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DOJ and FTC Release 2023 Merger Guidelines

On December 18, 2023, the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") (together, "the agencies") finalized merger guidelines[1] (the "Guidelines") to replace the 2010 Horizontal Merger Guidelines and the previously-rescinded 2020 Vertical Merger Guidelines[2] and meaningfully altered the approach the agencies use to evaluate mergers and acquisitions. The non-legally binding Guidelines include 11 specific guidelines that the agencies may use to determine whether a merger or acquisition is unlawful under the antitrust laws, and they call for the agencies to consider matters such as the risk of coordination and consolidation, potential entrants, and multi-sided platforms.[3] The Guidelines also explain how the agencies may evaluate market definition and the rebuttal evidence and defenses merging parties can use to show that no substantial lessening of competition is threatened by the merger, including the "failing firm" defense, entry and repositioning in the relevant market, and pro-competitive efficiencies.[4] The Guidelines follow the agencies' draft merger guidelines released in July 2023 and reflect the agencies' responses to more than 30,000 public comments from attorneys, economists, academics, law enforcement officials, and other interested parties.[5] The Guidelines differ from the draft guidelines in certain respects, although they are broadly consistent in substance to the draft version. Our previous memorandum on the July 2023 draft guidelines can be found here.

Section 7 of the Clayton Act ("Section 7") bars mergers and acquisitions where "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[6] Section 7 authorizes the agencies to determine whether a merger presents such risks.[7] The DOJ and FTC have authority to review all mergers, including those that are not subject to premerger review under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended,[8] or have already been consummated. First introduced in 1968, guidelines to inform the agencies' review have been amended

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1 Fed. Trade Comm'n & U.S. Dep't of Justice, Merger Guidelines (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf ("Merger Guidelines").

2 Fed. Trade Comm'n & U.S. Dep't of Justice, Horizontal Merger Guidelines (2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010; Vertical Merger Guidelines, U.S. Dep't of Justice & Fed. Trade Comm'n (June 30, 2020), https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf ; Press Release, Fed. Trade Comm'n, Fed. Trade Comm'n Withdraws Vertical Merger Guidelines and Commentary (Sept. 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary.

3 Press Release, Fed. Trade Comm'n, Fed. Trade Comm'n and Dep't of Justice 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 ("Fed. Trade Comm'n and Dep't of Justice Release 2023 Merger Guidelines"); Merger Guidelines, *supra* note 1, at 3–4 , 8, 10, 22–23.

4 Merger Guidelines, *supra* note 1, at 30–33, 39–48.

5 Fed. Trade Comm'n and Dep't of Justice Release 2023 Merger Guidelines, *supra* note 3; Merger Guidelines (Draft for Public Comment), Dep't of Justice & Fed. Trade Comm'n (Jul. 19, 2023), https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf ("Draft Merger Guidelines").

6 Merger Guidelines, *supra* note 1, at 1.

7 *Id*. at 1–2 ("To assess the risk of harm to competition in a dynamic and complex economy, the Agencies begin the analysis of a proposed merger by asking: how do firms in this industry compete, and does the merger threaten to substantially lessen competition or to tend to create a monopoly?").

8 15 U.S.C. § 18a.

several times; the most recent Horizontal Merger Guidelines were issued in 2010.[9] The FTC voted 3–0 to approve the Guidelines, which apply to both horizontal and vertical mergers.[10]

The Guidelines are divided into 11 sections to help assess whether a merger is unlawfully anticompetitive. They are set forth and summarized below. The DOJ and FTC advise that, given the complexity of modern transactions, a merger may implicate several of the guidelines below.[11]

- **Guideline 1:** Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market**.**[12]
    - The agencies measure concentration within a market using the Herfindahl-Hirschman Index ("HHI"), which is small when there are many firms in a given market and grows exponentially larger as the market becomes more concentrated.[13]
    - The Guidelines state that a merger "triggers a structural presumption" that it may substantially lessen competition if it results in a market with a post-merger HHI of 1,800[14] and produces an increase in the HHI of more than 100 points."[15]
    - The Guidelines also state that firms that would have a combined market share of greater than 30% warrant a structural presumption that a merger between them may substantially lessen competition if it also involves an increase in HHI of greater than 100 points.[16]
- **Guideline 2**: Mergers Can Violate the Law When They Eliminate Substantial Competition Between Firms.[17]
    - The Guidelines state that a merger that eliminates substantial competition between firms can indicate anticompetitive harm, regardless of the firms' market shares.[18]
    - The agencies may examine the following indicators to determine if substantial competition exists between firms: whether the firms monitor or react to one another's strategic deliberations or decisions; the market impact of recent mergers, entry, expansion, or exit events; customers' willingness to substitute one firm's product for the other; the impact of competitive actions by one firm on the other; and the firms' choices concerning price, quality, wages, or another element of competition.[19]

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[9] *Fact Sheet – 2023 Draft Merger Guidelines For Public Comment*, Fed. Trade Comm'n (Jul. 19, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/Merger-Guidelines-Fact-Sheet-07-17-2023.pdf.

[10] Fed. Trade Comm'n and Dep't of Justice Release 2023 Merger Guidelines, *supra* note 3.

[11] Merger Guidelines, *supra* note 1, at 2.

[12] *Id*. at 2, 5 ("The Supreme Court has endorsed this view and held that 'a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market[,] is so inherently likely to lessen competition substantially that it must be enjoined in the absence of [rebuttal] evidence.'") (quoting *United States* v. *Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963)).

[13] *Id*. at 6.

[14] This change restores the pre-2010 guideline concentration level of 1,800 (instead of 2,500) to trigger a structural presumption. *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Horizontal Merger Guidelines § 1.51 (1997); Fed. Trade Comm'n & U.S. Dep't of Justice, Horizontal Merger Guidelines § 1.51 (1992); U.S. Dep't of Justice, Merger Guidelines § 3(A) (1982).

[15] *Id*. at 5–6;

[16] *Id*. at 6.

[17] *Id*. at 2, 6.

[18] *Id*. at 7 ("Competition often involves firms trying to win business by offering lower prices, new or better products and services, more attractive features, higher wages, improved benefits, or better terms relating to various additional dimensions of competition. This can include competition to research and develop products or services, and the elimination of such competition may result in harm even if such products or services are not yet commercially available.").

[19] *Id*. at 7–8.

- **Guideline 3:** Mergers Can Violate the Law When They Increase the Risk of Coordination.[20]
    - The Guidelines state that a merger may substantially lessen competition if it "meaningfully increases the risk of coordination" among the relevant market's remaining firms or facilitates existing coordination.[21]
- **Guideline 4**: Mergers Can Violate the Law When They Eliminate a Potential Entrant in a Concentrated Market.[22]
    - The Guidelines state that a merger may substantially lessen competition or competitive pressure by eliminating the possibility (or even the mere perception) that the pre-merger firms could have entered into a concentrated market and generated new or enhanced competition.[23]
- **Guideline 5**: Mergers Can Violate the Law When They Create a Firm That May Limit Access to Products or Services That Its Rivals Use to Compete.[24]
    - The Guidelines state that a merged firm may substantially lessen competition by, for example, limiting (or threatening to limit) a rival's access to a product or service or facilitating access to a rival's competitively sensitive information.
- **Guideline 6**: Mergers Can Violate the Law When They Entrench or Extend a Dominant Position.[25]
    - The agencies will attempt to block mergers that would entrench or extend a firm's dominance through "exclusionary conduct, weakening competitive constraints, or otherwise harming the competitive process."[26]
- **Guideline 7**: When an Industry Undergoes a Trend Toward Consolidation, the Agencies Consider Whether It Increases the Risk a Merger May Substantially Lessen Competition or Tend to Create a Monopoly.[27]
    - The agencies will examine consolidation trends including trends toward concentration or vertical integration, trends of consolidating to gain bargaining leverage that "encourag[e] a cascade of further consolidation," and multiple mergers within the same industry.[28]

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[20] *Id*. at 3, 8.

[21] *Id*. at 8–10.

[22] *Id*. at 3, 10

[23] *Id*. at 10, 11 ("To determine whether an acquisition that eliminates a potential entrant into a concentrated market may substantially lessen competition, the Agencies examine (1) whether one or both of the merging firms had a reasonable probability of entering the relevant market other than through an anticompetitive merger, and (2) whether such entry offered a substantial likelihood of ultimately producing deconcentration of the market or other significant procompetitive effects"), 12 ("A perceived potential entrant can stimulate competition among incumbents. That pressure can prompt current market participants to make investments, expand output, raise wages, increase product quality, lower product prices, or take other procompetitive actions. The acquisition of a firm that is perceived by market participants as a potential entrant can substantially lessen competition by eliminating or relieving competitive pressure").

[24] *Id*. at 3, 13.

[25] *Id*. at 3, 18–19.

[26] *Id*. at 18.

[27] *Id*. at 3, 22.

[28] *Id*. at 22–23 ("The Supreme Court has explained that 'a trend toward concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anticompetitive effect of a merger may be'") (quoting *United States* v. *Pabst Brewing*, 384 U.S. 546, 552-53 (1966)).

- **Guideline 8**: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.[29]
    - The agencies may consider a series of acquisitions to be part of a consolidation trend or evaluate "an overall pattern or strategy of serial acquisitions by the acquiring firm."[30] The agencies may consider individual acquisitions in light of "the cumulative effect of related patterns or business strategies."[31]
- **Guideline 9**: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform.[32]
    - The Guidelines define platforms as firms with multiple sides where participants "provide or use distinct products and services."[33] Platforms also have "network effects," which occur when participants increase a platform's value to other participants or to the platform operator, who provides services allowing participants to access both sides of the platform.[34] The platform operator may have conflicts of interest between "its incentives to operate the platform as a forum for competition and its incentive to operate as a competitor on the platform itself."[35]
    - The Guidelines state that competition may be substantially lessened by mergers between two platform operators, between a platform operator and a participant, between firms that provide services to participants, or between firms that provide inputs to platform services, as they may deprive rivals of participants and network effects, create conflicts of interest, or allow a platform operator to deny inputs to rivals.[36]
    - Additionally, the Guidelines state that mergers may harm competition by preventing new non-platform technologies or services from displacing a platform of its products or services.[37]
- **Guideline 10**: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers, Creators, Suppliers, or Other Providers.[38]
    - The Guidelines state that a merger between competing buyers may substantially lessen competition by preventing competition between those buyers or increasing coordination among other buyers.[39] This can lead to undue buyer concentration or entrench a dominant buyer.[40]

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[29] *Id*. at 3, 23.

[30] *Id*. at 23 ("As the Supreme Court has recognized, a cumulative series of mergers can 'convert an industry from one of intense competition among many enterprises to one in which three or four large [companies] produce the entire supply'") (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 334 (1962)).

[31] *Id*. at 23.

[32] *Id*. at 3, 23.

[33] *Id*. at 24.

[34] *Id*. (for example, "[t]he value for groups of participants on one side [of the platform] may depend on the number of participants either on the same side (direct network effects) or on the other side(s) (indirect network effects)").

[35] *Id*.

[36] *Id*. at 25.

[37] *Id*. at 26.

[38] *Id*. at 3, 26.

[39] *Id*. at 26

[40] *Id*. ("[A] reduction in competition among buyers can lead to artificially suppressed input prices or purchase volume, which in turn reduces incentives for suppliers to invest in capacity or innovation").

- Additionally, the agencies will examine labor markets to determine whether a merger between buyers may substantially lessen competition for employees, as employers are “buyers” of labor and employees are “sellers.”[41] The merger may result in lower wages or stunted wage growth, less workplace equality, or poorer working conditions or benefits.[42]

- **Guideline 11**: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition.[43]
  - The Guidelines state that partial acquisitions, such as cross-ownership, where a firm has a non-controlling interest in a competitor, or common ownership, where individual investors have non-controlling interests in competitive firms, may substantially lessen competition.[44] Partial acquisitions may create anticompetitive risk by (1) allowing minority owners to influence a firm’s competitive conduct; (2) affecting strategic decisions of minority owners with respect to other investments; (3) providing minority owners with the firm’s non-public, competitively sensitive information; or (4) changing incentives of minority owners so as to “otherwise dampen competition” or soften firms’ competitive actions.[45]

The Guidelines largely align with those from the July 2023 draft, except that three guidelines included the draft (“Vertical Mergers Should Not Create Market Structures That Foreclose Competition,” “Mergers Should Not Further a Trend Toward Concentration,” and “Mergers Should Not Otherwise Substantially Lessen Competition or Tend to Create a Monopoly”) were removed as specific guidelines and incorporated into other sections.[46] Additionally, the July 2023 draft guidelines reflected more emphasis on legal precedent, including some cases that are over 50 years old,[47] than on economics. The Guidelines continue to cite older precedent, but also incorporate additional economic and evidentiary data, including data to evaluate conduct that may lessen competition in labor markets.

The Guidelines also discuss the legal tests to which rebuttal and defense evidence is subject, sources of evidence the agencies commonly rely on, tools used to evaluate competition, the process for defining relevant markets, and how to calculate market shares and concentration metrics.[48]

Conclusion

The Guidelines reflect the Biden Administration's general view that merger enforcement should be enhanced to promote competition in the U.S. economy. The Guidelines come more than two years after President Biden’s 2021

[41] *Id*. at 27.

[42] *Id*.

[43] *Id*. at 3, 28.

[44] *Id*. at 28.

[45] *Id*. at 28–29.

[46] *Compare* Draft Merger Guidelines, *supra* note 5, at 17, 21,28, *with* Merger Guidelines, *supra* note 1, at 5, 8, 10, 13–15, 22–23, 25–28.

[47] Draft Merger Guidelines, *supra* note 5, at 2–4 nn.8–9, 12, 14–20 (citing to *Mandeville Island Farms* v. *Am. Crystal Sugar Co*., 334 U.S. 219 (1948); *Brown Shoe Co*. v. *United States*, 370 U.S. 294 (1962); *United States* v. *Phila. Nat’l Bank*, 374 U.S. 321 (1963); *United States* v. *Pabst Brewing Co*., 384 U.S. 546 (1966); *Denver & Rio Grande* v. *United States*, 387 U.S. 485 (1967); *FTC* v. *Procter & Gamble Co*., 386 U.S. 568 (1967); *Ford Motor Co*. v. *United States*, 405 U.S. 562 (1972); *United States* v. *Gen. Dynamics Corp*., 415 U.S. 486 (1974); *United States* v. *Marine Bancorp*., 418 U.S. 602 (1974)).

[48] Merger Guidelines, *supra* note 1, at 30, 34, 39, 48.

Executive Order on Promoting Competition in the American Economy, which called on the DOJ and FTC to "review the horizontal and vertical merger guidelines and consider whether to revise those guidelines."[49]

The Guidelines highlight the increased significance of a variety of factors included in the FTC and DOJ's review of transactions, such as competition in labor markets, potential entrants, and platform competition. Frequent acquirers such as private equity firms may also face additional scrutiny of a series of acquisitions in the same industry, even if their effect on competition individually is negligible.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Lauren Rackow (counsel) at 212.701.3725 or lrackow@cahill.com; or Ryan M. Maloney (associate) at 212.701.3269 or ryan.maloney@cahill.com; or email publicationscommittee@cahill.com.

[49] *Exec. Order on Promoting Competition in the American Economy*, The White House (Jul. 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.