

The US Department of Justice (DOJ) and the Federal Trade Commission (FTC) published draft vertical merger guidelines on January 10, 2020 (the Draft Guidelines). The Draft Guidelines supersede the DOJ's 1984 Non-Horizontal Merger Guidelines and are intended to be read "in conjunction with the Horizontal Merger Guidelines published by the DOJ and FTC in 2010."

Vertical mergers combine assets that are used at different levels of the supply chain used in producing a final product. For example, such a merger could combine an automobile manufacturer and an aluminum supplier; an iron ore producer and a steel manufacturer; a content provider and a cable television or telephone company; or an orange juice supplier and an owner of orange orchards. The Draft Guidelines, according to Assistant Attorney General Makan Delrahim, are based in part on "new economic understandings . . . over the past several decades and better reflect . . . actual practice[s]" of the DOJ and FTC "in evaluating proposed vertical mergers."

Public comments relating to the Draft Guidelines are due by February 11, 2020.

The DOJ and FTC will review and consider public comments before issuing final Vertical Merger Guidelines. It is intended that the final guidelines will assist the business community, as well as competition lawyers, in providing greater transparency concerning enforcement policies with respect to vertical mergers.

The Draft Guidelines focus on the following:

- The potential anticompetitive effects resulting from vertical mergers, which may include both unilateral effect (e.g., foreclosure and raising rivals' costs and access to competitive sensitive information) and coordinated (e.g., enabling the sharing of confidential information)
- An analytic framework (including economic models) to evaluate the potential effects of vertical mergers
- How the elimination of double marginalization may mitigate or completely eliminate the potential anticompetitive effects of vertical mergers

The Draft Guidelines also provide numerous examples to give greater clarity about the analytical methods to be used by the DOJ and FTC in evaluating vertical mergers.

It should be noted that two Democratic Commissioners at the FTC abstained from the vote to release the Draft Guidelines. They agreed with the need to update the 1984 guidelines, but in their "dissents," they explained that the Draft Guidelines were too narrow and should go further.

To a certain extent, the Draft Guidelines reflect positions that the DOJ and FTC recently have been applying to vertical merger cases. The Draft Guidelines also provide a tangible and useful reference point to assess vertical deals going forward.

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