



July 07, 2020

Department of Justice, Federal Trade Commission Finalize New Vertical Merger Guidance

In a year of many firsts, the U.S. Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC) Bureau of Competition published new [Vertical Merger Guidelines](#) on June 30, 2020 (Guidelines) — the first set of such guidance since 1984. These finalized Guidelines incorporate and respond to select public comments solicited on a draft version of the guidelines published by the agencies in January 2020. (For more information on the draft guidelines published earlier this year, please see our [previous client alert](#).) After the period for comment closed in late February, the agencies held a workshop on March 11, 2020 to discuss the draft guidelines, featuring panelists who had submitted commentary.

Changing Attitudes Toward Vertical Combinations

Vertical mergers include the combination of companies that operate within a single supply chain but at different levels. Historically, vertical mergers have been of less interest to the DOJ and FTC than the more-frequently pursued horizontal merger of competitors because vertical corporate services are complementary.

That trend has been changing with both enforcement agencies and private parties challenging and litigating notable vertical mergers. The contemplated merger of AT&T, Inc. and Time Warner, Inc., valued at \$85.4 billion, was the first vertical merger the DOJ litigated to judgment in nearly 40 years. The transaction parties ultimately prevailed, and the merger has since been consummated. However, both the district and appellate courts acknowledged the possibility that a vertical merger could be enjoined. The district court's decision invites further guidance, as it noted "the dearth of modern judicial precedent on vertical mergers and the multiplicity of contemporary viewpoints about how they might optimally be adjudicated and enforced." *United States v. AT&T, Inc.*, 916 F.3d 1029, 1037 (D.C. Cir. 2019). The FTC most recently addressed vertical mergers in the 2018 Staples-Essendant transaction. That combination was also allowed to proceed, but only after the parties agreed

to erect strict barriers to internal access to relevant pricing data.

The goal of the new Guidelines is to provide transparency and better reflect the agencies' investigative practices as they have applied them in recent years, according to a [press release](#) statement by Assistant Attorney General Makan Delrahim.

Merger Analysis Under the New Guidelines

The DOJ and FTC intend for the new Guidelines to be read in conjunction with the agencies' [2010 Horizontal Merger Guidelines](#). Note, too, that these Guidelines apply to all non-horizontal mergers and not strictly vertical integrations.

Analysis necessarily begins with the definition of a relevant market and related markets in which the merger could disrupt competition. Sections 4 and 5 of the Horizontal Merger Guidelines outline thresholds for market shares and concentrations. In analyzing the competitive effects, the Guidelines outline two non-exhaustive unilateral theories of harm: 1) foreclosure and raising rivals' costs, and 2) access to competitively sensitive information.

The Guidelines contemplate that a merged firm may harm competition under the foreclosure theory by either an **ability** to directly affect prices or sales or an **incentive** to cause rivals to stop competing in the market. Under the access theory of harm, the agencies intend to focus on whether the combination will provide the resulting firm with access to information about its upstream or downstream rivals that was previously unavailable to either company before the combination. In addition to these theories of harm, the agencies will investigate potential coordinated effects. That analysis will still track Section 7 of the Horizontal Merger Guidelines.

The agencies continue to recognize that vertical integrations "eliminate contracting frictions, and therefore have the capacity to create a range of potentially cognizable efficiencies that benefit competition and consumers." The merging parties bear the burden of establishing these procompetitive efficiencies, but the Guidelines explain that the agencies may independently attempt to quantify those positive effects, as well.

Noteworthy Development

The publication of new guidance is momentous but not terribly surprising given the leadership of AAG Delrahim in the DOJ and Chairman Joseph Simons of the FTC. Upon Simons' nomination, we expected an active enforcement agenda to emerge from the FTC that centered on the consumer welfare inquiry. Similarly, Delrahim quickly demonstrated a desire to review previous guidance and has previously said that the Antitrust Division's

job is to pursue justice in the marketplace by creating “an environment where rules are clear, rather than opaque and arbitrary.” [U.S. Department. of Justice, Assistant Attorney General Makan Delrahim Delivers Remarks at New York University School of Law \(Oct. 27, 2017\).](#)

It is unclear how these Guidelines will be used in practice, particularly if a new administration is voted into the White House this November. The FTC Commissioners passed the Guidelines by a vote of 3-2, with Commissioners Rohit Chopra and Rebecca Kelly Slaughter voting against publication. You can find the statements in support by the majority and statements of dissent by the minority on the FTC’s website.

Further Guidance

If you have questions on how antitrust enforcement and guidance will likely affect your company, consult with your antitrust counsel for specific recommendations regarding the Guidelines.

MEET THE AUTHORS



Kathy L. Osborn

Partner

+1 317 237 8261
Indianapolis
kathy.osborn@faegredrinker.com



Richard A. Duncan

Partner

+1 612 766 8612
Minneapolis
richard.duncan@faegredrinker.com



Jason D. Kimpel

Partner

+1 317 237 1172

Indianapolis

jason.kimpel@faegredrinker.com



Joie C. Hand

Associate

+1 202 230 5108

Washington, D.C.

joie.hand@faegredrinker.com

Services and Industries

Litigation

Antitrust

Corporate Group

Mergers and Acquisitions