calculated price effects. For example, following the AT&T-Time Warner merger, the company shut down several streaming services serving distinct consumer niches, and began the process of withdrawing Warner content from Netflix to supply its own streaming platform, HBO Max.[38] AT&T also pulled HBO and Cinemax off of DISH and Sling TV while encouraging DISH subscribers to find "other ways" to access HBO, with the implication that they could access the services directly through AT&T-owned products, HBO Now or DirecTV Now. The impact of allowing two powerful firms in concentrated markets to combine also increases barriers to entry in content production to the detriment of consumers, creators, and competition, as discussed further below.

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[32] Arne Holst, *Number of Subscribers to Wireless Carriers in the U.S. From 1st Quarter 2013 to 3rd Quarter 2018, By Carrier*, Statista (Sept. 13, 2019), https://www.statista.com/statistics/283507/subscribers-to-top-wireless-carriers-in-the-us/.
[33] Post-Trial Brief of Defendants AT&T Inc., et al, *United States v. AT&T Inc., DirecTV Group Holdings, LLC, and Time Warner, Inc.*, No. 1:17-cv-02511 at 11-12 (May 3, 2018).
[34] Expert Report of Carl Shapiro, *United States v. AT&T Inc., DirecTV Group Holdings, LLC, and Time Warner, Inc.,* No. 1:17-cv-02511, at 63 (Feb. 2, 2018).
[35] Jon Brodkin, *AT&T Raises DirecTV Now Price – Again – After Promising Lower Post-Merger Bills*, ArsTechnica (Mar. 3, 2019), https://arstechnica.com/information-technology/2019/03/att-raises-directv-now-price-again-after-promising-lower-post-merger-bills/.
[36] Jon Brodkin, *AT&T Makes It More Expensive To Cancel DirecTV or Internet Service*, ArsTechnica (Dec. 3, 2018) https://arstechnica.com/information-technology/2018/12/att-makes-it-more-expensive-to-cancel-directv-or-internet-service/.
[37] Janko Roettgers, *AT&T TV Now Price Hike Coming Next Month, Base Package to Cost $65,* Variety *(Oct. 18, 2019),* https://variety.com/2019/digital/news/att-tv-now-price-hike-directv-now-1203375388/; Tom McKay, *AT&T Is Jacking Up the Price of Its DirecTV Now Streaming Service By $5 a Month*, Gizmodo (July 1, 2018), https://gizmodo.com/at-t-is-jacking-up-the-price-of-its-directv-now-streami-1827273526.
[38] Todd Spangler, *'Friends' to Leave Netflix for WarnerMedia's HBO Max Streaming Service in 2020,* Variety (July 9, 2019), https://variety.com/2019/digital/news/warnermedia-hbo-max-friends-exclusive-streaming-1203262335/.

In order to be accorded any weight with regulators, a merger benefit must be both merger-specific and verifiable.[39] Academic analysis and real-world outcomes form a compelling body of evidence that EDM and short-term price-based efficiencies are unreliable and unverifiable metrics for analyzing the competitive effects of vertical integration. As a result, such claims should be greatly restricted in their use and subject to significantly heightened scrutiny. Agencies should move away from the predictive models that have performed so poorly in practice.

<u>Insufficient Consideration of New Entry and Market Development</u>

The Draft Guidelines emphasize efficiencies and EDM as possible merger benefits, and focus on price effects from the potential harms of foreclosure or raising rivals' costs, access to competitively sensitive information, and coordination between rival firms. Prior mergers and ongoing market developments illustrate that preserving new entry and innovation in markets have been overlooked by enforcers and regulators, leaving powerful firms in concentrated markets with the ability to control those markets' development into the future. The Draft Guidelines should give significantly more consideration to these issues.

As noted above, the last several decades in the media industry have been marked by increasing vertical integration between video content production and distribution. The newest iteration of this comes as video content distribution has significantly expanded online. In the 2013-2014 TV season, sixteen professional scripted series were distributed online; that number increased to over 100 in 2018-2019.[40] Netflix has thus far been the dominant distributor of online video, and originally increased competition by providing a third-party outlet for unaffiliated content and non-vertically integrated producers. However, Netflix has been increasingly producing content in-house, and the new and forthcoming streaming services from Disney, AT&T, Comcast, and Apple portend a significant increase in vertical self-supply. Disney, AT&T, and Comcast have all announced that they will withdraw affiliated content from unaffiliated third-party streaming services in order to supply their own, while Netflix has ramped up its own production to compensate for the expected loss of licensed content.

The result will be a small group of powerful companies focused on supplying their own distribution channels, often with the ability to tie their services to other products, raising powerful barriers to entry in content production and decreasing competition from independent producers. Disney has already announced plans to bundle Disney+, Hulu, and ESPN+[41] and to offer Disney+ at no additional cost to unlimited Verizon wireless subscribers,[42] while Apple offers its Apple+ service at no additional cost to consumers who purchase various Apple devices.[43] AT&T and Comcast have vertically integrated further downstream into Internet and cable distribution, which compounds the issue and gives these companies more tools they can use to control the

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[39] See Comcast-NBCU Order, 26 FCC Rcd. at 4331.
[40] WGAW analysis of covered scripted programming.
[41] Dade Hayes, *Disney Confirms Disney Plus-Hulu-ESPN Plus Bundle for $12.99 A Month,* Deadline (Aug. 6, 2019), https://deadline.com/2019/08/disney-confirms-disney-plus-hulu-espn-plus-bundle-for-12-99-a-month-1202662794/.
[42] Travis Clark, *How to Get a Free Year of Disney Plus if You're a Verizon Customer,* Business Insider (Nov. 12, 2019), https://www.businessinsider.com/verizon-offering-customers-free-year-of-disney-plus-details-2019-10.
[43] Erin Carson, *You can get a free year of Apple TV Plus if you buy an iPhone, iPad or Mac,* cnet (Sept. 10, 2019), https://www.cnet.com/news/you-can-get-a-free-year-of-apple-tv-plus-if-you-buy-an-iphone-ipad-or-mac/.

direction of markets, such as bundling streaming services with other products or prioritizing affiliated services through user interfaces or preferential exemption from data caps. For instance, Disney+ is not supported on the Comcast Xfinity platform, while AT&T has prioritized its affiliated online cable bundle AT&T TV Now (formerly DirecTV now) by exempting the service from AT&T's wireless Internet data caps.[44] These tactics may or may not have clear short-term price impacts, as dominant firms may have other incentives to temporarily price products low, but they can have a profound influence on the ability of new firms to enter the market and on the ability of rival products to compete. Similarly, by focusing heavily on whether firms would find it profitable to foreclose rivals, the Draft Guidelines inadequately consider the possibility that a firm could forego short-term profits in order to capture more of the market and preclude future competition. For example, AT&T recently disclosed that its decision to withhold Time Warner-affiliated content from third-party streaming services cost the company $1.2 billion in quarterly revenue and contributed to an 8% year-over-year decline for the Warner Bros. segment, despite the company's claim that its goal post-merger would continue to be wide distribution of Time Warner content.[45]

Independent producers that lack distribution outlets may have difficulty finding buyers for their content. If they do find buyers, their content may be de-prioritized by a competing streaming service's user interface in much the same manner as a vertically-integrated cable company preferencing its own channels in the channel lineup, or Amazon prioritizing its own branded products in search results. Yet consumer "subscription fatigue" essentially ensures that new paid streaming services will have difficulty breaking into the market and suggests that streaming attrition and consolidation will further diminish competition in online video going forward. Currently, the submarket for online series distribution is highly concentrated, with Netflix commanding a 50% market share. While the forthcoming streaming services will increase competition to a degree, these factors will allow vertically-integrated conglomerates to maintain control of the market.

Online Scripted Series by Market Share and HHI 2018-2019 Season		
	Market Share	HHI
Netflix	50%	2500
Amazon	14%	208
Disney	12%	133
ViacomCBS	7%	45
Google	6%	33
Facebook	4%	15
AT&T/Time Warner	3%	8
Industry HHI		2953

The mechanisms for such control over the market continue to evolve and change, and the Draft Guidelines must be cognizant of vertically-integrated companies' abilities to utilize measures like

[44] Karl Bode, *AT&T Lets Users Avoid Broadband Caps…If they use AT&T's Own Streaming Service,* techdirt (Dec. 21, 2018), https://www.techdirt.com/articles/20181220/08015941270/att-lets-users-avoid-broadband-capsif-they-use-ats-own-streaming-service.shtml.
[45] Jon Brodkin, *AT&T is doing exactly what it told Congress it wouldn't do with Time Warner*, ArsTechnica (Feb. 4, 2020), https://arstechnica.com/information-technology/2020/02/att-lost-1-2b-by-preventing-time-warner-shows-from-airing-on-netflix/.

product incompatibility, product bundling, user interfaces, and more to reduce future or potential competition in markets.

The Draft Guidelines Fail to Adequately Consider Labor Markets

In addition to neglecting non-price issues like preserving new entry and variety, there is growing acknowledgement among economists and agencies that antitrust enforcement has given inadequate attention to labor markets. No merger has ever been blocked on the grounds of reduced labor market competition,[46] and the FTC, for instance, has never even challenged a merger over such concerns.[47] As a result of this neglect, wages are stagnant and workers change jobs at lower rates,[48] while employers capture ever greater surplus from employees and enjoy record profits. FTC Chairman Joseph Simons announced in October 2018 that FTC staff have been instructed to "look for potential effects on the labor market with every merger they review."[49] However, the Guidelines bear no mention of labor markets at all, or of buyer power. This is a major oversight that the FTC must correct; labor markets should be a key piece of any merger review including that of vertical mergers, and must be evaluated separately to account for market characteristics that can decrease competition below the level signified by market shares, such as search friction.

The Disney-Fox and AT&T-Time Warner mergers, for example, have already resulted in harm to labor markets, and promise more in the future. As an initial matter, both mergers were followed by significant job loss: AT&T's massive debt load following the Time Warner purchase and the related pressure to cut costs led the merged company to plan a 4% reduction in labor costs in 2020,[50] on top of nearly 28,000 reported layoffs since late 2017.[51] Less than a year after the Disney-Fox merger's official closure, Disney has laid off close to 400 workers; analysts have predicted that the merger will eventually cost 3,000 jobs.[52] In addition, each merger will impact the labor market for writing services by enabling vertical self-supply of each company's respective streaming service, HBO Max and Disney+.

[46] Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 Indiana L. Rev. 1031 (2019) at 1062.
[47] *Oversight of the Enforcement of the Antitrust Laws: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. at 22 (2018) (Simons' Responses to Questions for the Record), Chairman, Federal Trade Commission).
[48] *Supra* note 46 at 1039 and 1047; Council of Economic Advisers, Exec. Office of The President, Benefits of Competition and Indicators of Market Power at 5 (Apr. 2016).
[49] *Supra* note 47 at 20.
[50] Edited Transcript, AT&T Inc. at Wells Fargo TMT West Conference (Dec. 3, 2019), https://investors.att.com/~/media/Files/A/ATT-IR/events-and-presentations/Final%20Wells%20Fargo%20transcript%2012319.pdf
[51] Stephen Gandel, *AT&T Got a Giant Tax Cut But Has Laid Off Thousands, Union Says,* CBS News (Aug. 28, 2019), https://www.cbsnews.com/news/at-t-got-a-giant-tax-cut-but-has-laid-off-thousands-union-says/; Karl Bode, *AT&T Preps for New layoffs Despite Billions in Tax Breaks and Regulatory Favors,* Vice (Jan. 8, 2019), https://motherboard.vice.com/en_us/article/nepxeg/atandt-preps-for-new-layoffs-despite-billions-in-tax-breaks-and-regulatory-favors; Joe Flint, *AT&T Breaks Up Turner, Bulks Up Warner Bros. in Major WarnerMedia Overhaul,* Wall Street Journal (Mar. 4, 2019), https://www.wsj.com/articles/at-t-shakes-up-warner-media-unit-11551708372?mod=hp_lead_pos1.
[52] Matthew Blake, *Disney Plans to Lay off 130 More Workers,* Los Angeles Business Journal (Sept. 18, 2019), https://labusinessjournal.com/news/2019/sep/18/disney-lays-130-more/.

For writers who create professional audiovisual content, the few large television, digital media, and film producer/employers exercise significant labor market power, compounded by search friction that limits competition between buyers of labor. As noted above, three companies distributed 62% of TV and digital series in 2018-2019, illustrating the tight control large media conglomerates have over employment. Creative labor markets in the entertainment industry are also free agent markets in which finding work is notoriously difficult. Not only is demand irregularly timed and skills highly variegated, but idiosyncratic preferences play an outsized role in matching talent and employers. For instance, writers often specialize in writing drama or comedy and develop professional reputations for writing specific styles. On television series staffs, writers progress from the entry-level position of staff writer through writer-producer roles that include associate producer, producer, co-executive producer, and executive producer. Within the broad market there is only a subset of jobs available at each level. All of these factors enhance the buyer power of writers' employers, and emphasize that labor markets should not be analyzed under the same model as product markets.

The cost of searching for these jobs is so burdensome that large employers can hold down compensation without losing talent. For example, the median weekly compensation of writer-producers on television and online series has declined over the past several years—23% between 2014 and 2016, and 16% between 2014 and 2018—at a time of record profits in the entertainment industry and peak demand for programming.[53] Disney has also used its market power to pressure content producers and creators to accept a less-lucrative profit participation model for new series.[54] As discussed above, the mergers of Disney-Fox and AT&T-Time Warner have paved the way for each company to offer its own affiliated streaming service, to be supplied with its own content. This raises barriers to entry for new competitors, promising to reduce competition among content producers, and in turn increasing employer market power over writers. This not only puts further downward pressure on writers' compensation, but also limits creativity and choice when few companies decide what projects will be made and which stories will be told.

The Draft Guidelines provide an opportunity to include labor market analysis explicitly as a key part of every merger review, and to explore the ways in which vertical integration specifically impacts labor markets and buyer markets, not only product markets. The DOJ and FTC's Horizontal Merger Guidelines clarify equal application of antitrust law to both buyer and seller sides of the market,[55] yet the Draft Guidelines fail to even mention this key area of concern. It is clear that both horizontal and vertical consolidation has harmed competition in entertainment industry labor markets, a trend that promises to continue unless regulators give due attention to this area of impact in mergers.

Conclusion

U.S. antitrust enforcement has failed to prevent harmful concentration in markets across the economy. Revising the 1984 Non-Horizontal Guidelines is a necessary step in re-invigorating enforcement, but any new Vertical Guidelines must be guided by the outcomes of approved mergers that have caused harm and the failures of those merger reviews. New Vertical

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[53] WGAW analysis.
[54] Stephen Battaglio, *The End of the Backend? Disney wants to limit profit participation on its new TV shows,* Los Angeles Times (Sept. 12, 2019), https://www.latimes.com/entertainment-arts/business/story/2019-09-12/disney-tv-shows-backend-profit-participation-changes.
[55] US Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* at 32 (Aug. 29, 2010) available at https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf.

Guidelines should incorporate a presumption that large mergers in concentrated markets are anti-competitive, give minimal weight to economic predictions of “efficiencies” such as the elimination of double marginalization, and elevate attention to the ways that vertical mergers can raise barriers to entry and impact labor markets. The Draft Guidelines issued on January 20 are insufficient to protect competition and should be revised.

Respectfully submitted,

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