CLIENT ALERT

U.S. Antitrust Agencies Issue Draft Merger Guidelines Formalizing Their Aggressive Approach to Enforcement

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AUTHORS

Matthew Freimuth | Jeffrey B. Korn | Wesley R. Powell | Katrina Robson
William H. Rooney | Neil W. Townsend | Jonathan J. Konoff | Agathe Richard
Ari Blask

On July 19, 2023, the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") issued draft revised merger guidelines[1] for public comment. The Guidelines confirm that the DOJ and FTC (the "Agencies") will continue to take an aggressive approach to reviewing and challenging mergers, consistent with President Biden's Executive Order on Promoting Competition in the American Economy.[2] The Guidelines also come on the heels of the Agencies' proposal of rulemaking under the Hart-Scott-Rodino Act ("HSR") that would require substantially more comprehensive premerger

[1] U.S. Department of Justice and the Federal Trade Commission, Draft Merger Guidelines for Public Comment (2023) ("Guidelines"), available at https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines.

[2] *See* Executive Order on Promoting Competition in the American Economy (July 2021), available here. ("To address the consolidation of industry in many markets across the economy, as described in section 1 of this order, the Attorney General and the Chair of the FTC are encouraged to review the horizontal and vertical merger guidelines and consider whether to revise those guidelines" as part of the Administration's policy "to enforce the antitrust laws to meet the challenges posed by new industries and technologies, including the rise of the dominant Internet platforms, especially as they stem from serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects."). The White House Press Release describes the purpose of the Draft Guidelines as follows: "While they are non-binding, these Guidelines provide clarity to a broad audience about which types of mergers may substantially lessen competition in a way that would harm other market participants, including workers and consumers."

notification filings.[3] Although the Guidelines are presented as a "draft" and a 60-day comment period will ensue, their strong endorsement by the White House likely indicates that the final merger guidelines will closely resemble the Guidelines.

The Guidelines are consistent with the Agencies' recent litigation priorities, focusing on issues such as concentrated markets, multi-sided platforms, vertical integration, and acquisitions of potential entrants—issues that have surfaced in recent challenges to mergers in the healthcare, pharmaceuticals, and technology space. Further, the focus of the Guidelines confirms the Agencies' already articulated interest in scrutinizing private equity-backed transactions. The Guidelines' expansive discussion of potential anticompetitive effects—including a reduction of the concentration thresholds that trigger the Agencies' application of structural presumptions—contrasts starkly with the near-absence of any acknowledgment of potential procompetitive benefits.

The restrictive profile of the Guidelines matches the Agencies' aggressive enforcement practice under the Biden administration, but that practice has frequently been viewed by courts as inconsistent with prevailing merger law and lacking the evidentiary support to prove the Agencies' claims of anticompetitive effect. The consequence has been a string of high-profile losses in cases that the Agencies have based on theories of anticompetitive harm that these new Guidelines now adopt.[4]

Further, the Guidelines draw on many cases that were decided before the modern turn in antitrust law that occurred in the late 1970s and early 1980s and ignore many more recent cases that credit dynamic competitive processes. Although the old Supreme Court cases upon which the Guidelines rely may technically be "good law," the Supreme Court has not had the occasion to review and update those precedents because the 1976 HSR premerger review regime has largely rendered post-closing Supreme Court review of mergers unnecessary.

The Guidelines do not change the case law that courts have developed over the last 40 years, and whether the Guidelines will move merger litigation in the Agencies' favor remains an open question.[5] Additionally, the Agencies are resource-constrained and, in practice, will likely focus only on a subset of the mergers that would be considered anticompetitive under the Guidelines. Under the Biden administration, the Agencies have focused on acquisitions in "big-tech," healthcare, biotechnology, and other allegedly concentrated industries (e.g., publishing and sugar).[6] We expect that the Agencies will

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[3] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178 (June 29, 2023) available here. We summarized and analyzed the key changes to the HSR filing system contained in the proposed rules in a June 29, 2023 memorandum, available here.

[4] *See, e.g.*, *Fed. Trade Comm'n v. Microsoft Corp.,* No. 23-CV-02880-JSC, 2023 WL 4443412 (N.D. Cal. July 10, 2023); *Fed. Trade Comm'n v. Meta Platforms Inc.*, No. 5:22-CV-04325-EJD, 2023 WL 2346238 (N.D. Cal. Feb. 3, 2023); *United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118 (D.D.C. 2022); *United States v. United States Sugar Corp.*, No. CV 21-1644 (MN), 2022 WL 4544025, (D. Del. Sept. 28, 2022), *aff'd*, No. 22-2806, 2023 WL 4526605 (3d Cir. July 13, 2023).

[5] The merger guidelines are not binding, but courts may refer to them as a source of persuasive authority, especially with respect to market definition and the calculation of market share. *See, e.g.*, *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 52 (D.D.C. 2011).

[6] *See supra* note 7.

continue to focus on "high-profile" industries, even as the Guidelines appear to signal a broader focus, and that mergers in many other industries will continue to receive a pragmatic review and clearance.

Key Revisions in the Guidelines

The Agencies had previously issued separate guidelines for vertical and horizontal mergers. That division reflected a view that horizontal mergers were more likely to lessen competition than vertical mergers.[7] The Guidelines, by contrast, combine vertical and horizontal mergers into a single document, signaling that the Agencies believe that vertical mergers should be subject to closer scrutiny than in the past.

The changes in the Guidelines pertaining to vertical mergers are a matter of substance, and not just form. For instance, the Guidelines suggest that a vertical merger in which the combined entity has at least fifty percent share in an input market should be presumptively considered to lessen competition.[8] The previous vertical merger guidelines contained no such numerical presumption. Instead, under the previous guidelines, the Agencies would consider the 'net effects' on efficiency and consumer prices when considering whether the merged entity could foreclose or raise the costs of its competitors.[9]

More generally, the Guidelines reflect the Agencies' view that the concept of presumptive illegality in merger review should be revived and expanded. Presumptions of illegality give the Agencies a significant advantage in demonstrating the unlawfulness of a merger and shift the burden to the merging parties to rebut the presumption based on justifications that the Guidelines construe narrowly and subject to stringent criteria. Moreover, these presumptions—which may be triggered by combined market shares as low as 30%—appear likely to trigger many more protracted investigations that impose significant delay and costs on merger parties. The Guidelines have thus attempted to provide the Agencies with important litigation advantages that do not accord with current case law and, if achieved, would have significant practical consequences for parties to proposed transactions.

Previously, the merger guidelines were organized around thematic topics, such as 'evidence of adverse competitive effects,' 'market definition,' and 'efficiencies.'[10] This format was consistent with the Agencies' use of a balancing approach to analyze competitive effects, meaning that the Agencies would consider procompetitive effects and anticompetitive effects in tandem when reviewing mergers. The Guidelines instead center on eight criteria that are all phrased as negative prohibitions.[11]

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7 *See, e.g.*, Jonathan B. Baker et al., *Five Principles for Vertical Merger Enforcement Policy*, 33 ANTITRUST 12 (2019) (discussing and challenging the view that vertical mergers should be analyzed under different criteria than horizontal mergers).

8 Guidelines at 3.

9 U.S. Department of Justice and the Federal Trade Commission, Vertical Merger Guidelines (June 2020), available here, at 5.

10 2020 Vertical Merger Guidelines at 5; U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines (Aug. 2010), available here, at 2, 7, 29.

11 Guidelines at 3. The Guidelines list thirteen guidelines in total. In addition to the eight negatively phrased guidelines, "[g]uidelines 9-12 explain issues that often arise when the Agencies apply [guidelines 1-8] in several common settings," and guideline 13 explains that guidelines 1-12 are "not exhaustive of the ways that a merger may substantially lessen competition or tend to create a monopoly."

These Guidelines are as follows:

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

Guideline 2: Mergers should not eliminate substantial competition between firms.

Guideline 3: Mergers should not increase the risk of coordination.

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

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

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

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

Guideline 8: Mergers should not further a trend toward concentration.

Additionally, the Guidelines contain important changes regarding procompetitive benefits and assessments under the Herfindahl-Hirschman Index ("HHI"), which likely implicate how the Agencies understand and seek to apply the eight prohibitions listed above. Starting with procompetitive benefits, past iterations of the merger guidelines acknowledged efficiency improvements—"which may result in lower prices, improved quality, enhanced service, or new products"—as evidence that merging entities could use to rebut allegations that their transaction was anticompetitive.[12] The Guidelines, by contrast, emphasize that "[c]ompetition usually spurs firms to achieve efficiencies internally," and that organic growth is preferred.[13] Further, the Agencies articulate a "procompetitive" litmus test for efficiencies: "efficiencies are cognizable only if they do not result from the anticompetitive worsening of terms for the merged firm's trading partners."[14] This means, among other things, that if the efficiency is a reduction in input cost, it will not be credited if it "reflects an increase in monopsony [or buyer] power."[15] The Guidelines thus shrink the bases on which merging parties can show that "no substantial lessening of competition is threatened by the merger."[16]

As for the HHI, the Guidelines lower the HHI thresholds used to evaluate the concentration within certain markets and specify more severe consequences for exceeding those thresholds relative to the 2010 horizontal merger guidelines. The

[12] 2010 Horizontal Guidelines at 29. *See also* 2020 Vertical Guidelines at 5.
[13] Guidelines at 34.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 16.

HHI is calculated by taking the sum of the squares of the market share of firms within a relevant market. Previously, the Agencies would consider a merger as "likely to enhance market power" if the merger increased HHIs by more than 200 points in a highly concentrated market (an HHI above 2,500).[17] Under the new guidelines, an increase of just 100 points in far less concentrated market (HHI only has to be greater than 1,800) will trigger the Agencies' structural presumption.[18] In addition, the Agency added a trigger based on market share, specifically if the merged firm's market share is greater than 30% and the change in HHI is greater than 100.[19] Finally, even where the structural presumption under guideline 1 is not triggered, the Agencies may assess whether a merger "further[s] a trend toward concentration sufficiently" under guideline 8 if the merger occurs in an industry where there is a "significant tendency toward concentration." Such a tendency may be demonstrated by a "steadily increasing HHI" that "exceeds 1,000 and rises toward 1,800" or a "significant increase in concentration," regardless of market structure, "such as a change in HHI greater than 200."[20]

Conclusion

The Guidelines contain substantial revisions that align with the Agencies' recently aggressive approach to antitrust enforcement. The revisions are consistent with the statements made and cases brought by current Agency leadership, and therefore may represent a formalization of the Agencies' existing approach rather than a "new" policy. Although the Guidelines indicate that the Agencies may view a wide array of mergers as anticompetitive, the Guidelines do not change the case law that courts apply when considering lawsuits that challenge mergers. In practice, the Agencies' enforcement priorities will likely continue to be bound by (i) an inclination to focus on high profile cases, (ii) judicial precedent (which, as noted, is inconsistent with the Guidelines in various respects and would control), (iii) resource constraints, and (iv) other practical factors that are not acknowledged in the Guidelines.

Willkie attorneys are well-situated to assist clients with navigating antitrust uncertainty and devising a strategic approach that accounts for the Agencies' current understanding of the potential anticompetitive harms posed by mergers. We are happy to discuss the Guidelines and the impact they may have for certain industries, investors, and transactions in more detail.

[17] 2010 Horizontal Guidelines at 19.
[18] Guidelines at 7.
[19] *Id.*
[20] Guidelines at 21–22.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

Matthew Freimuth
212 728 8183
MFreimuth@willkie.com

Jeffrey B. Korn
212 728 8842
JKorn@willkie.com

Wesley R. Powell
212 728 8264
WPowell@willkie.com

Katrina Robson
202 303 1096
KRobson@willkie.com

William H. Rooney
212 728 8259
WRooney@willkie.com

Neil W. Townsend
212 728 8272
NTownsend@willkie.com

Jonathan J. Konoff
212 728 8627
JKonoff@willkie.com

Agathe Richard
212 728 8190
ARichard@willkie.com

Ari Blask
202 303 1075
ABlask@willkie.com