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JUSTICE NEWS

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Justice Department Issues Statement on the Vertical Merger Guidelines

Acting Assistant Attorney General Richard A. Powers of the Justice Department's Antitrust Division issued the following statement today after the Federal Trade Commission (FTC) voted to withdraw from the 2020 Vertical Merger Guidelines, which had been issued jointly with, and remain in place at, the Department of Justice:

"The Department of Justice is conducting a careful review of the Horizontal Merger Guidelines and the Vertical Merger Guidelines to ensure they are appropriately skeptical of harmful mergers. Both documents are designed to provide increased transparency and guidance to the public on how the department makes law enforcement decisions. The department's review has already identified several aspects of the guidelines that deserve close scrutiny, and we will work closely with the FTC to update them as appropriate.

"The department continues to collaborate with the FTC on a robust public engagement process to seek comment on ways the Vertical Merger Guidelines could be improved. Public comment, which has not yet been sought on the substantial changes made to the published version of the Vertical Merger Guidelines, will be helpful in considering a range of questions, including the following areas that staff has identified warrant consideration:

1. Whether the Vertical Merger Guidelines create confusion as to the merging parties' burden to establish that the elimination of double marginalization is verifiable, merger specific and will likely be passed through to consumers.
2. Whether the Vertical Merger Guidelines unduly emphasize the quantification of price effects, which is not the only means to determine that a vertical merger is unlawful.[1]
3. Whether the Vertical Merger Guidelines appropriately account for the traditional burden shifting framework applied by U.S. courts in their review of mergers.[2] For example, some have suggested that descriptions of how the department may consider offsetting incentives in determining the net effect of a transaction suggests a deviation from the prevailing legal framework in which the department may establish in court a *prima facie* case based on evidence of harm alone.[3]
4. Whether the Vertical Merger Guidelines should more fully explain, as some have suggested would be appropriate, the range of circumstances that can lead to a concern that a merger may have anticompetitive effects.[4]
5. Whether the Vertical Merger Guidelines would benefit from further elaboration of the circumstances in which mergers raise concerns of harm related to the evasion of regulation.

"The Justice Department recognizes the substantial benefit of providing transparency on these and all of the other issues touched on by the Vertical Merger Guidelines, and will work closely with the FTC as this process continues."

[1] See *United States v. AT&T, Inc.*, 916 F.3d 1029, 1045 (2019) ("Preliminarily, the court does not hold that quantitative evidence of price increase is required in order to prevail on a Section 7 challenge. Vertical mergers can create harms beyond higher prices for consumers, including decreased product quality and reduced innovation.")

[2] See *United States v. Baker Hughes*, 908 F.2d 981, 982-83 (D.C. Cir. 1990) (cited in *AT&T*, 916 F.3d at 1032).

[3] See Carl Shapiro, *Vertical Mergers and Input Foreclosure Lessons from the AT&T/Time Warner Case*, 59 Rev. of Indus. Org. 303 (2021) (noting risks associated with requiring quantification of net harm as part of the government's *prima facie* case, and benefits of the sequencing in the *Baker Hughes* framework in the context of vertical mergers).

[4] See Steven S. Salop, *The 2020 Vertical Merger Guidelines: A Suggested Revision*, Geo. L. Fac. Publications & Other Works (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3839768 .

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