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DOJ and FTC Issue Final Vertical Merger Review Guidelines

On Tuesday, June 30, the Department of Justice's Antitrust Division and the Federal Trade Commission issued new Vertical Merger Guidelines (the "Guidelines").¹ Vertical mergers involve the combination of firms operating at different levels of the same supply chain, such as a manufacturer acquiring its supplier or its distributor. The Guidelines are intended to provide businesses with guidance regarding how the agencies analyze vertical mergers and the circumstances in which the agencies might decide to challenge such a vertical merger. The Guidelines are largely consistent with the draft version initially released for public comment on January 10; however, there are some key changes.²

KEY CHANGES

- **Elimination of Safe Harbor Provision**

Notably, the draft provision that would have established a safe harbor for vertical mergers was eliminated from the final Guidelines. Based on the assumption that firms with low market shares are unlikely to be able to harm competition, the provision would have established a presumption whereby agencies would be unlikely to challenge a vertical merger where the parties to the transaction had less than a 20% share of the relevant market and the related product was used in less than 20% of the relevant market.³

Critics alternately derided the draft provision as being too high and permissive of possibly anticompetitive vertical mergers, or too low and likely to capture vertical mergers posing little competitive risk. In particular, a group of Democratic Senators (including Amy Klobuchar (D-MN),⁴ Patrick Leahy (D-VT), Richard Blumenthal (D-CT), Cory Booker (D-NJ), Mazie Hirono (D-HI), Jeffrey Merkley (D-OR), Tammy Baldwin (D-WI), and Edward Markey (D-MA)) addressed the DOJ and FTC in an open letter requesting, among other things, the elimination of the proposed 20% market share threshold.⁵ In their letter, the Senators cited concerns regarding the empirical basis for the 20% threshold and questioned whether market concentration, rather than market share, would be a more appropriate basis for a safe harbor.⁶ Notably, these concerns were also



expressed by FTC Commissioner Rebecca Slaughter, who issued a dissenting statement in conjunction with the release of the draft Guidelines.⁷ FTC Commissioner Rohit Chopra also dissented, specifically citing the possibility of vertical transactions increasing barriers to entry.⁸

- **Expanded Analysis of Anticompetitive Unilateral Effects:** The draft Guidelines provided a detailed analysis of the possible anticompetitive unilateral effects that may lead to an investigation into a vertical merger, specifically the potential for merged firms to foreclose competition and raise rivals' costs. The draft Guidelines noted that the agencies are more likely to challenge a transaction if, as a result of the merger, the combined firm will have both the ability and incentive to foreclose competition in the relevant market by denying/impeding access to or raising their rivals' cost to access to an input (the related product) that they need to compete.⁹

Expanding on this analysis, the final Guidelines provide examples of specific scenarios likely to raise agency concerns about anticompetitive unilateral effects. In particular, the final Guidelines add a section addressing so-called "diagonal mergers," which involve the joinder of firms at different stages of competing supply chains (e.g., a high-end computer manufacturer acquiring the component supplier for low-end computer manufacturers). The final Guidelines note that where the acquired firm competes in the relevant market, but is not a purchaser of the related product, the agencies are more likely to challenge the merger as anticompetitive.¹⁰

TAKEAWAYS

- Although the Guidelines provide valuable insight into how the antitrust agencies will evaluate a vertical merger, the Guidelines are not law and the agencies are not required to strictly adhere to them. While the new Guidelines may result in increased enforcement, ultimately, the facts of each transaction will dictate the outcome of a merger analysis.
- As was the case with the draft Guidelines, the final Guidelines are relatively general and reflect conventional and well-accepted economic principles in vertical merger analysis that are reflected in existing legal precedent. It is notable, however, that the dissents from Commissioners Slaughter and Chopra were quite vigorous and strongly worded, potentially foreshadowing continuing battles on the points raised in the dissents.
- While the final Guidelines provide guidance on when vertical mergers *may* be viewed as anticompetitive, they do not provide a definitive answer on when vertical mergers *will* be viewed as anticompetitive. As a result, they may offer only limited utility to companies contemplating vertical mergers. This lack of certainty was strongly criticized by Democratic Senators in their open letter to the FTC and DOJ.¹¹
- In her dissenting statement, FTC Commissioner Rebecca Slaughter proffered the possibility of a safe harbor threshold based on market concentration, rather than market share.¹² This view was echoed in the Senators' open letter to the FTC and DOJ.¹³ Market concentration will likely play an important role in the government's analysis of vertical mergers, and it is possible that a market concentration threshold could be part of a future version of the Guidelines.



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¹ DOJ & FTC, VERTICAL MERGER GUIDELINES (June 30, 2020), available at https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

² DOJ & FTC, DRAFT VERTICAL MERGER GUIDELINES (Jan. 10, 2020), available at <https://www.justice.gov/opa/press-release/file/1233741/download>.

³ A related product is a good or service that is "supplied by the merged firm, is vertically related to the products or services in the relevant market, and to which access by the combined entity's rivals will affect competition in the relevant market." DOJ & FTC, DRAFT VERTICAL MERGER GUIDELINES 2 (Jan. 10, 2020), available at <https://www.justice.gov/opa/press-release/file/1233741/download>.

⁴ Senator Amy Klobuchar, Statement on Final Justice Department, FTC Vertical Merger Guidelines (July 1, 2020), available at <https://www.klobuchar.senate.gov/public/index.cfm/2020/7/klobuchar-statement-on-final-justice-department-ftc-vertical-merger-guidelines>.

⁵ Senators Amy Klobuchar et al., Letter to DOJ & FTC regarding the Final Vertical Merger Guidelines 3-4 (June 8, 2020), available at <https://www.klobuchar.senate.gov/public/cache/files/5/e/5e9f9d2d-dac8-4dd2-9d56-474fa3bea515/1793D1AA9B818C127A8DAE9466D2CBC6.0618dojverticalmergerletter.pdf>.

⁶ *Id.*

⁷ REBECCA SLAUGHTER, STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER 2-3 (Jan. 20, 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1561721/p810034slaughtervmgabstain.pdf.

⁸ ROHIT CHOPRA, STATEMENT OF COMMISSIONER ROHIT CHOPRA 2, 4 (Jan. 20, 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1561727/p810034chopravmgabstain.pdf.

⁹ DRAFT VERTICAL MERGER GUIDELINES, *supra* note 2, at 4-6.

¹⁰ VERTICAL MERGER GUIDELINES, *supra* note 1, at 4-10.

¹¹ *Id.* at 9-10.

¹² STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER, *supra* note 7, at 3-4.

¹³ STATEMENT OF COMMISSIONER ROHIT CHOPRA, *supra* note 8, at 4-6.