

Final DOJ and FTC Vertical Merger Review Guidelines Fail to Impress

After much anticipation and a round of public comments on the draft guidelines released in January, the Department of Justice (DOJ), along with the Federal Trade Commission (FTC), officially issued the final [Vertical Merger Review Guidelines](#), replacing the Non-Horizontal Merger Guidelines originally issued in 1984. The updated guidelines govern how federal antitrust agencies evaluate vertical, as well as other non-horizontal mergers.

The guidelines outline three main sources of evidence for potential adverse competitive effects from vertical mergers: 1) Foreclosure and Raising Rivals' Costs, 2) Access to Competitively Sensitive Information, and 3) Coordinated Effects. Notably, the [agencies indicate](#) that the new guidelines "explain our investigative practices as we apply them today and have applied them in recent years." As such, there is much emphasis on the pro-competitive effects of vertical mergers, reflecting the previously adopted view that vertical mergers are generally less problematic horizontal mergers. In fact, the FTC was split 3-2 in approving the guidelines, as dissenting Commissioners [Rohit Chopra](#) and [Rebecca Slaughter](#) argued that the guidelines overestimate the benefits of vertical transactions and underestimate the drawbacks.

As a result, antitrust experts are calling the new guidelines disappointing. The [American Antitrust Institute](#) (AAI) issued a statement that the new guidelines "fall short" of what is needed to protect competition and "fail to provide balanced and transparent agency guidance at a critical time when rising market concentration and a rash of vertical integration is

restructuring key markets in the U.S.” AAI noted that while the agencies addressed some of the issues raised in public comments and eliminated the “safe harbor” that was included in the draft version, they failed to take into account other suggestions, such as a “presumption” that certain vertical mergers are likely to harm competition.

The Source also provided comments in the realm of healthcare. In “[Comments on the Draft Vertical Merger Guidelines with Special Consideration to Health Care](#),” Executor Editor Jaime King, along with health economists and policy experts including Source Advisory members Tim Greaney and Richard Scheffler, urged that special attention be paid to the effects of vertical mergers in the health care sector, for which they argue anticompetitive harm may be particularly strong. FTC Commissioners [Rohit Chopra](#) and [Rebecca Slaughter](#) agreed, as they raise in their dissenting statements special concerns about large, integrated healthcare companies’ ability to prevent new entrants from competing in the healthcare market.

As the COVID-19 pandemic drives more firms to consolidate, both horizontally and vertically, the need for greater antitrust scrutiny of mergers is also more pressing than ever. Unfortunately, the new guidelines did little to alleviate growing concerns.