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CLIENT ALERT

FTC and DOJ Issue Draft of Long-Anticipated Vertical Merger Guidelines

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The Federal Trade Commission and the Antitrust Division of the Department of Justice recently released a long-anticipated draft update to the agencies' Vertical Merger Guidelines. The draft Guidelines—which come on the heels of the DOJ's failed bid to block the AT&T/Time Warner merger and several recent and very public skirmishes among the FTC Commissioners in vertical transactions—are the first update to the agencies' guidance on vertical merger enforcement in nearly four decades.

The draft Guidelines set forth how the two federal antitrust enforcement agencies will review vertical mergers and acquisitions (i.e., mergers and acquisitions that combine companies at different levels of the same supply chain) to evaluate whether they violate the antitrust laws. The draft Guidelines:

- Indicate that the agencies will evaluate market shares and concentration—measured using the same methodology described in the agencies' long-standing Horizontal Merger Guidelines—but not use these metrics as a "rigid screen" for procompetitive and anticompetitive mergers. The Guidelines do include a "soft" safe harbor, providing that 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 [e.g., an input supplied into the relevant market] is used in less than 20 percent of the relevant market."
- Identify both unilateral and coordinated effects that the agencies will evaluate in determining whether to challenge a transaction. Unilateral harms include raising rivals' costs, input foreclosure, and improper sharing of competitively sensitive data. Coordinated effects include changing a market's structure such that it is more susceptible to coordination and creating the ability to eliminate nascent competitors that would otherwise prevent coordination.
- Identify certain efficiencies that may reduce competitive concerns with vertical mergers, including the elimination of double marginalization, combining complementary functions, and eliminating contracting friction. Under the draft Guidelines, the agencies will not challenge a proposed vertical transaction "if cognizable efficiencies are of a character and magnitude such that the merger is unlikely to be anticompetitive in any relevant market."

In our view, the draft Guidelines may be most remarkable for just how unremarkable they are—breaking no significant new ground—but nevertheless clearing away the outdated 1984 guidelines and adding some additional transparency to vertical merger enforcement.

Although there appears to be little that is controversial in the draft Guidelines, there are certain questions yet to be answered. In particular, it will be important to see how the agencies use these Guidelines in practice. For example, while the draft Guidelines establish a safe harbor for parties with market shares of less than 20%, it bears watching whether, in practice, that same provision creates an antitrust danger zone for companies with shares above that level. And it will be interesting to see whether the concerns raised by the two Democratic Commissioners, including that the Guidelines fail to establish a more pro-enforcement environment, will trigger public comments and lead the agencies to further revise the draft Guidelines before they are finalized.

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The draft Guidelines will be open for public comment until February 11, 2020. For more information or for assistance in submitting comments about the Guidelines to the agencies, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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