

FTC and DOJ Issue Final Merger Guidelines, Formalize Shift in Enforcement Philosophy and Legal Theories

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Almost exactly five months after the U.S. Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice (the Agencies) released their draft merger guidelines ([Proposed Guidelines](#)), the FTC and DOJ issued the final [2023 Merger Guidelines](#) (Final Guidelines or Merger Guidelines). The Merger Guidelines are the product of nearly two years of work by the antitrust regulators in the Biden administration, including consideration of more than 35,000 public comments, four listening sessions, and three Merger Guidelines Workshops. Although the Merger Guidelines mark a notable change in regulatory philosophy from past administrations, they also reflect the existing practice of the Agencies for merger review during the Biden administration. Some of the key aspects of the Merger Guidelines include:

- A significantly lower “structural presumption” of harm backed by a market share threshold. A market share of 30% or more held by the acquiring firm can now trigger a presumption that the transaction is anticompetitive, even when acquiring a small firm with minimal market share. The Agencies also returned to a pre-2010 threshold for market shares and concentration that indicates that the Agencies will view as presumptively unlawful a transaction that results in a post-merger Herfindahl-Hirschman Index (“HHI”) of 1,800 and an increase in HHI of 100 or more (see chart below).^[1]

HIGHLY CONCENTRATED MARKETS THAT ARE PRESUMPTIVELY UNLAWFUL

	Pre-2010	2010 Guidelines	2023 Guidelines
Post-Merger HHI and Change in HHI Index	HHI of 1,800 and merger related HHI increase of 100+	HHI of 2,500+ and merger related HHI increase of 200+	HHI of 1,800 and merger related HHI increase of 100+
Market Share of	No specific	No specific	Combined share of

Combined Firm	presumption	presumption	30% or more (even if share of one firm is de minimis) and merger related HHI change of 100+
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- The Agencies will continue to focus on monopsony power, with particular attention on the impact of transactions on competition for workers, creators, suppliers, or other providers rather than just consumers.
- As we previously reported, industries such as private equity, known for their “roll-up” strategies, have increasingly found themselves under closer scrutiny during this administration. The Final Guidelines make clear that the Agencies will now analyze not just a single proposed transaction but a series of mergers in the aggregate.
- Technology companies accused of “killer acquisitions” are subject to closer agency review, as we have discussed previously.

There are some notable differences between the Final Guidelines and the Proposed Guidelines—most significantly, the deletion of three draft guidelines:

- draft guideline 6 regarding vertical mergers, which suggested that a vertical merger resulting in a firm with at or near a 50% market share of a related product (such as an input) would presumptively indicate that the merger may substantially lessen competition;
- draft guideline 8 regarding mergers that “occur[] during a trend toward concentration,” which was based on case law dating back to the 1970s and was largely duplicative of guideline 1; and
- draft guideline 13, which simply stated that the preceding guidelines were not exhaustive. The Final Guidelines also more clearly explain how merging firms may rebut the presumption that a transaction will substantially lessen competition.

Ultimately, however, the Final Guidelines are broadly consistent in substance with the Proposed Guidelines.

Through these Final Guidelines, the Agencies have set forth a framework that formalizes the definitive shift in merger review and enforcement during the Biden administration. Notably, whereas the previously issued Horizontal Merger Guidelines (2010) and Vertical Merger Guidelines (2020), as well as the Proposed Guidelines, all noted their purpose of helping “the public, business community, practitioners, and courts understand the factors and frameworks the Agencies consider when investigating mergers” (see, e.g., Proposed Guidelines at 1), the Final Guidelines do not include similar language—instead, they “set forth several different analytical frameworks ... to assist the Agencies in assessing whether a merger presents sufficient risk to warrant an enforcement action” (Final Guidelines at 2).

While the Merger Guidelines are not legally binding and do not “predetermine enforcement action by the agencies,” they are meant to “provide transparency into the Agencies’ decision-making process.”^[2] As discussed in our prior Competition Corner posts regarding the new merger guidelines [here](#) and [here](#), these Merger Guidelines do little to spell out precisely when a proposed merger will be challenged. They do, however, offer valuable insight into some of the key theories of harm that will cause the FTC or DOJ to take a closer look at whether a proposed merger substantially lessens competition or tends to create a monopoly, including the new and resurrected theories that the Agencies have said they will pursue and that they have alleged in recent merger challenges.

Winston & Strawn’s antitrust team focuses on staying abreast of all developments in the merger enforcement space—from agency guidance like the Merger Guidelines to developments in case law and legal precedents—to better understand the constantly evolving landscape. As a result, Winston & Strawn is able to counsel businesses regarding regulatory risk, advise clients as they pursue growth and continued viability while reducing their exposure to challenges, and, when necessary, position issues for the greatest chance of success in litigation.

[1] The HHI is a measure of concentration calculated by adding together the square of the market shares of each firm in the market (e.g., $a^2 + b^2 + c^2 \dots$).

[2] Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Release 2023 Merger Guidelines (dec. 18, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/12/federal-trade-commission-justice-department-release-2023-merger-guidelines?utm_source=govdelivery.

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