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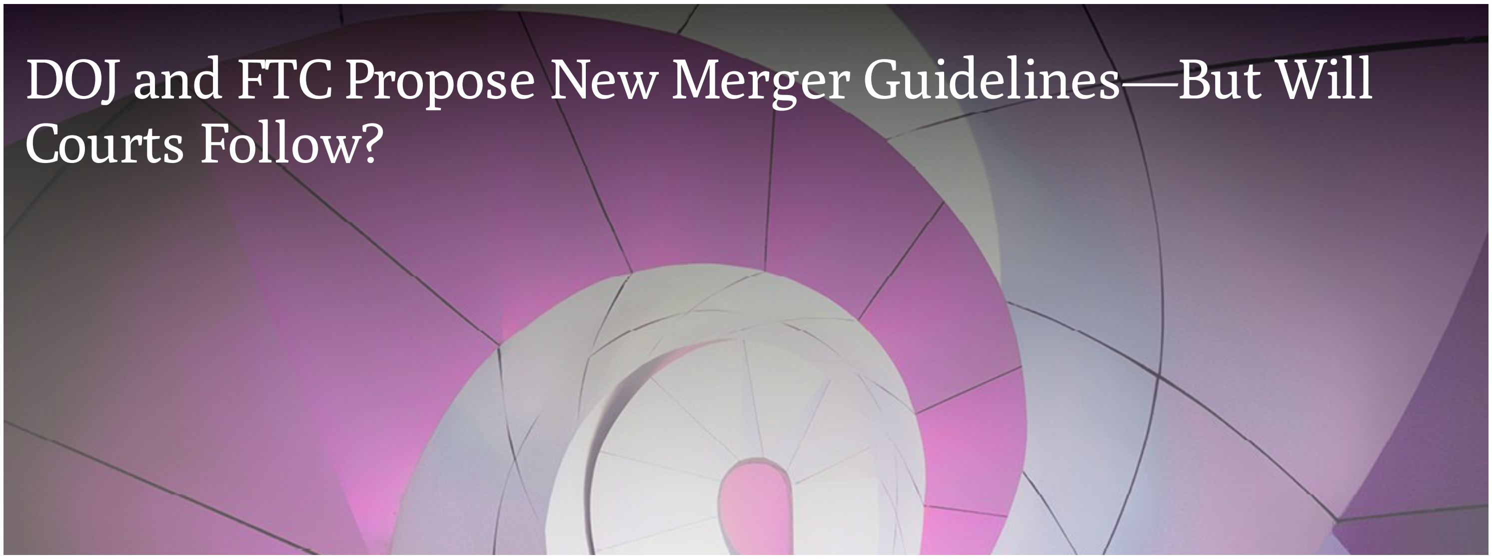
BLOG

DOJ and FTC Propose New Merger Guidelines—But Will Courts Follow?



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After a series of withdrawals of key antitrust policy statements and guidance documents and announcing an intention to make changes to the merger guidelines, the Federal Trade Commission and Department of Justice (the Agencies) recently jointly released for public comment updated draft merger guidelines (the Proposed Guidelines). The Proposed Guidelines differ significantly from prior merger guidelines. Most notably, the Proposed Guidelines largely focus on theories of harm, and relegate to appendices a summary of the process for evaluating mergers. Although the guidelines have no independent legal force, the benefit of the Proposed Guidelines as drafted is that the Agencies have seemingly been very intentional about using plain language that can be understood by the public and members of the business community who are not lawyers.[1] But in doing so, they sacrifice the technical guidance upon which practitioners have long relied to help clients navigate the regulatory process of merger reviews. As a result, it will become more critical for a company considering a transaction to engage early in the deal life cycle seasoned antitrust counsel who has experiential understanding of the Agencies' objectives and approaches.

The Proposed Guidelines are divided into four primary sections that discuss (a) an overview of the Guidelines, (b) application of the Proposed Guidelines, (c) the tools the Agencies use to define relevant markets, and (d) the Agencies' approach to several common types of rebuttal evidence. Below, we summarize the key highlights of the Proposed Guidelines, noting significant changes from the prior guidelines, and introducing new considerations not previously addressed in the guidelines:

- The Proposed Guidelines signal the Agencies' plan to pursue a broad approach to merger reviews and challenges, stating that the Supreme Court's reading of Section 7 is quite deferential: "Section 7 itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect *may be* substantially to lessen competition."
- Although the Agencies had published separate guidelines for horizontal and vertical mergers, the Proposed Guidelines cover both kinds of mergers, and note that they also cover mergers that do not fit either category.
- The Proposed Guidelines set forth 13 guidelines, or analytical frameworks, to be applied either individually or in combination, to assess the risk of harm to competition from a merger. Those guidelines are broken up into three thematic categories: (a) frameworks used to assess the risk that a merger's effect may be substantially to lessen competition or create a monopoly, (b) issues that often arise in the application of those frameworks in common

settings, and (c) how regulators consider mergers and acquisitions that raise competitive concerns not addressed by the other guidelines.

- As drafted, the Proposed Guidelines appear to be crafted with the Biden administration's and top antitrust regulators' main policy objectives in mind: curb the dominance of large tech companies; prevent business combinations in key sectors, such as health care, that the Agencies believe will harm consumers; and protect competition for employees (i.e., labor) by ensuring that a merger will not lead to lower wages or slower wage growth, reduced benefits, or worsening working conditions.
- The Proposed Guidelines contemplate a lower threshold for when a structural presumption of likelihood of substantial harm to competition applies using the Herfindahl–Hirschman Index ("HHI")—any HHI above 1,800—and for the first time set forth a post-merger market share threshold of likelihood of harm at 30% for horizontal mergers and 50% for vertical mergers, whether upstream or downstream.
- The Proposed Guidelines still recognize that efficiencies from a transaction may prevent a reduction in competition when the transaction may otherwise have been anticompetitive. However, they further limit when the Agencies will credit such efficiencies by requiring the efficiencies not only to be (a) merger specific, (b) verifiable, and (c) passed via competition (all previously required) but also to "not result from the anticompetitive worsening of terms for the merged firm's trading partners" and to not "accelerate a trend toward concentration … or vertical integration."
- The Proposed Guidelines suggest that the Agencies consider a deal's financial terms as evidence of its competitive impact, stating that "a purchase price that exceeds the acquired firm's stand-alone market value can sometimes indicate that the acquiring firm is paying a premium because it expects to be able to benefit from reduced competition."

THE THIRTEEN PROPOSED GUIDELINES

As noted above, the structure of the Proposed Guidelines diverges from prior merger guidelines; the Agencies set forth a series of frameworks to review mergers that are built around conditions that tend to result in significant market concentrations or monopolies, or otherwise substantially lessen competition. The following is a brief overview of each of the 13 Proposed Guidelines.

1. Mergers should not significantly increase concentration in highly concentrated markets.

The Agencies may challenge a merger based on market structure alone, i.e., if a merger would increase concentration and result in a highly concentrated market. Concentration is not merely about the total number of rivals competing to offer a product or service to a group of customers; it also is affected by the relative size of the rivals. Therefore, for example, even where a market includes numerous competitors, if there is one dominant firm, and that dominant firm seeks to acquire another strong firm, the Agencies may challenge the transaction because the remaining alternatives are much smaller than the merging parties.

This first guideline contemplates much-lower standards for when there is a structural presumption of illegality/harm using the HHI and now, for the first time, also includes a merged-entity market share threshold: the structural presumption applies where (a) the increase in market HHI post-merger is greater than 100 and (b) post-merger, either (i) the market HHI is greater than 1,800 or (ii) the merged entity's market share exceeds 30%.

In contrast, the most recent horizontal guidelines set forth three categories of concentration based on HHI ranges—markets with an HHI below 1,500 were unconcentrated; markets with an HHI between 1,500 and 2,500 were "moderately concentrated markets"; and markets with an HHI above 2,500 were highly concentrated. HMG at 19. Additionally, under the previous guidelines, a structural presumption applied only where the merger resulted in a 200+-point HHI increase (an increase of 100+ points would "potentially raise significant competitive concerns and often warrant scrutiny"). *Id.*

HIGHLY CONCENTRATED MARKETS THAT ARE PRESUMPTIVELY UNLAWFUL			
	Pre-2010	2010 Guidelines	Proposed Guidelines
Post-Merger HHI and Change in HHI Index	HHI of 1,800 and merger-related change in HHI of 100 or more	HHI of 2,500 or more and merger-related change in HHI of 200 or more	HHI of 1,800 and merger-related change in HHI of 100 or more
Market Share of Combined Firm	No specific presumption regarding level at which the merged firm's share is presumptively unlawful	No specific presumption regarding level at which the merged firm's share is presumptively unlawful	Combined share of 30% or more (even if share of one firm is *de minimis*) and merger-related change in HHI of 100 or more

2. Mergers should not eliminate substantial competition between firms.

If the merging parties are key rivals of each other, no matter how much competition there may be in the market, this Guideline suggests that elimination of competition between the parties likely would have an effect on the competitive landscape, and regulators may presume that effect would be negative. This means that when market shares are difficult to calculate, or even when the regulators determine that market shares might not reflect the current state of competition, evidence indicating that there is substantial competition between the merging parties will present a basis for challenging the merger.

3. Mergers should not increase the risk of coordination.

Coordination among rivals lessens competition, whether that coordination is explicit (collusive agreements not to compete or compete less) or tacit (through observation and response to rivals). The Agencies acknowledge that tacit collusion is hard to prove under section 1 of the Sherman Act (which prohibits competitors from agreeing to restrain trade, fix prices, or otherwise harm competition), and therefore intend to use section 7 to prevent the formation of market structures that would be conducive to such conduct.

4. Mergers should not eliminate a potential entrant in a concentrated market.

The Agencies may challenge a merger between parties that may not compete directly with each other but *could* in the future. Even if one or both merged parties are *perceived* potential entrants in a market such that the possibility of their entry into the market applied competitive pressure and stimulated competition among the incumbents, the Agencies will consider whether eliminating that perceived competition through the merger would substantially lessen competition.

5. Mergers should not substantially lessen competition by resulting in a firm that controls products or services its rivals may use to compete.

This framework applies to not just the expected vertical mergers but also any transaction involving access to products, services, or customers rivals use to compete. The Agencies will investigate whether the merged firm can, and may be incentivized to, make it harder for rivals to compete in the relevant market. The Agencies will, however, consider objective and nonspeculative evidence from the merging parties that there are no plausible ways in which they could profitably worsen the terms for the related product and make it harder to compete, or that the merged firm will actually be able to compete better as a result of the merger.

6. Vertical mergers should not create market structures that foreclose competition.

Similar to the above, if a vertical merger results in a company capturing a significant share of the supply source or distribution chain for a relevant product such that competitors would face difficulty accessing sufficient inputs to manufacture a competing product or getting it to consumers, the transaction could be challenged.

The Agencies will define a “related market” of the product or service that is controlled by the merged firm and determine the share of that market that has been captured by the merged firm (the “foreclosure share”). Adopting a new presumption, the agencies will consider a foreclosure share of over 50% as sufficient evidence that the merger may substantially lessen competition (subject to rebuttal evidence). If the foreclosure share is less than 50%, the Agencies may still investigate or challenge the merger based on other factors.

7. Mergers should not entrench or extend a dominant position.

The Agencies will investigate whether the merger may extend a firm’s dominant position into one or more new markets, thereby substantially lessening competition in those markets. Notably, concerns can arise from mergers that are not strictly horizontal or vertical.

The Agencies will consider whether (a) one of the merged firms already has a dominant position and (b) the merger may entrench or extend that position. The more dominant a firm is before the merger, the less marginal entrenchment is needed to substantially lessen competition. Thus, when one merging firm has approached or is approaching monopoly power, any acquisition that may tend to preserve its dominant position may be considered a violation of the Clayton Act.

8. Mergers should not further a trend toward concentration.

In a new development for the guidelines, the Agencies have indicated that they may block a combination that would reduce the number of players in an already-shrinking market. The Agencies provide little guidance on what pace of concentration would trigger a concern over an already-shrinking market under this principle.

9. When a merger is part of a series of multiple acquisitions, the Agencies may examine the whole series.

This novel guideline highlights the Agencies’ new “cumulative effect” approach. They will not only examine a single transaction but also consider the impact on competition of a party’s broader acquisition history. This is particularly important for private equity firms as they acquire multiple portfolio companies that operate in a single space as part of a roll-up strategy.

10. When a merger involves a multisided platform, the Agencies examine competition *between* platforms, *on* a platform, and to *displace* a platform.

The Guidelines now make clear that the Agencies will consider how the merging firms' dominance in one market influences the potential effects on competition in other markets, even where they might not currently have significant market share but could still exercise their firm-wide market power to lessen competition.

11. When a merger involves competing buyers, the Agencies examine whether it may substantially lessen competition for workers or other sellers.

The Agencies will assess whether a proposed transaction could result in less competition for qualified employees, which would allow for wage stagnation and harm to employees. The Proposed Guidelines note that where a merger between employers may substantially lessen competition for workers, that reduction in labor may lower wages or slow wage growth, worsen benefits or working conditions, or result in other degradations of workplace quality—any one of these effects may demonstrate that the merging firms are substantial competitors for labor.

12. When an acquisition involves partial ownership or minority interests, the Agencies examine its impact on competition.

The Agencies will review closely joint ventures and partial stock acquisitions to determine whether such transactions could enable conduct that would harm competition. The Agencies' concern is particularly acute in cases where acquisitions of partial ownership or other minority interests may give the investor rights in the target firm, such as rights to appoint board members, observe board meetings, veto the firm's ability to raise capital or impact operational decisions, or access competitively sensitive information.

13. Mergers should not otherwise substantially lessen competition or tend to create a monopoly.

The 12 preceding Guidelines are not exhaustive, and the FTC and DOJ reserve the right to investigate and challenge mergers that might, for reasons other than those above, reduce competition or create a monopoly.

The Guidelines provide three examples of scenarios the Agencies have encountered that do not fall into the categories above but nonetheless give rise to competitive concerns: (a) a merger that would enable firms to avoid regulatory constraints that are only applicable to one of the firms, (b) a merger that would enable firms to exploit a unique procurement process that favors the bids of a particular competitor who would be acquired in the merger, or (c) a merger that would dampen the acquired firm's incentive or ability to compete due to the structure of the acquisition or the acquirer.

MARKET DEFINITION

The Proposed Guidelines offer several new considerations that regulators may evaluate in their investigation of relevant markets. Most notably, the Proposed Guidelines expand the hypothetical-monopolist test. The test previously focused on analyzing whether the hypothetical monopolist could successfully implement a small but significant non-transitory increase in price ("SSNIP") for a candidate product in a candidate region. The SSNIP test has now been expanded to include "other worsening of terms." The Proposed Guidelines also specifically apply the hypothetical-monopolist test to input and labor markets.

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These Proposed Guidelines are perhaps the most significant formal policy guidance the FTC and DOJ have released in recent history. The Proposed Guidelines are now in a 60-day public-comment period, after which the Agencies will consider the comments received and may revise as needed the Proposed Guidelines before officially publishing them. Winston & Strawn's experienced antitrust attorneys have been tracking trends in regulatory enforcement and merger investigations, as well as further development of these Proposed Guidelines as they take their final form. Companies that are contemplating a merger, acquisition, or other business combination should consider engaging antitrust counsel early in the deal process to assess whether the proposed transaction may raise any of the concerns identified in these Proposed Guidelines and the likelihood that the transaction will be investigated and, ultimately, cleared or challenged.

[1] The Agencies argue that “these are the first merger guidelines to cite case precedents,” https://www.ftc.gov/system/files/ftc_gov/pdf/Merger-Guidelines-Fact-Sheet-07-17-2023.pdf at 1, but many of the case precedent cites are over 50 years old.

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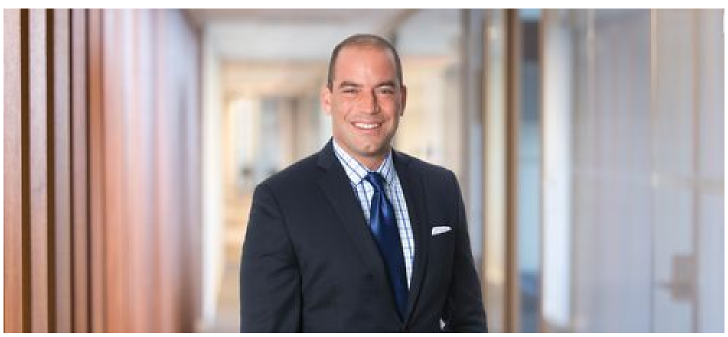

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