



## Proposed vertical merger guidelines have finally arrived

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The Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) recently issued [draft vertical merger guidelines](#) aimed at assisting antitrust attorneys and members of the business community in evaluating potential antitrust issues associated with vertical mergers. The proposed guidelines are intended to supersede and replace guidance issued by the DOJ in 1984.

Calls for vertical merger guidance have increased as attitudes toward vertical mergers have shifted over the past 36 years. Historically, because vertical mergers are combinations of entities that operate at different levels of the supply chain (such as a hospital acquiring a physician practice), they have faced less scrutiny than horizontal mergers that often involve direct competitors (such as one hospital affiliating with another hospital). It was previously accepted that vertical mergers were procompetitive methods to increase efficiency without directly impacting competition. However, antitrust enforcement agencies have become increasingly concerned that vertical mergers could cause harm to competition by, among other things, potentially increasing a rival's costs or foreclosing a rival's ability to compete in the future. As scrutiny of these transactions has increased, so has the desire for guidance.

While the proposed guidelines provide some insight into the agencies' underlying analytical processes behind enforcement decisions, many questions remain. For example, the proposed guidelines offer relatively clear guidance 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 percent, and the related product is used in less than 20 percent of the relevant market." By contrast, the proposed guidelines provide somewhat vague explanations that the agencies will consider "reasonably available and reliable evidence" to evaluate

whether a vertical merger might adversely impact competition, whether the proposed merger might allow the merged firm to profitably weaken or remove a rival, or whether the merger might allow competitively sensitive information to be obtained by the merged firm as possible methods of evaluating antitrust concerns.

Evaluation of vertical mergers will continue to be a complex analysis even if the guidelines are made final. As enforcement agencies challenge such transactions, and courts ultimately become involved, the additional guidance flowing from those cases will likely be of great importance, because it is clear that enforcement agencies are now closely tracking vertical mergers.

# Authors

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