
FTC and DOJ Propose Significantly Revised Merger Guidelines

The U.S. Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) (together “the agencies”) have released draft merger guidelines¹ that will replace the 2010 Horizontal Merger Guidelines² and meaningfully alter the approach the DOJ and FTC previously used to evaluate mergers. These guidelines describe and guide the agencies’ review of mergers and acquisitions to assess the potential to harm competition. The guidelines focus on 13 principles that the agencies may use when determining whether a merger may be unlawful under the antitrust laws, including a focus on labor markets, potential entrants, and multi-sided platforms that connect two or more different groups of customers, allowing the groups to interact.³ The guidelines also explain tools the agencies may use to evaluate market definition and enumerate the rebuttal evidence merging parties can use to demonstrate that no substantial lessening of competition is threatened by the merger, including the failing firm defense, entry and repositioning in the relevant market, efficiencies, and structural barriers to coordination.⁴

The DOJ and FTC have authority to investigate all mergers, including those that are not subject to premerger review under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (“HSR Act”)⁵ or have already been consummated. The guidelines have been amended several times since they were first introduced in 1968, and the most recent Horizontal Merger Guidelines were issued in 2010.⁶ The draft merger guidelines apply to both horizontal and vertical mergers.⁷

¹ *Merger Guidelines*, DEP’T OF JUSTICE & FED. TRADE COMM’N (Jul. 19, 2023), https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf (“*Merger Guidelines*”).

² *Horizontal Merger Guidelines*, ANTITRUST DIV., DEP’T OF JUSTICE, August 19, 2010, <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>.

³ *FTC and DOJ Seek Comment on Draft Merger Guidelines*, FED. TRADE COMM’N (Jul. 19, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines> (“*FTC and DOJ Seek Comment*”); *Merger Guidelines*, *supra* note 1, at 11, 23, 26.

⁴ *Merger Guidelines*, *supra* note 1, at 27, 31.

⁵ 15 U.S.C. § 18a.

⁶ *Fact Sheet – 2023 Draft Merger Guidelines For Public Comments*, FED. TRADE COMM’N (Jul. 19, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/Merger-Guidelines-Fact-Sheet-07-17-2023.pdf (“*Fact Sheet*”).

⁷ *Merger Guidelines*, *supra* note 1, at 22.

The FTC voted 3-0 to approve the draft guidelines, with each commissioner issuing a separate statement joined by the other commissioners.⁸ The DOJ and FTC will accept public comments until September 18, 2023, which they will use to further revise the draft before finalizing the guidelines.⁹

The guidelines are divided into 13 principles to help assess whether a merger is unlawfully anticompetitive. They are set forth in order below, along with information on some changes or adjustments to the agencies' approach when evaluating mergers. Generally, the guidelines reflect more emphasis on legal precedent, including cases more than 50 years old that technically remain good law,¹⁰ and less reliance on economics. The DOJ and FTC advise that given the complexity of modern transactions, a merger may implicate several guidelines.¹¹


1. Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets.
 - The guidelines state that merged firms that would have a combined market share of greater than 30% would in nearly all cases warrant a structural presumption that the merger may substantially lessen competition.
 - 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.
 - The guidelines reduce (and restore to older guideline levels) the concentration level and change that warrant a structural presumption to a post-merger HHI of 1,800 (instead of 2,500) alongside an increase in HHI of 100.
2. Mergers Should Not Eliminate Substantial Competition Between Firms.
3. Mergers Should Not Increase the Risk of Coordination.
 - According to the agencies, a highly concentrated market is vulnerable to an increased risk of coordination, and in such markets the agencies presume that a merger may substantially lessen competition. In a less concentrated market, the agencies will review the facts to determine if there would be an increased risk of coordination.
4. Mergers Should Not Eliminate a Potential Entrant in a Concentrated Market.
 - The agencies will examine whether the merger would eliminate a potential entrant to the market or competitive pressure from a perceived potential entrant to the market.

⁸ *Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding FTC-DOJ Proposed Merger Guidelines*, FTC, Jul. 19, 2023, <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-joined-commissioner-rebecca-kelly-slaughter-commissioner-alvaro-m-bedoya-3>; *Statement of Commissioner Rebecca Kelly Slaughter Joined by Chair Lina M. Khan and Commissioner Alvaro M. Bedoya Regarding FTC-DOJ Proposed Merger Guidelines*, FTC, Jul. 19, 2023, <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-commissioner-rebecca-kelly-slaughter-joined-chair-lina-m-khan-commissioner-alvaro-m-bedoya-2>; *Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter Regarding the Proposed Merger Guidelines*, FTC, Jul. 19, 2023, <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-commissioner-alvaro-m-bedoya-joined-chair-lina-m-khan-commissioner-rebecca-kelly-slaughter-1>.

⁹ *FTC and DOJ Seek Comment*, *supra* note 3; see also *Justice Dep't and FTC Seek Comment on Draft Merger Guidelines*, OFFICE OF PUBLIC AFFAIRS, DEP'T OF JUSTICE (Jul. 19, 2023), <https://www.justice.gov/opa/pr/justice-department-and-ftc-seek-comment-draft-merger-guidelines>.

¹⁰ *Merger Guidelines*, *supra* note 1, at 3–4 nn.8–9, 15–20.

¹¹ *Fact Sheet*, *supra* note 6, at 1–2.

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5. Mergers Should Not Substantially Lessen Competition by Creating a Firm That Controls Products or Services That Its Rivals May Use to Compete.
 - The agencies will also examine whether a merger would give the merged firm access to rivals' competitively sensitive information.
 6. Vertical Mergers Should Not Create Market Structures That Foreclose Competition.
 - If the agencies find that the “foreclosure share” (the share of the related market that is controlled by the merged firm, such that it could foreclose rivals' access to the related product on competitive terms) is above 50%, that factor alone would constitute a sufficient basis for the agencies to conclude that the merger may substantially lessen competition. If the share is less than 50%, the agencies may still conclude the merger may substantially lessen competition based on other factors.
 7. Mergers Should Not Entrench or Extend a Dominant Position.
 - The DOJ and FTC will also examine whether a dominant position in one market will enable the combined firm to extend that dominant position to another market.
 8. Mergers Should Not Further a Trend Toward Concentration.
 - The agencies will be more focused on trends towards concentration and serial acquisitions. In other words, a given acquisition that may not have raised concerns on its own will be analyzed with a view towards prior acquisitions by the buyer or in the same markets.
 9. When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.
 10. When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform.
 11. When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers.
 - The guidelines emphasize labor markets and other buy-side markets in reviewing mergers. The agencies will seek to block mergers that lead to fewer options for employees.
 12. When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition.
 - The agencies will examine whether the acquisition would give the partial owner the ability to influence the competitive conduct of the target firm, reduce the incentive of the acquiring firm to compete, or give the acquiring firm access to non-public, competitively sensitive information from the target firm.
 13. Mergers Should Not Otherwise Substantially Lessen Competition or Tend to Create a Monopoly.¹²

¹² *Merger Guidelines*, *supra* note 1, at 3–4.

The guidelines also include an appendix that explains sources of evidence the agencies commonly rely on, tools used to evaluate competition, the process for defining relevant markets, and how the agencies typically calculate market shares and concentration metrics.¹³

Conclusion

The guidelines reflect the Biden Administration's view that merger enforcement should be enhanced in order to promote competition in the U.S. economy. The guidelines come two years after President Biden's 2021 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."¹⁴

The guidelines highlight the increased significance of a variety of factors, such as competition in labor markets, potential entrants and platform competition, included in the FTC and DOJ's review of transactions. Frequent acquirers such as private equity firms may also face additional scrutiny of a series of allegedly anticompetitive acquisitions, 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 publications@cahill.com.

¹³ *Id.* at 5.

¹⁴ *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/>.

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