

Federal Trade Commission and Department of Justice Issue New Merger Guidelines

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Last month, the Department of Justice Antitrust Division (“DOJ”) and the Federal Trade Commission (“FTC”) (collectively, the “Agencies”) released the 2023 Merger Guidelines (the “Guidelines”).¹ The Guidelines are the latest iteration of a guidance document published by the Agencies since 1968, which has been revised numerous times over the years.² The Guidelines replace the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines, the latter of which had been previously withdrawn by the FTC.³

The new Guidelines articulate a more comprehensive and aggressive approach to merger enforcement than contemplated in recent iterations. This should not come as a surprise. The Agencies under the current administration have signaled this approach through their public statements and their enforcement activity to date, as well as the draft versions of the Guidelines issued for public comment in July 2023.

Among the most significant changes:

- *Lowering the concentration thresholds for structural presumptions.* The Agencies assess market concentration using the Herfindahl-Hirschman Index (HHI), calculated by adding the squares of the market shares of each market participant; larger HHIs represent a more concentrated market. Under the Guidelines, markets with an HHI above 1,800 are deemed “highly concentrated,” and harm to competition is presumed if a transaction in a highly concentrated market results in an increase in HHI greater than 100.⁴ The HHI threshold of 1,800 lowers the threshold in the most recent guidelines (from 2,500) and returns to the standard articulated in prior versions. Additionally, the Guidelines adopt a structural presumption that a merger is presumed to substantially lessen competition when the combined firm in a horizontal merger would possess a market share of 30 percent or larger, regardless of the overall concentration of the market, and the transaction would result in an increase in HHI greater than 100.⁵
- *Changing the approach to vertical mergers.* The Guidelines adopt some of the approaches to vertical mergers from the 2020 Vertical Merger Guidelines that were subsequently withdrawn by

¹ Press Release, Federal Trade Commission, Federal Trade Commission and Justice Department Release 2023 Merger Guidelines (Dec. 18, 2023).

² Federal Trade Commission, Merger Guidelines at 4 (Dec. 18, 2023) (hereinafter “Guidelines”).

³ Press Release, Federal Trade Commission, Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary (Sept. 15, 2021).

⁴ Guidelines at 5.

⁵ *Id.* at 6 (citing *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 363 (1963)).

the FTC. Specifically, the Guidelines identify factors to be considered in analyzing the risk that a vertical merger will lessen competition by (i) limiting rivals' access to products and services used to compete with one of the merged firms; (ii) allowing the merged firm to gain increased access to rivals' competitively sensitive information; or (iii) dissuading competition from rivals through the threat of limited access.⁶

- *Considering roll-ups and serial acquisitions.* Unlike prior versions of the Guidelines, which focused only on the transaction before the agency, the new Guidelines permit the Agencies to consider the instant transaction in the context of "a pattern or strategy of growth through acquisition by examining both the firm's history and current or future strategic incentives."⁷ This is consistent with recent agency practice of challenging acquisitions by private equity firms that attempt to "roll-up" a particular industry through a series of smaller acquisitions that, individually, may not appear anticompetitive.⁸
- *Focusing on labor markets.* For the first time, the Guidelines expressly mention labor markets as a particular concern. The Guidelines assert that labor markets not only are important buyer-side markets but also present special concerns that are more likely to raise competition issues, including high switching costs and search frictions in finding a new job, the fact that the employee-employer matching process frequently narrows the pool of potential competitors, and narrower geographic markets.⁹ Moreover, the Guidelines state that a merger that tends to substantially lessen competition among buyers cannot be justified by competitive benefits in the downstream market among sellers.¹⁰ In other words, a merger that would substantially lessen competition for workers cannot be saved by a defense that the efficiencies would result in lower prices for consumers.

Merger guidelines are a non-binding statement explaining the Agencies' approach to merger enforcement; they do not carry the force of law. Their function is to inform the public about the standards the Agencies apply when reviewing mergers. While there has been, and will continue to be, substantial debate about whether the Guidelines reflect the "correct" view of antitrust policy, their value lies in the transparency they provide into the Agencies' view.

Finally, while any agency's enforcement practices reflect the policy preferences of the administration it serves, those practices are nonetheless constrained by the bounds of the statutes and by legal precedent. Within those bounds, the Agencies have discretion to prioritize their resources to bring the cases they consider the most important, and the Guidelines should reflect the considerations informing those choices. From this perspective, the Guidelines appear to be an accurate reflection of the Agencies' policy and practice based on their words and actions to date. Ultimately, however, the Guidelines' viability and relevance will depend on how they are applied by the courts in merger litigation.

⁶ *Id.* at 13-18.

⁷ *Id.* at 23.

⁸ See, e.g., Cohen & Gresser, *FTC and DOJ Signal Increased Scrutiny of Private Equity Firms* (Dec. 20, 2022).

⁹ Guidelines at 27.

¹⁰ *Id.*

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