

THE FTC AND DOJ ISSUE FINAL MERGER GUIDELINES

On December 18, 2023, the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission (collectively, the "Agencies") published the final version of the [2023 Merger Guidelines](#) ("Final Guidelines") which replace all earlier Merger Guidelines. After several months and numerous constructive comments from the antitrust bar, the Final Guidelines largely maintain the aggressive approach contained in the Draft Merger Guidelines ("Draft Guidelines") circulated in July 2023, with some notable exceptions discussed below. The Final Guidelines consist of 11 core Guidelines (consolidated from 13 in the Draft Guidelines), which reinforce the Biden administration's enforcement priorities and views on antitrust theories of harm.

KEY TAKEAWAYS

- **The Final Guidelines maintain the market share presumption and lower market concentration thresholds to identify a lessening in competition.** In Guideline 1, the Agencies preserved the structural presumptions used to identify mergers that may be found to substantially lessen competition or tend to create a monopoly. Notably, by lowering HHI market concentration thresholds from 2,500 to 1,800, the Final Guidelines now indicate that a "7-to-6" merger in a market where competitors have equal market shares is presumptively anticompetitive. Also, the Final Guidelines state that any merger that would give the merging parties a market share over 30% and increase HHI by 100 would be presumptively illegal. For example, a combination of two companies with shares of 28% and 2% is presumptively anticompetitive. Merging parties can seek to rebut both presumptions of illegality. This lower threshold is significant and, if applied as written, is estimated to likely double the number of deals that will get extended scrutiny.
- **The Final Guidelines maintain a focus on labor markets.** Guideline 10 provides that a merger of employers, who compete to purchase the same sources of labor, can substantially lessen competition by eliminating

competition for employees or by increasing coordination among the remaining employers. The Agencies will examine the merging firms' power to cut or freeze wages, exercise increased leverage in negotiations with workers, or generally degrade benefits and working conditions without prompting workers to quit. The Final Guidelines' focus on labor comports with the proposed major changes in the Hart-Scott-Rodino ("HSR") Form that requires substantial labor information.

- **The Final Guidelines maintain the entrenchment theory of competitive harm.** For dominant firms, Guideline 6 provides that the Agencies will consider whether a merger may entrench or extend an already dominant position in violation of Section 7 of the Clayton Act and/or Section 2 of the Sherman Act through exclusionary conduct, weakening competitive constraints, or otherwise harming the competitive process.
- **The Final Guidelines maintain scrutiny of serial acquisitions and partial ownership.** Guideline 8 provides that the Agencies may evaluate proposed mergers against industry trends toward consolidation or evaluate the overall pattern of serial acquisitions by the acquiring firm. This analysis will include examining the merging firms' history and current or future strategies and incentives. The Final Guidelines' focus on serial acquisitions comports with the proposed major changes in the HSR Form that requires information about prior transactions, including unreportable ones, in the same industry.
- **The Final Guidelines maintain a catch-all section stating that the Agencies' investigations may extend beyond the articulated Guidelines.** Although no longer stated as a separate guideline, the Agencies maintain that they may consider other evidence when determining if a merger substantially lessens competition or tends to create a monopoly. Examples include mergers that enable a firm to evade regulatory constraints, exploit a unique procurement process, or dampen the acquired firm's incentive or ability to compete because of the structure of the acquisition or the acquirer.

SUBSTANTIVE CHANGES FROM THE DRAFT GUIDELINES

- **Removal of the vertical merger market share presumption of competitive harm.** The Agencies have notably walked back from the 50% market share presumption of harm in vertical mergers articulated in the Draft Guidelines. But the Agencies indicate, in a footnote, that they will generally infer that a company has monopoly power over related products when its share of that product exceeds 50%. The Final Guidelines removed a draft Guideline related to vertical mergers, instead consolidating its vertical foreclosure concepts into other guidelines.
- **Emphasis on what will and will not succeed as rebuttal evidence.** The Agencies clarify that rebuttal evidence of potential entry will not be as strong as evidence of actual entry to combat claims that a merger will not substantially lessen competition. But the Agencies have helpfully reintroduced the concept that the elimination of double marginalization

that occurs when a company is vertically integrated can be a procompetitive efficiency.

- **Addition of pricing algorithms.** The Agencies included pricing algorithms, programmatic pricing services, and other analytical or surveillance tools that track prices as factors that make a market more susceptible to coordination and market observability.
- **Focus on what constitutes a nascent threat.** Guideline 6 articulates that the most likely nascent threats are firms with "niche or only partially overlapping products or customers" with the incumbent firm. The Guideline goes on to clarify that a nascent threat can effectively create "ecosystem" competition by encouraging the entry and development of complementary providers.

FINAL TAKEAWAYS

- While the Final Guidelines reaffirm the Agencies' aggressive approach to merger enforcement, the principles outlined are not a considerable deviation from current encounters with the Agencies on particular theories of harm and the considerable amount of evidence sometimes required to obtain merger clearance under the Biden administration.
- The Final Guidelines are not binding on courts, and courts have no obligation to follow them. Indeed, some parts of the Final Guidelines likely will face an uphill battle in the courts.

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