

CLIENT ALERT

Antitrust Agencies Launch Vertical Merger Guidelines, Still Fall Flat with Two FTC Commissioners

July 1, 2020

The Department of Justice and Federal Trade Commission issued final [updated Vertical Merger Guidelines](#) yesterday. Although the Agencies had planned to hold a second joint public workshop on the draft Guidelines and several Senators in June [urged the Agencies](#) to continue the public process of updating the Guidelines to garner bipartisan support, the Agencies issued the final Guidelines on June 30, with two FTC Commissioners opposed. The final Guidelines significantly revise the [draft Guidelines](#) issued in January—including eliminating a proposed “soft” safe harbor, as Senators and other critics had urged—and now replace obsolete Non-Horizontal Merger Guidelines from 1984.

Final Vertical Merger Guidelines

The final Guidelines set out the Agencies’ “analytical techniques, practices, and enforcement policies” for vertical mergers. The final Guidelines make clear that “vertical mergers” is a broad term that includes mergers of firms at different levels of the same supply chain; “diagonal mergers,” meaning those that combine firms at different levels of competing supply chains; and mergers involving complementary products and services. Overall, the final Guidelines, like the draft Guidelines, are not particularly groundbreaking and, indeed, the Agencies’ [press release](#) states that the “new Guidelines reflect [their] current enforcement approach.”

The final Guidelines reflect significant changes from the draft Guidelines, apparently incorporating input received during the comment period, though surely not enough to satisfy all commenters, or critics. In particular, the final Guidelines:

- **Eliminate the 20% Market Share Safe Harbor.** The draft Guidelines’ 20% market share-based safe harbor was criticized by some for being set too low compared to the Agencies’ actual practice and the 30% safe harbor in Europe. On the other hand, others criticized the existence of any safe harbor, even the “soft” safe harbor in the draft Guidelines. The final Guidelines eliminate the safe harbor, with the FTC majority pointing to the concerns about the safe harbor by Commissioner Slaughter, state attorneys general, and other commenters.
- **Elevate the Position of Competitive Effects.** The draft Guidelines discussed the competitive effects of vertical mergers in Section 4. The final Guidelines elevate that discussion to the first section after the introduction. Presumably, as they did when updating the Horizontal Merger Guidelines in 2010, the Agencies’ intended to elevate the importance and focus of ultimately assessing competitive effects over defining markets and calculating market shares and concentration levels.
- **Raise the Bar for Elimination of Double Marginalization Claims.** The final Guidelines combine the discussion of the elimination of double marginalization (EDM) and efficiencies in a new “Procompetitive Benefits” section, and now indicate that the Agencies will evaluate EDM under a heightened standard—approaching their standard for evaluating efficiencies—by requiring EDM claims to be merger-specific and substantiated. Some commenters criticized the draft Guidelines for suggesting that EDM would be presumed in vertical mergers. The final Guidelines specify that it is “incumbent upon merging firms to provide substantiation” for EDM claims, but state that the Agencies may “independently attempt to quantify” EDM. Additionally, the final Guidelines state that the Agencies will assess the

merger-specificity of EDM claims, but provide that they will not reject the merger-specificity of EDM claims “solely because [EDM] could theoretically be achieved but for the merger, if such practices are not reflected in documentary evidence.”

- **Expanded Discussions and Examples.** The final Guidelines also elaborate on several topics compared to the draft Guidelines. This includes an expanded discussion of unilateral effects, and additional and more detailed examples of potential competitive issues in vertical mergers. For example, the final Guidelines elaborate on how the Agencies will assess a vertically integrated firm’s ability and incentive to harm competition; the offsetting considerations the Agencies will analyze, like downward pricing pressure from EDM; and provide hypothetical examples of how mergers of complements and diagonal mergers may harm competition.

FTC Majority Statement

Chairman Simons and Commissioners Phillips and Wilson issued a majority statement touting the final Guidelines for reflecting “accumulated knowledge from over 35 years of experience,” economic analysis, 74 public comments, the joint workshop, and input from the FTC’s competition hearings. Substantively, the majority highlights that the new Guidelines “substantially expand” on unilateral theories of harm; “present a broader treatment” of potential coordinated effects; address the elimination of potential competition; and explain how vertical mergers can lower prices to consumers through the elimination of double marginalization, a type of cost saving the majority recognizes as distinct from efficiency claims arising in horizontal mergers. Finally, the majority encourages the academic and professional community to continue to study the effects of vertical mergers.

Two Dissents

The press release for the new Guidelines highlighted the “strong collaboration” of the DOJ and FTC in developing the revised Guidelines. But the FTC issued the final Guidelines on a 3-2 vote, with Commissioners Chopra and Slaughter writing dissenting statements.

Commissioner Chopra’s dissent focuses on his belief that the Guidelines “are incomplete and rely too heavily on unproven assumptions” and do not address the ways in which vertical transactions may suppress competition or create barriers to entry. He writes that the Guidelines make assumptions based on contested economic theories and ideology rather than on historical, real-world facts. Commissioner Chopra points to the rise of vertically integrated tech giants, arguing that they have effectively curbed new innovation and entrepreneurship. He contends that the Guidelines “support the status-quo ideological belief that vertical mergers are presumptively benign, and even beneficial,” noting that any such benefits instead “often accrue to incumbents at the expense of the competitive market.”

Commissioner Slaughter’s dissent focuses on procedural and substantive criticisms. On process, she argues that additional time and public comment were necessary before finalizing the Guidelines and would have “demonstrated the FTC’s commitment to transparency and good government.” On substance, Commissioner Slaughter argues that the Guidelines over-emphasize the benefits of vertical mergers while under-emphasizing the potential anticompetitive harms; fail to identify the conditions most likely to present competitive concerns; should establish “explicit presumptions of harm”; and take an “overly optimistic” treatment of EDM. Finally, the Commissioner states that omitted discussion of buy-side concerns, remedies, and regulatory evasion prevented her from supporting the new Guidelines.

Take-Aways

The final Guidelines do not break significant new ground, but nonetheless emphasize that the Agencies are increasingly focused on vertical mergers, resulting in such transactions facing more intense and lengthier scrutiny, potentially delaying closing. Moreover, although the final Guidelines generally reflect current Agency practice, actual vertical merger enforcement at the FTC is divided—like the vote to issue these final Guidelines: the majority of FTC Commissioners do indeed assess vertical mergers through the lens of these Guidelines, but the two dissenting Commissioners have repeatedly dissented in prior vertical-merger enforcement actions, calling for stronger enforcement, remedies, and even litigation, consistent with the views in their dissents here. As such, these Guidelines—like the composition of the Commission itself—could change after the November elections if there is a change in Administration, which could mean these Guidelines might not be “final” for long.

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