

INSIGHT: Proposed Vertical Merger Guidelines—Increased Transparency or Opaque Glass?

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New proposed vertical merger guidelines from the FTC and DOJ essentially codify the informal lore in the antitrust bar that vertical mergers generally pose less of a potential anticompetitive threat than certain horizontal mergers, Cadwalader attorneys write. They say the guidelines reserve wide latitude for the government to justify almost any outcome of a vertical merger investigation.

The Federal Trade Commission and Department of Justice proposed vertical merger [guidelines](#), which the agencies will enforce jointly, may give the appearance of analytical clarity, but actually reserve wide latitude for the government to justify almost any outcome of a vertical merger investigation.

The FTC's vote to issue the proposed guidelines proceeded along party lines, with the three Republican commissioners voting to issue them and the two Democratic commissioners abstaining. The public comment period ends Feb. 10. The DOJ simultaneously revoked its 1984 vertical guidelines, which had been largely ignored by enforcers and the courts for more than a decade.

The antitrust bar has lauded the agencies for proposing new guidelines. The bar

a vertical supply chain. The agencies already have in force a set of joint horizontal merger guidelines.

As a general matter, the proposed vertical guidelines would essentially codify the informal lore in the antitrust bar (including economists who are the satellites of that bar) that vertical mergers generally pose less of a potential anticompetitive threat than certain horizontal mergers.

The guidelines expressly identify, and incorporate into an analytical framework, the three types of harm most commonly associated with vertical mergers. But, as a starting point, the guidelines reference certain principles (e.g., relevant product and geographic markets) that are already familiar as analytical tools in the horizontal guidelines.

'Sort of' Safe Harbor

The guidelines open at a seemingly strange place and with an odd quasi-exemption. Picking up on the market definition and market concentration provisions in the horizontal guidelines, the proposed vertical guidelines explain that the agencies will begin their analyses of a vertical merger by examining the relevant upstream (supplier) and downstream (customer) markets in which two firms seek to be combined through merger. Focusing on one market at a time (the relevant market), the other (upstream or downstream) market is referred to as the "related market."

The guidelines then provide that: "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%, and the related product is used in less than 20% of the relevant market."

The provision was wildly controversial among the commissioners themselves, with one of the Republican commissioners (Christine S. Wilson) wr-3 (m()5 (ef)-3.1 (i)-4 (nes)-1 (t)p deedel, t

Remedies

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