

## FTC, DOJ RELEASE DRAFT VERTICAL MERGER GUIDELINES

On January 10, 2020, the Federal Trade Commission (“FTC”) and Antitrust Division of the U.S. Department of Justice (“DOJ”) (collectively, the “Federal Antitrust Enforcers”) proposed their first new vertical merger guidelines (the “Draft Vertical Merger Guidelines”) in 36 years. The Draft Vertical Merger Guidelines, which will supersede and replace the 1984 DOJ “Non-Horizontal Merger Guidelines,” provide guidance to the business community and antitrust practitioners on the analytical processes underlying the FTC and DOJ’s enforcement decisions on vertical mergers. This updated guidance comes on the heels of the DOJ litigating and losing its first major vertical merger case in more than 40 years when it recently challenged AT&T’s merger with Time Warner.

A vertical merger combines firms or assets that operate at different stages of the same supply chain. In health care, a classic example of a vertical merger is the acquisition of a physician group by a hospital or health system. Similarly, vertical mergers can occur at different points in the supply chain, such as when a health system acquires a post-acute care provider or a health plan.

Historically, vertical mergers have been seen as procompetitive because they tend to create efficiencies in the supply chain and eliminate double marginalization. But as detailed in the Draft Vertical Merger Guidelines, the FTC and DOJ are concerned that vertical mergers may foreclose a more efficient rival post-transaction or may raise that rival’s costs. For example, if a health system acquires a large multi-specialty physician group, a more efficient rival health system may be foreclosed in the future from competing due to the loss of the physician group’s referrals.

### VERTICAL MERGER GUIDELINES

The Draft Vertical Merger Guidelines create a quasi-safe harbor for mergers when the parties have less than 20 percent market share for a relevant product (i.e., general acute care inpatient services) and less than 20 percent market share for a related product (i.e., physician services and the related referrals).

While the Draft Vertical Merger Guidelines are a welcome update from the 1984 guidelines and detail the current process the FTC and DOJ use to analyze vertical mergers, the Draft Vertical Merger Guidelines are squishy enough and give the FTC and DOJ enough flexibility to provide limited comfort to merging parties. Indeed, the more interesting aspect will be whether the FTC and DOJ become more active and aggressive in investigating and challenging vertical mergers. In the health care arena, the FTC and DOJ have let two large vertical mergers proceed in the last couple of years with limited concessions—CVS/Aetna and Cigna/Express Scripts. To this end, it is interesting to note that both of the FTC’s Democratic commissioners abstained from voting on the Draft Vertical Merger Guidelines. Instead, each issued statements saying that while they agreed that the old guidelines should be rewritten, these Draft Vertical Merger Guidelines were too “lax” and failed to adequately protect consumers from potential anticompetitive harm.

Comments on the draft guidelines can be submitted via email ([verticalmergerguidelines@ftc.gov](mailto:verticalmergerguidelines@ftc.gov) or [verticalmergerguidelines@usdoj.gov](mailto:verticalmergerguidelines@usdoj.gov)) and must be received no later than February 11, 2020. Following the submission of written comments, the FTC and DOJ may make changes and finalize the new Vertical Merger Guidelines.

### PRACTICAL TAKEAWAYS

- As lines blur in health care and more health systems look to vertically integrate through acquisitions, it is important to understand the competitive dynamics in all relevant markets and understand whether the acquisition will harm competition.
- Coupling this new guidance with the DOJ’s first litigation of a vertical merger case in 40 years, it is likely that we will see a renewed focus by the FTC and DOJ on investigating and challenging vertical mergers. This is especially true in the health care industry where more and more economic studies and academic papers conclude that both vertical and horizontal mergers are leading to increased health care costs.
- While historically antitrust enforcement has stayed above the political fray, given the partisan split among the FTC commissioners, it is possible that in the future we see a more politicized discussion surrounding the antitrust laws and perhaps even a policy shift towards a more aggressive overall enforcement environment.

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