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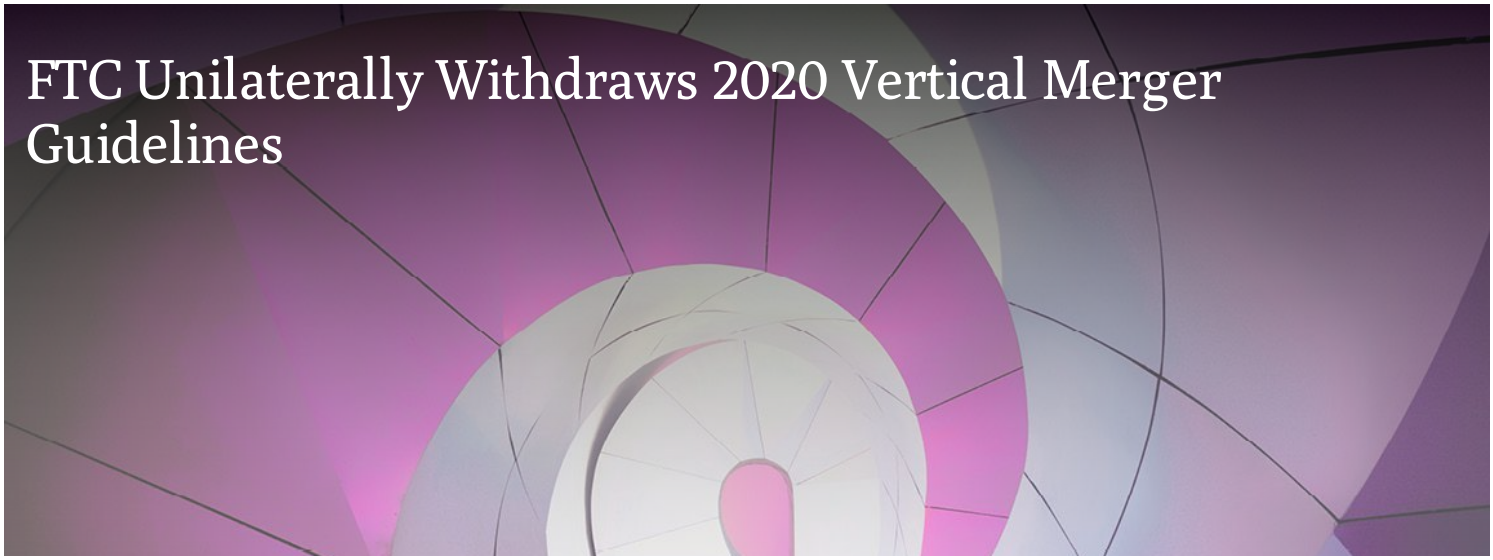

FTC Unilaterally Withdraws 2020 Vertical Merger Guidelines

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On September 15, 2021, the Federal Trade Commission (FTC) voted 3-2 along party lines to withdraw the 2020 Vertical Merger Guidelines. The FTC and the Department of Justice (DOJ) jointly issued the Vertical Merger Guidelines just over a year ago, on June 30, 2020. In a statement, the majority justified withdrawing the Vertical Merger Guidelines based on their purported "flawed discussion of the procompetitive benefits (i.e., efficiencies) of vertical mergers."

When issued last year, the FTC and DOJ lauded the Vertical Merger Guidelines for more accurately reflecting the agencies' then current enforcement practices with respect to vertical mergers than the 1984 Non-Horizontal Merger Guidelines (the 1984 Guidelines) that were in effect at the time. In particular, the Vertical Merger Guidelines, like recent enforcement actions related to vertical mergers, focused on the likelihood of vertical mergers resulting in input foreclosure, the incentive and ability to raise rivals' costs, the use of competitively sensitive information, and/or the possibility that a vertical merger might increase the likelihood of coordinated behavior. In addition, the Vertical Merger Guidelines also recognized the potentially procompetitive benefits of vertical mergers, particularly the elimination of double marginalization. (Double marginalization refers to the margin that each firm in a vertical relationship earns from making a sale.) Under the Vertical Merger Guidelines, the FTC and the DOJ stated that they would not challenge a merger if the net effect of the elimination of double marginalization made the merger unlikely to be anticompetitive. The economic theory underlying the Vertical Merger Guidelines posits that the elimination of double marginalization will reduce the merged firm's costs because the merged firm will not charge itself a margin when self-supplying an input, thereby increasing the incentive to lower prices charged to the merged firm's customers.

Although the FTC majority's statement acknowledged that the Vertical Merger Guidelines were a "substantial improvement' over the 1984 Guidelines, the commissioners were particularly critical of the Vertical Merger Guidelines' recognition of efficiencies, including the elimination of double marginalization, as justifying an otherwise potentially anticompetitive merger. According to the majority, the Vertical Merger Guidelines recognized an efficiencies defense contrary to the text of the Clayton Act, which they believe provides no such defense.

In a dissenting statement, Commissioners Phillips and Wilson criticized the FTC's decision to "pull the rug out from under the honest businesses and lawyers who advise them." The dissenting commissioners also were critical of the

majority's decision to withdraw the Vertical Merger Guidelines unilaterally (without DOJ agreement) and without replacement.

Shortly after the FTC's withdrawal of the Vertical Merger Guidelines, Richard Powers, the acting assistant attorney general of the DOJ's Antitrust Division, issued a statement indicating that the Vertical Merger Guidelines "remain in place" at the DOJ. However, Powers also stated that the DOJ has "already identified several aspects of the Vertical Merger Guidelines that deserve close scrutiny" and pledged to work closely with the FTC to update the Vertical Merger Guidelines "as appropriate." Indeed, the DOJ is actively conducting a review of the Vertical Merger Guidelines as well as the Horizontal Merger Guidelines to ensure that the guidelines are "appropriately skeptical of harmful mergers." Powers and FTC Chair Lina Khan had previously issued a joint statement promising to review and update the Vertical Merger Guidelines and the Horizontal Merger Guidelines after President Biden issued a comprehensive executive order on the promotion of competition in the U.S. economy.

For now, it remains to be seen what the FTC's (and possibly the DOJ's) new approach will be with respect to vertical merger enforcement. Based on the FTC majority's statement, it seems likely that the FTC's new approach will include "bright-line screens" that would clarify the types of vertical mergers that the FTC considers to be unlawful. In the interim, merging parties should be wary of resting any defense of a vertical transaction under investigation by the FTC on efficiencies arguments, particularly the elimination of double marginalization. From a practical perspective, however, the removal of the recognition of the efficiencies defense may be less significant than either the tone of the majority or the dissenters' statements would suggest. Practitioners have frequently found the DOJ and FTC skeptical of efficiencies defenses.
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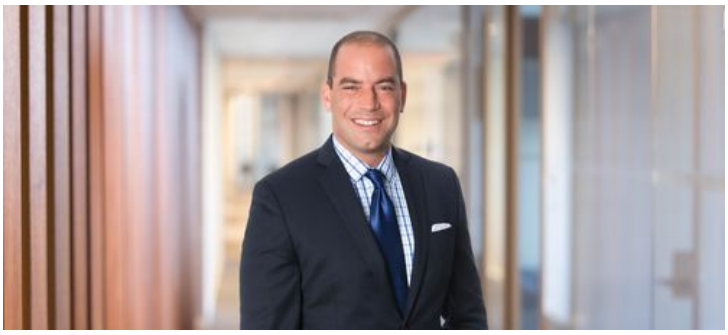

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