Westlaw Today
powered by Reuters

Final FTC and DOJ 2023 Merger Guidelines affirm Biden administration's aggressive enforcement agenda

By Preston Miller, Esq., Peter Guryan, Esq., Sara Y. Razi, Esq., and Karen Kazmerzak, Esq., Simpson Thacher & Bartlett LLP

JANUARY 9, 2024

On December 18, 2023, the Federal Trade Commission ("FTC") and U.S. Department of Justice ("DOJ") published the final version of their highly-anticipated updated Merger Guidelines, which now officially replace prior guidelines. The 2023 guidelines are the latest installation in a series of updates made over the years, starting in 1982 and most recently in 2020.[1]

According to the agencies, the final Merger Guidelines "emphasize the dynamic and complex nature of competition ranging from price competition to competition for the terms and conditions of employment, to platform competition."[2]

The Merger Guidelines have been under development since January 2022, and reflect consideration of over 30,000 public comments.

The final version largely mirrors the Draft Merger Guidelines (originally published on July 19, 2023, and which were the subject of a previous client alert published by Simpson Thacher[3]), and in so doing reaffirms the agencies' commitment to the Biden administration's aggressive enforcement agenda.

As noted in a joint DOJ/FTC press release, the Merger Guidelines have been under development since January 2022, and reflect consideration of over 30,000 public comments. As always, the press release accompanying the Merger Guidelines cautions that they "do not predetermine enforcement action by the agencies" and that "enforcement decisions will necessarily depend on the facts in any case and will continue to require prosecutorial discretion and judgment."

Final Merger Guidelines

The final Merger Guidelines are as follows[4]:

- **Guideline 1**: Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market.
- **Guideline 2**: Mergers Can Violate the Law When They Eliminate Substantial Competition Between Firms.
- **Guideline 3**: Mergers Can Violate the Law When They Increase the Risk of Coordination.
- **Guideline 4**: Mergers Can Violate the Law When They Eliminate a Potential Entrant in a Concentrated Market.
- **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.
- **Guideline 6**: Mergers Can Violate the Law When They Entrench or Extend a Dominant Position.
- **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.
- **Guideline 8**: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.
- **Guideline 9**: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform.
- **Guideline 10**: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers, Creators, Suppliers, or Other Providers.
- **Guideline 11**: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition.

Important takeaways

Guidelines articulate a wide range of theories of harm that reflect Biden administration case record

Consistent with the Draft Merger Guidelines, the final Guidelines include a wider range of articulated theories of harm to competition than appeared in the 2010 Horizontal Merger Guidelines ("2010 Merger Guidelines") or any prior iterations.

In addition to the horizontal unilateral and coordinated effects theories of harm identified in earlier versions of the guidelines, these Draft Merger Guidelines incorporate non-horizontal concerns, including vertical foreclosure; entrenchment of a monopoly position; harms to competition from roll-up acquisitions; and harms to platform competition and labor competition.

While some theories of competitive harm were not reflected in prior merger guidelines, they are largely consistent with the theories articulated in Agency complaints brought by the Biden administration and apparent in recent investigations. Accordingly, while they are a departure from prior guidelines, they do not represent a fundamental shift in how the Agencies are evaluating mergers in the current antitrust landscape. Rather, they seek to memorialize the administration's enforcement policies and priorities.

A few examples of Guidelines reflecting notable recent enforcement actions include:

- **Guideline 4 — Mergers Can Violate the Law When They Eliminate a Potential Entrant in a Concentrated Market**. This guideline is clearly reflected in the FTC's (unsuccessful) efforts to block the *Meta/Within* transaction. In June 2022, the FTC sued under both actual and perceived potential competition theories to block Meta's proposed acquisition of Within Unlimited and its virtual reality dedicated fitness app, Supernatural. The complaint alleged that Meta was a potential entrant in the virtual reality dedicated fitness app market, and that the mere possibility of Meta's entry likely influenced competition in the virtual reality dedicated fitness app market, which would be dampened by the acquisition. The FTC lost its bid for a preliminary injunction in federal district court in February 2023, and subsequently dismissed its administrative complaint.
- **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**. A prime example of this guideline is the FTC's (again unsuccessful) opposition to the Microsoft/Activision transaction. In December 2022, the FTC sued to block Microsoft from acquiring video game developer Activision Blizzard, alleging that the transaction would enable Microsoft to suppress competitors to its Xbox gaming consoles and subscription content and cloud-gaming business by foreclosing access to Activision's popular content to Microsoft's gaming rivals. In July 2023, a federal district court denied the FTC's request for a preliminary injunction, ruling that the FTC failed to show Microsoft's incentive to foreclose, citing among other factors, the risk of reputational harm to Microsoft from the alleged foreclosure and the contractual commitments that Microsoft made to expand access of Activision content to other console manufacturers. The FTC has appealed the district court decision to the Ninth Circuit, however the Ninth Circuit denied a motion by the FTC seeking to block the deal pending the appeal.
- **Guideline 6 — Mergers Can Violate the Law When They Entrench or Extend a Dominant Position**. The guideline is reflective of the FTC's position in the Amgen/Horizon case, which has now been settled. In May 2023, the FTC sued to block Amgen Inc.'s purchase of Horizon Therapeutics plc, alleging that the transaction would allow Amgen to leverage its portfolio of blockbuster drugs in negotiations with insurance companies and pharmacy benefit managers ("PBMs"). The complaint does not allege that the parties are competitors in any relevant markets; rather, the transaction allegedly would allow the combined firm to engage in bundling to entrench the monopoly position of Horizon's drugs to treat thyroid eye disease and chronic gout. The FTC and parties settled the transaction mid-litigation.

Market concentration: Much broader view of 'concentrated markets' consistent with recent aggressive enforcement

The final Merger Guidelines take a much broader view of what comprises a "concentrated" market than the previous version, reverting to thresholds applied in versions of the Guidelines prior to 2010: now, "concentrated" markets are those markets in which the post-merger HHI exceeds 1000, and "highly concentrated" markets are those with an HHI over 1800.

These Draft Merger Guidelines incorporate non-horizontal concerns, including vertical foreclosure; entrenchment of a monopoly position; harms to competition from roll-up acquisitions; and harms to platform competition and labor competition.

In addition to reverting to these lower thresholds, the Merger Guidelines include two market share tests that create a presumption of harm to competition. For horizontal mergers, the presumption captures mergers in which the combined firm's share is greater than 30% and the change in HHI is over 100.

This would capture as presumptively anticompetitive, for example, the acquisition by a 30% market share holder of only a 2% market share holder. For vertical mergers, the presumption is triggered at shares over 50%. This is a departure from the 2010 Merger Guidelines, which contained no market share-based presumptions.

The revised thresholds and presumptions in the Merger Guidelines cast a wide net over the categories of transactions that may be scrutinized more closely by the Agencies. This view, however, is consistent with the Agencies' recent track record of more aggressive enforcement and now provides a more specific quantification that parties may use to assess enforcement risk.

Market definition: Tools continue to expand and move from economically-driven horizontal monopolist test to direct forms of evidence

The Merger Guidelines continue the trend started in the 2010 Merger Guidelines away from the Hypothetical Monopolist Test for market definition (the "HMT") and towards more direct forms of evidence.

Under the Merger Guidelines, the HMT is merely one of four equally situated tools that the Agencies may rely on to demonstrate a relevant antitrust market:

(1) Direct evidence of substantial competition between the merging parties can demonstrate that a merger may substantially lessen competition, even if the precise metes and bounds of the market are not specified;

(2) Direct evidence of the exercise of market power can be used to identify market power and "the rough contours of the relevant market,"

(3) Practical indicia of market characteristics, such as the seven cited in the Supreme Court's decision in Brown Shoe; and

(4) The HMT, i.e., whether a hypothetical monopolist could impose a small but significant non-transitory increase in price or worsening of terms (e.g., 5% or more).

When the Agencies do choose to use the HMT, the Merger Guidelines supplement the HMT in ways that enhance its applicability to the non-horizontal theories of harm in the Merger Guidelines, such as by expanding it to account for non-price effects (e.g., reduction in quality or service, or depression of wages) and to include products and services that do not yet exist, such as in innovation markets.

Key changes made in the final publication

The final Merger Guidelines reflect two notable changes from the draft guidelines initially released, neither of which promise much relief for merging parties:

> *First*, the Merger Guidelines do not include the prior Guideline 6, establishing a presumption that vertical mergers harm competition when one of the parties' market share exceeds 50% — though the notion is still reflected in a footnote describing that the agencies will infer the merging firm has or is approaching monopoly power (with the ability to weaken or exclude competitors by limiting access to their products) when market share is greater than 50%.

This development is neutral for merging parties: while it eliminates a presumption of harm *for now*, it leaves open the possibility that the agencies may take an even more aggressive stance down the road, particularly considering the FTC's recent Court of Appeals victory in the *Illumina / Grail* vertical merger (which is now cited in the final Merger Guidelines).

Second, the Merger Guidelines delete the prior Guideline 13, a "catch-all" guideline prohibiting any transaction that otherwise substantially lessens competition or tends to create a monopoly. This provides little comfort to merging parties given that the Draft Merger Guidelines merely took the opportunity to note that they were "not exhaustive" and that the "Agencies look to the facts and the law in each case."

The revised thresholds and presumptions in the Merger Guidelines cast a wide net over the categories of transactions that may be scrutinized more closely by the Agencies.

The final Merger Guidelines still note, now in the preamble, that "the factors contemplated in these Merger Guidelines neither dictate nor exhaust the range of theories or evidence that the Agencies may introduce in merger litigation" and that "[t]he Agencies follow the facts and the law in analyzing mergers as they do in other areas of law enforcement."

On the other hand, the Merger Guidelines also make more clear that each of the scenarios described may, if factually supported, create only an *inference* that a merger may lessen competition, but that this inference may be rebutted by various forms of evidence also discussed in the Merger Guidelines.

In response to criticism, the Merger Guidelines also now contain more even-handed case law citations, including recent cases lost by the government.

Final note — how will the courts react?

As we cautioned in our prior alert, it remains to be seen whether the courts will accept these Merger Guidelines within the facts and framework of the cases presented. The FTC and DOJ have reason to be optimistic after the recent 5th Cir. decision in Illumina/Grail, in which the Court endorsed the FTC's "Brown Shoe" approach to market definition and competitive effects, but only time will tell how future courts adopt and apply the Guidelines themselves.

Notes

[1] Prior guidelines were issued in 1982, 1984, 1992, 1997, 2010 and 2020. A predecessor to the modern chain of guidelines was also issued in 1968.

[2] https://bit.ly/3ROGaaV

[3] https://bit.ly/48zctla

[4] See https://bit.ly/3RHGQ1M.

About the authors




(L-R) **Preston Miller** is a partner in **Simpson Thacher & Bartlett LLP**'s antitrust and trade regulation practice. He focuses on antitrust and competition law, with a particular emphasis on merger review, and has extensive experience obtaining regulatory clearance from domestic and international competition authorities for transactions across a wide variety of industries. He can be reached at preston.miller@stblaw.com. **Peter Guryan** is a partner at the firm and global co-chair of its antitrust and trade regulation practice. He has represented clients in obtaining antitrust approvals in numerous transactions, including before the Department of Justice, the Federal Trade Commission and competition authorities outside the United States. He previously worked as a trial attorney in the Antitrust Division of the DOJ. He can be reached at peter.guryan@stblaw.com. **Sara Y. Razi** is also a partner and global co-chair of the firm's antitrust and trade regulation practice. She focuses on merger reviews, government antitrust investigations, antitrust litigation and counseling on a variety of competition issues in multiple jurisdictions. She previously served in senior roles at the FTC for nearly a decade. She can be reached at sara.razi@stblaw.com. **Karen Kazmerzak** is a partner in the firm's antitrust and trade regulation practice. She advises clients on a wide range of antitrust and competition issues, particularly in seeking clearance for high-profile, complex mergers and acquisitions before the DOJ and FTC, and in developing strategies to advocate for merger approval in international jurisdictions. She started her career as a lawyer at the FTC. She can be reached at karen.kazmerzak@stblaw.com. Miller, Razi and Kazmerzak are located in Washington, D.C., while Guryan is based in New York.

This article was first published on Westlaw Today on January 9, 2024.