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# Client Alert

**January 2020**

## FTC and DOJ Release Vertical Merger Guidelines

**What Happened:** Over the weekend, the Federal Trade Commission and the Department of Justice's Antitrust Division released draft Vertical Merger Guidelines. Vertical mergers combine companies at different levels of the same supply chain.

**The Bottom Line:** The new guidelines replace the outdated guidelines from 1984, outlining current FTC and DOJ analytical practices. Clients contemplating a merger or acquisition with a supplier or distributor should reach out to counsel early in the deal to discuss the application of these new guidelines.

**The Full Story:**

On January 10, 2020, the agencies released draft guidelines, providing a new review roadmap. These new guidelines largely rely on the Horizontal Merger Guidelines for market definition. However, they set forth the following vertical merger-specific practices.

### Agencies Are Unlikely to Challenge Vertical Mergers Where Parties Have Less than 20 Percent Share

According to the new guidelines, 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 is used in less than 20 percent of the relevant market." While this is consistent with agency practice, this new benchmark differs from the 1984 guidelines.

Democratic FTC Commissioner Rebecca Slaughter took issue with the 20 percent threshold, regarding it as an imprudent safe harbor. She joined fellow Democrat Rohit Chopra in declining to endorse the new guidelines. However, the guidelines do not rule out challenging mergers with small shares.

### Agencies Analyze Factors Related to Foreclosure

During merger review, the agencies will analyze whether the combined company may stop selling inputs to competitors or, alternatively, raise prices or degrade quality. The updated guidelines include identifying factors to determine whether this type of foreclosure could occur. The FTC and DOJ may consider whether:

(1) The merged company could cause rivals to lose sales (or the incentive to innovate) by foreclosure and/or raising prices on supplies;

(2) The merged company would benefit from this foreclosure and/or increased costs;

(3) The merged company may profit even though foreclosure and/or raising prices was not profitable prior to the merger; and

(4) The magnitude of this behavior is substantial.

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If each of these factors is met, potential scrutiny is increased. Therefore, if a deal is likely to meet these factors, it is especially important for counsel to work with clients to identify procompetitive benefits of the transaction. The agencies will continue to rely on the parties to identify efficiencies. Proving that they outweigh potential anticompetitive effects is paramount.

**Agencies Remain Concerned with the Sharing of Competitively Sensitive Information**

The agencies also remain concerned that the sharing of competitively sensitive information will lead to anticompetitive effects by allowing the upstream or downstream companies access to information about the business practices of their competitors. This can lead to preemptive or quick reactions to competitor business actions, leading those competitors to see less value in taking procompetitive actions. According to the draft guidelines, it also can facilitate "(a) reaching a tacit agreement among market participants, (b) detecting cheating on such an agreement, or (c) punishing cheating firms."

The public comment period is open until February 11, 2020. The merger review and counseling practice at Hunton Andrews Kurth LLP will continue to closely monitor related developments. Please contact us if you have any questions or would like further information.

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