

Antitrust Agencies Issue Draft Vertical Merger Guidelines

The U.S. Antitrust Agencies issued new draft vertical merger guidelines on January 10, 2020 (the “Guidelines”), providing a long overdue replacement for the Non-Horizontal Merger Guidelines from 1984. The Guidelines are designed to explain to businesses and their advisors how proposed mergers might be reviewed and to reduce uncertainty for dealmakers contemplating vertical mergers, which have attracted increased attention in recent years. While not binding on the courts, such guidelines often serve as a roadmap for judges tasked with adjudicating complex mergers.

The Guidelines describe the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice’s (the “Agencies”) current enforcement approach and analytic framework for vertical mergers, that is mergers between companies at different stages of the same supply chain, such as manufacturers and distributors, as opposed to horizontal mergers between competitors. The Agencies are seeking public comment on these guidelines until February 11, 2020, before issuing a final version. In summary, the Guidelines:

- Begin by describing a two-pronged market analysis: first, identifying relevant markets in which a vertical merger may substantially lessen competition and, next, specifying “related products” or services supplied by the merged firm that its rivals need to compete effectively (such as an input, means of distribution or access to customers).
- Discuss evaluating market shares and market concentration alongside other available evidence, including the competitive significance of the related products.
- Indicate that the Agencies are unlikely to challenge a merger where the parties have less than a 20 percent share in the relevant market and the related product is used in less than 20 percent of the relevant market.
- Identify a framework for analyzing anticompetitive effects, including foreclosure of competitors in the relevant market, incentives to raise rivals’ costs, access to upstream and downstream rivals’ competitively sensitive information, ability to harm a maverick competitor, and potential coordination with rivals.
- Confirm that vertical mergers with sufficient cognizable efficiencies are unlikely to be anticompetitive and acknowledge that the elimination of double marginalization that may result from vertical mergers may benefit the merged firm and engender lower prices for its customers.
- Notably, the Guidelines fail to address the Agencies’ approach to identifying appropriate remedies. The Agencies have historically used conduct remedies, setting limitations on the merged company’s business practices, to resolve vertical merger concerns but many enforcers prefer structural remedies, where divestitures are required to obtain antitrust approval.

The Guidelines are available [here](#).

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email Helene Banks at 212.701.3439 or hbanks@cahill.com; Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; Elai Katz at 212.701.3039 or ekatz@cahill.com; Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; Ross Sturman at 212.701.3831 or rsturman@cahill.com; or Lauren Rackow at 212.701.3725 or lrackow@cahill.com.

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