

CLIENT ALERT

A Partisan Tale: The FTC's Vertical Merger Enforcement Commentary

Jan.06.2021

In a hotly contested 3-to-2 vote, the Federal Trade Commission in December 2020 issued a 43-page [Commentary on Vertical Merger Enforcement](#) (“Commentary”) that examines the agency’s prior vertical merger enforcement actions. While the Commentary does not break new ground, it helpfully compiles the FTC’s vertical enforcement record from the past quarter century and summarizes the Commission’s theories of harm and analysis of both anticompetitive effects (*e.g.*, foreclosure and raising rivals’ costs) and pro-competitive benefits (*e.g.*, elimination of double marginalization and efficiencies) in vertical merger reviews. Most notably, the Commissioners’ statements on the Commentary once again reveal a deep split—along party lines—about the agency’s approach to vertical merger enforcement and remedies, and portend potentially substantial enforcement changes under the Biden administration.

In addition to voting with Chairman Simons to issue the Commentary, Commissioners Phillips and Wilson explained in a [concurring statement](#) that the Commentary is intended to promote transparency and facilitate both the predictability and credibility of the Commission’s vertical merger review process.

By contrast, as they did when the revised Vertical Merger Guidelines were released in June 2020, Commissioners Chopra and Slaughter opposed issuing the Commentary and issued a vigorous [dissenting statement](#). They described the Commentary as “flawed” because it supports “the same status quo thinking that has allowed decades of vertical consolidation to go uninvestigated and unchallenged,” and because it highlights the agency’s use of behavioral remedies, the efficacy of which, they say, “is suspect.”

The last paragraph of the dissenting statement warns:

We strongly caution the market against relying on the Vertical Merger Guidelines and the Vertical Merger Commentary as an indication of how the FTC will act upon past, present, and future transactions. Moving forward, we need to aggressively enforce against the harms of vertical mergers. We look forward to turning the page on the era of lax oversight and to beginning to investigate, analyze, and enforce the antitrust laws against vertical mergers with vigor.

Commissioners Phillips and Wilson criticized the dissenting Commissioners in their concurring statement, noting that “[a]ny proposals for a new approach to vertical merger enforcement, which our colleagues have yet to articulate, would need to take into account and grapple with the law, economics, and the evidence in each case. Until then, vague promises of a dramatic and undefined change in enforcement ring hollow.”

Although the FTC has not been traditionally considered a partisan agency, the Commissioners’ statements reveal fundamental and recurring party-line disagreements on approaches to vertical merger enforcement and remedies, exhibited in several instances since 2017 (*e.g.*, the Staples/Essendant consent, the Fresenius/NxStage consent, and draft and final Vertical Merger

Guidelines). Under the incoming Biden administration, vertical merger enforcement and remedies may change significantly if a third Commissioner shares the views of Commissioners Chopra and Slaughter.

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