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Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary

2020 guidance withdrawn to prevent industry and judicial reliance on unsound economic theories; FTC to work with DOJ to update merger guidance

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The Federal Trade Commission voted to withdraw its approval of the Vertical Merger Guidelines, issued jointly with the Department of Justice (DOJ), and the FTC's Vertical Merger Commentary. The guidance documents, which were published in 2020, include unsound economic theories that are unsupported by the law or market realities. The FTC is withdrawing its approval in order to prevent industry or judicial reliance on a flawed approach. In voting to withdraw, the FTC reaffirmed its commitment to working closely with the DOJ to review and update the agencies' merger guidance.

The withdrawn [Vertical Merger Guidelines](#) set out analytical techniques and enforcement policies for non-horizontal mergers, while the associated commentary had summarized a selection of prior investigations that largely utilized that framework. The guidelines noted several ways vertical mergers can harm competition, which the statement by the FTC majority recognizes provided valuable analysis.

The statement by the FTC majority, however, notes that the 2020 Vertical Merger Guidelines had improperly contravened the Clayton Act's language with its approach to efficiencies, which are not recognized by the statute as a defense to an unlawful merger. The majority statement explains that

the guidelines adopted a particularly flawed economic theory regarding purported pro-competitive benefits of mergers, despite having no basis of support in the law or market reality. The majority noted that because the Vertical Merger Guidelines were adopted in 2020, they had yet to have a significant impact and that acting swiftly was paramount to preventing judicial reliance on this flawed discussion.

Going forward, the FTC will work with the DOJ to update merger guidance to better-reflect market realities. The FTC majority statement lays out several areas for consideration in that review. First, the FTC intends to explore ways to provide clear guidance on the characteristics of transactions that are likely unlawful. Second, the FTC will look at ways to provide guidance on ineffective remedies, based on an evaluation of past remedy practices and any evidence that past remedies may not have fully restored competition. Finally, the agency will look to expand on the harms identified in the 2020 Vertical Merger Guidelines to consider various features of modern firms, including in digital markets, and impacts of mergers on labor markets.

The Commission vote to rescind the policy statement was 3-2, with [the majority issuing a separate statement](#) and Commissioners Noah Joshua Phillips and Christine S. Wilson [issuing a separate dissenting statement](#).

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