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New merger guidelines position agencies for continued aggressive enforcement

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On July 19, the FTC and DOJ (the "Agencies") jointly published highly anticipated Draft Guidelines[1] (the "Draft Guidelines") laying out their approach to merger enforcement and confirming the Biden Administration's continued commitment to rigorous antitrust enforcement.[2] The guidelines follow much of the prior guidance for horizontal mergers, albeit adopting lower market share and concentration thresholds for deeming a merger presumptively anticompetitive.

They also reflect recent Agency enforcement actions based on more progressive theories — covering topics such as elimination of potential competition (*Meta/Within*), vertical foreclosure (*Microsoft/Activision*), access to competitively sensitive information (*UHG/Change*), extension of a dominant position (*Amgen/Horizon*), platform considerations (*Facebook/WhatsApp/Instagram* and *IQVIA/Propel*), and concentrations among purchasers or employers (*Penguin Random House/Simon & Schuster*).

As such, the Draft Guidelines exhibit an effort to transparently communicate current enforcement practices to the market rather than signal a change in approach. Finally, they feature citations to decades-old case precedent, with a goal of anchoring reinvigorated enforcement principles to historical legal precedent, despite the more limited success that the Agencies have seen in pressing some of these theories in the courts.

The Draft Guidelines are organized into 13 principles, each called a "guideline," describing the range of scenarios in which a merger may be considered problematic:

Mergers should not *significantly increase concentration* in highly concentrated markets.

Mergers should not *eliminate substantial competition* between firms.

Mergers should not *increase the risk of coordination*.

Mergers should not *eliminate a potential entrant* in a concentrated market.

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

Vertical mergers should not *create market structures that foreclose competition*.

Mergers should not *entrench or extend a dominant position*.

Mergers should not *further a trend toward concentration*.

When a merger is part of a series of multiple acquisitions, *the agencies may examine the whole series*.

When a merger involves a multi-sided platform, *the agencies examine competition between platforms, on a platform, or to displace a platform*.

When a merger involves competing buyers, the agencies examine whether it may *substantially lessen competition for workers or other sellers*.

When an acquisition involves *partial ownership or minority interests*, the agencies examine its impact on competition.

Mergers should not otherwise substantially lessen competition or tend to create a monopoly.

The Draft Guidelines are organized into 13 principles, each called a "guideline," describing the range of scenarios in which a merger may be considered problematic.

Below, we discuss the key provisions of the new guidelines, describe the ways in which they align with or differ from prior iterations, and discuss implications for future merger review.

The Draft Guidelines are available for public comment until September 18, 2023 (unless the period is extended), following which the Agencies will draft and publish the final version.

The draft guidelines reflect Biden administration case record

The Draft Guidelines include various theories of competitive harm that did not appear in the 2010 Horizontal Merger Guidelines ("2010 Guidelines") or any prior iterations, such as vertical foreclosure; entrenchment of a monopoly position; harms to competition from roll-up acquisitions; and harms to platform competition and labor competition.

While new to the guidelines, however, these theories are largely consistent with the those articulated in recent Agency complaints, and memorialize the Biden Administration's already-existing enforcement policies and priorities. Below are some examples of the theories of harm articulated in the Draft Guidelines, and corresponding recent cases the Agencies have brought or settled applying them, in which the Agencies have achieved only mixed success.

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

While the 2010 Guidelines address the concern that the acquisition of a maverick firm may eliminate potential competition, the Draft Guidelines provide a new framework for determining whether an acquisition may eliminate actual potential competition (*i.e.*, a reasonable probable future entrant) and explain that mergers may substantially lessen competition by eliminating even a *perceived* new entrant.

The Agencies will consider whether (1) one of the merged firms already has a dominant position, and (2) the merger may entrench or extend that position.

Meta/Within: 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 FTC lost its bid for a preliminary injunction in federal district court in February 2023, and subsequently dismissed its administrative complaint.

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

The Draft Guidelines explain that the Agencies will evaluate whether a merger may substantially lessen competition by giving a firm control over access to a product, service, or customers that its rivals use to compete. In assessing the likelihood of anticompetitive effects, the Agencies will consider the merged firm's ability and incentive to weaken or exclude rivals.

The Draft Guidelines also caution that the Agencies apply little weight to the merging parties' rebuttal claims that are not supported by an objective analysis, including speculative claims about reputational harms or commitments to protect or otherwise avoid harming their rivals that do not align with the firm's economic incentives.

To assess vertical merger competitive effects, the Agencies advise they will assess whether the merged firm has an incentive to worsen rivals' terms, taking into account the structure, history, and probable future of the market, such as: (1) the extent to which the merged firm competes with its rivals that use the related product or service, (2) the merging parties' prior actions to limit rivals' access to products they used to compete, and (3) internal documents prepared by the merging parties identifying instances where the firms believe they have incentives to raise rivals' costs.

Microsoft/Activision: In December 2022, the FTC sued to block Microsoft from acquiring video game developer Activision Blizzard, alleging that the transaction would enable Microsoft to foreclose rival gaming platforms access to Activision's popular content.

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.

The Draft Guidelines also address the possibility that a merger may substantially lessen competition if it would grant the firm access to rivals' competitively sensitive information, which it might use to either (1) undermine competition from a rival, or (2) facilitate coordination by giving the firm efficient access to its rival's competitive strategies.

UnitedHealth Group/Change: In February 2022, the DOJ sued to block UnitedHealth Group's acquisition of Change Healthcare, alleging that the acquisition would allow United to use competitively sensitive healthcare claims data to undermine rival health insurers.

A federal district court denied the DOJ's bid injunction request in September 2022, finding that the government failed to show United's post-merger incentives aligned under this theory, and noting that United would have to uproot its entire business strategy, violate longstanding firewall policies, flout existing contractual commitments, and sacrifice reputational interests to do so.

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

The Draft Guidelines expand the scope of potential competitive harms beyond horizontal and vertical effects concerns articulated in prior iterations to cover mergers that would entrench a monopolist or allow it to extend its dominant position into new markets.

The Agencies will consider whether (1) one of the merged firms already has a dominant position, and (2) the merger may entrench or extend that position. To determine if one of the firms already has a dominant position, the Agencies will rely on direct evidence of market power or a market share of at least *30%*.

If a dominant position is established, the Agencies will examine whether the merger may entrench that position by increasing entry barriers or switching costs, interfering with competitive alternatives, depriving rivals of scale economies or network effects, or eliminating a nascent competitor. This theory is most likely to be used in connection with mergers in markets where the merged firm can allegedly use bundling or tying to delay or prevent competition from nascent competitors, such as in life sciences.

Amgen/Horizon Therapeutics: In May 2023, the FTC sued to block Amgen Inc.'s purchase of Horizon Therapeutics plc. Despite a lack of horizontal or vertical overlaps, the FTC alleges competitive concerns with the transaction because Amgen would have the ability and incentive to offer cross-market bundled rebates that include its blockbuster drugs with Horizon's products, denying Horizon's potential rivals from being able to compete. The case is currently pending in federal district court in Illinois and in the FTC's administrative court.

Guideline 8: Mergers should not further a trend towards concentration

In another expansion beyond prior iterations, the Draft Guidelines explain that a merger may substantially lessen competition if it facilitates a *trend* toward concentration, relying on two factors. *First*, whether the market in which the merger would occur has a tendency toward concentration, such as a steadily increasing Herfindahl-Hirschman Index ("HHI") (between 1000 and 1800) or the exit of significant players. *Second*, whether the merger would increase the concentration trend, such as by an HHI increase greater than 200.

JAB Consumer Partners/National Veterinary Associates: In June 2022, the FTC entered into a consent order with JAB, requiring it to divest certain veterinary clinics and citing the trend towards consolidation in emergency and specialty veterinary services across the United States in recent years. The FTC Chair's contemporaneous statement explains how prior approval and notice provisions also included in the order will allow the FTC to better address "stealth roll-ups by private equity firms . . . and serial acquisitions by other corporations."

Guideline 10: When a merger involves a multi-sided platform, the agencies examine competition between platforms, on a platform, or to displace a platform

The Draft Guidelines distinguish competition *between platforms* (*e.g.*, to attract participants) from competition *on platforms* (giving the example of a platform operator combining with a platform participant that sells products or services on that platform — and the resulting incentive for the platform operator to favor the now-affiliated participant as a seller) and competition to *displace a platform* (in many ways a potential competition or nascent competitor concept, looking to prevent established platforms from stifling would-be alternatives or workarounds).

Facebook/WhatsApp/Instagram: In December 2020, the FTC sued Facebook seeking to unwind its WhatsApp and Instagram acquisitions. The FTC alleges that the acquisitions amplified the "strong network effects" creating "high barriers to entry" and "leave[] consumers with few choices for personal social networking." The matter is still pending.

IQVIA/Propel Media: In July 2023, the FTC sued to block IQVIA's acquisition of Propel Media. The FTC alleged the combination would eliminate competition between two of the largest providers of demand-side platforms for programmatic advertising. Coupled with IQVIA's data assets (which the FTC calls the "gold standard"), the FTC also alleged the acquisition would "disadvantage current or emerging rival[]" platforms. The matter is still pending.

Guideline 11: When a merger involves competing buyers, the agencies examine whether it may substantially lessen competition for workers or other sellers

Consistent with Biden Administration enforcement priorities, the Draft Guidelines also explain how powerful buyers can harm any manner of sellers/suppliers, characterizing labor markets as "important buyer markets" and noting the potential harms from a merger between competing employers.

Although the Draft Guidelines offer a few new twists, the expanded scope has already been foreshadowed in the Biden Administration enforcement actions and the analytical tools, evidence, and framework stay true to prior iterations.

Penguin Random House/Simon & Schuster: In November 2021, the DOJ successfully sued to block Penguin Random House's acquisition of Simon & Schuster on "buyer power" grounds, alleging it would diminish competition between publishers to sign authors of "anticipated best sellers" (*i.e.*, those receiving cash advances over $250,000). Focusing on the market structure and in particular the market shares of the parties in the relevant market, the district court agreed, and the merger was prohibited.

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

The Draft Guidelines also use a much wider lens through which to view market concentration. According to the Draft Guidelines, the lower thresholds at which markets may be deemed concentrated aim to revert to the thresholds in versions of the Guidelines prior to 2010: a "concentrated" post-merger market HHI exceeds 1000 and "highly concentrated" exceeds 1800.[3]

The Draft Guidelines also add 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. For vertical mergers, the presumption is triggered at foreclosure shares over 50%.[4]

The Draft Guidelines' revised thresholds and presumptions 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' more aggressive enforcement over the past two years and now provides updated metrics to assess enforcement risk.

Market definition, coordinated/unilateral effects, and affirmative defenses: Approach remains largely unchanged

Market definition

The Draft Guidelines continue the trend started in the 2010 Guidelines away from the Hypothetical Monopolist Test for market definition (the "HMT") and towards more direct forms of evidence and frameworks that orient to non-horizontal theories, such as by explicitly covering non-price effects (*e.g.*, reduction in quality or service, or depression of wages) and innovation markets.

Under the Draft 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**, even if the precise metes and bounds of the market are not specified;

(2) **Direct evidence of the exercise of market power** can identify "rough contours of the relevant market";

(3) **Practical indicia** of market characteristics, such as those cited 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.

Coordinated/unilateral effects

The Draft Guidelines do not substantially depart from the horizontal unilateral and coordinated effects theories in the 2010 Guidelines.

Guideline 2: Mergers Should Not Eliminate Substantial Competition Between Firms

As described in prior guidelines, the Agencies examine a variety of indicators to identify whether a merger may substantially lessen competition, including the parties' ordinary course documents. The Agencies may also consider entry and exit events, customer substitution, the impact of a competitive actions between the merging firms. Appendix 2 to the Draft Guidelines describes the economic tools the Agencies use to assess competition between firms, largely adopting the same framework and tools described in the 2010 Guidelines.

Guideline 3: Mergers Should Not Increase the Risk of Coordination

This guideline discusses how a merger may increase the risk of coordination. The Draft Guidelines explain that Agencies presume that post-merger conditions are susceptible to coordinated effects if any of three primary factors are present: (1) a highly concentrated market, (2) prior actual or attempted coordination, and (3) elimination of a maverick.

They also address certain "secondary" factors that increase risk, even absent the primary factors, such as market concentration and market transparency. The Draft Guidelines also note that "[b]ecause tacit coordination may be difficult to address under Section 1 of the Sherman Act, vigorous enforcement of Section 7 of the Clayton Act to prevent market structures conducive to such coordination is especially critical."

Affirmative Defenses Available to Parties are Broadly Unchanged

Fundamentally, the types of defenses recognized by the Draft Guidelines are unchanged from 2010, but the Draft Guidelines take steps to narrow each defense.

Failing Firm: Remains consistent with previous guidance in emphasizing that this will be accepted only where there are no alternatives to the proposed transaction (*i.e.*, no other plausible, less competitively problematic buyers are available).

New Entry: Restates the long-held requirements that new entry be timely, likely and sufficient to eliminate the threat a merger presents.

Procompetitive Efficiencies: Holds the merging parties to a high bar; among other things, efficiencies must be merger-specific (specific to *that particular buyer and seller*, not any merger generally), and they must demonstrably result in likely pass-through of benefits to consumers, rather than simply captured and kept by the merging firms.

Takeaways

In releasing their Draft Guidelines, the Agencies announced three goals for the new guidance. *First*, that it reflect and cite to relevant legal precedent. *Second*, that the Draft Guidelines offer transparency on the framework and the underlying legal precedent to identify potentially illegal mergers. And, *finally*, the Agencies sought to update the analytical tools used to assess the competitive merits using guidelines that reflect the commercial realities of the modern economy.

Although the Draft Guidelines offer a few new twists, the expanded scope has already been foreshadowed in the Biden Administration enforcement actions and the analytical tools, evidence, and framework stay true to prior iterations. Most of the new guidance relates to non-horizontal mergers based on legal precedent that is several decades old. It remains to be seen whether the courts will accept these Draft Guidelines within the facts and framework of the cases presented.

Notes

[1] https://bit.ly/3q4z9ch

[2] DOJ Press release available here: https://bit.ly/3OzCKbO; FTC press release available here: https://bit.ly/3YiPua0.

[3] The HHI is defined as the sum of the squares of the market shares (e.g., the HHI for a market of five equal firms is 2,000 (5 x 202 = 2,000)).

[4] The Draft Guidelines define "foreclosure share" as "the share of the related market that is controlled by the merged firm, such that it could foreclose rival's access to the related product on competitive terms."

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