Cooley

New Year, New Merger Guidelines: What Dealmakers Need to Know

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As a capstone on the Biden administration's aggressive 2023 antitrust enforcement, the Department of Justice (DOJ) and Federal Trade Commission (FTC) jointly issued **revised Merger Guidelines** before the holidays, replacing the Horizontal Merger Guidelines issued by the Obama administration in 2010 and the Vertical Merger Guidelines issued by the Trump administration in 2020.

The 2023 Merger Guidelines reflect many of the aggressive and novel theories of harm that the DOJ and FTC have pursued under the Biden administration through enforcement actions and also enunciated in speeches.

This alert puts the 2023 Merger Guidelines in the context of the overall antitrust enforcement climate, describes the key changes from preexisting guidelines and discusses what the guidelines mean for the future of antitrust enforcement and dealmakers.

Guidelines issued against aggressive enforcement backdrop

As discussed in **Cooley's July 2023 alert** on the draft revised merger guidelines, the Biden administration has called for more aggressive antitrust enforcement, including greater scrutiny of M&A activity. The agencies have answered the call, pursuing broader and more novel theories of harm.

For example, in attempting to block **Amgen's acquisition of Horizon Therapeutics**, the FTC filed suit in federal court alleging the transaction would enable Amgen to leverage its portfolio of medicines to entrench monopoly positions of Horizon's rare disease medications, despite the parties having no horizontal overlap or vertical relationship. The transaction was allowed to proceed after the FTC reached a settlement agreement with the companies.

The 2023 Merger Guidelines – which answer President Joe Biden's directive in his **Executive Order on Promoting Competition in the American Economy** to address concerns around market consolidation by issuing new guidelines – memorialize the tack that the agencies have been taking in enforcement actions and speeches and provide a roadmap of what parties should expect to see in future merger enforcement actions.

The agencies tout the guidelines as providing "transparency" and reflecting "modern market reality," though it is clear that they also are aimed at supporting an aggressive merger enforcement agenda – potentially so much so that it deters dealmaking.

In touting the FTC's track record under her leadership, FTC Chair Lina Khan referenced a quote from an Evercore investor in a **November 2023 letter to Congress**: "The new regulatory team … already have succeeded in dissuading a series of business combinations which would have gone ahead in a different environment." Khan concluded that "[t]he fact that the FTC's work is driving this type of deterrence is a real mark of success."

Key provisions and changes from preexisting guidelines

The 2023 Merger Guidelines are organized as 11 guides, six of which describe frameworks for identifying concerns and five of which describe how to apply those frameworks in specific situations. Some of the guides are consistent with historic practices, some are more aggressive applications of historic practices and others present novel principles in modern antitrust enforcement.

Key principles include:

1. Lower concentration thresholds and introduction of a 30% combined share threshold to trigger a "structural presumption" that a merger is illegal. The 2023 Merger Guidelines continue to measure concentration by the Herfindahl-Hirschman Index (HHI) used in the 2010 guidelines, but have reduced the level of concentration under which a transaction will be presumed to risk substantially lessening competition and violating antitrust law back to levels first announced in 1982.

While stating that the guidelines' presumption of illegality "can be rebutted or disproved," the agencies place more emphasis on the merging parties' combined market share as a factor that independently supports a presumption.

Anticompetitive presumption	2010 Merger Guidelines	2023 Merger Guidelines
Indicator 1: Post-merger HHI	HHI greater than 2,500	HHI greater than 1,800 and HHIΔ greater than 100
Indicator 2: Combined firm's market share	N/A	Combined share greater than 30% and HHIΔ greater than 100

2. Entrenchment or extension of "dominant" firms and acquisitions of "nascent" competitors. The 2023 Merger Guidelines indicate heightened scrutiny for mergers involving a dominant incumbent with durable market power that may create or enhance barriers to entry, whether the merger is characterized as horizontal or vertical. The guidelines highlight concerns regarding transactions where a dominant firm may eliminate a "nascent competitive threat," which, according to the agencies, includes firms that "could grow into a significant rival [or] facilitate other rivals' growth." Such nascent threats, according to the agencies, could include firms with "niche or only partially overlapping products."

3. Structural inference for vertical transactions. The 2023 Merger Guidelines reflect the agencies' position that they will infer, absent "countervailing evidence," that a vertical merger is anticompetitive because it will allow foreclosure, where a combined firm will hold more than a 50% share in a market for a "product, service, or route to market that rivals use to compete" (i.e., a related product or service) – though that 50% number is buried in a footnote in the guidelines.

The guidelines identify two primary theories of competitive harm for vertical transactions:

- Where the combined firm may have the ability and incentive to raise rivals' costs, foreclosing or limiting rivals' access.
- Where the transaction would facilitate access to rivals' nonpublic competitively sensitive information.

4. Roll-up strategies and serial acquisitions. The guidelines suggest scrutiny where a firm engages in a "pattern or strategy of multiple acquisitions in the same or related business lines." If there is a "pattern or strategy" of acquisitions, the agencies "will examine the impact of the cumulative strategy" – including a review of the "firm's history and current or future strategic incentives." The principle implicitly targets private equity roll-up transactions, which DOJ Assistant Attorney General Jonathan Kanter has characterized as "very much at odds with the competition [the agencies are] trying to protect."

5. Assessing competitive harm in labor markets. The guidelines advise that the agencies will challenge mergers that may substantially lessen competition for "workers, creators, suppliers, and service providers" – including through lower wages, slower wage growth, diminished benefits, or worsened working conditions or workplace quality. The guidelines also assert that "labor markets can be relatively narrow" based on unique characteristics, such as high switching costs, search frictions and worker needs.

6. Concerns raised by partial ownership and minority interests. The guidelines focus on three principles in analyzing partial and minority acquisitions:

- Control or influence of the target firm through governance rights.
- Incentive to compete with the target firm.
- Access to nonpublic competitively sensitive information that may facilitate coordination.

The guidelines include notable expansions from previous guidelines:

- Even nonvoting interests may "provide opportunities to prevent, delay, or discourage important competitive initiatives, or otherwise impact competitive decision making."
- In addition to coordination, a partial owner may use nonpublic competitively sensitive information to "preempt or appropriate a rival's competitive business strategies for its own benefit."
- The guidelines also express concern about "common ownership," in which investors hold noncontrolling interests in firms that have a competitive relationship that "could be affected by those joint holdings."

7. Assessing competition in deals involving multisided platforms. The guidelines focus on multisided platforms – i.e., firms providing different products or services to two or more groups or "sides" that may benefit from each other's participation – for the first time in agency guidelines and suggest that harm to competition involving multisided platforms may occur in various ways, including:

- Elimination of competition between platforms, including acquisitions by dominant platforms of smaller or up-and-coming platforms with specialized technology or services.
- The acquisition of platform participants that may deprive rivals of participants and network effects.
- The acquisition of firms facilitating participation on multiple platforms.
- The acquisition of firms providing inputs to platforms to deny rivals the benefits of those inputs.

Are the 2023 Merger Guidelines the new standard?

The 2023 Merger Guidelines memorialize the agencies' current approach to evaluating mergers, including the theories the agencies are likely to pursue in investigating and challenging transactions. They provide a framework for companies and their counsel to consider in assessing the antitrust risk of particular transactions, negotiating merger agreements and advocating before the government.

The 2023 Merger Guidelines do not have the force of law, however, and they are not binding on courts. They do not impose new standards, unless they are considered to be persuasive and are adopted by the courts.

While courts have cited previous merger guidelines in analyzing challenges to transactions, judicial adherence to guidelines has varied.

Some courts have referred to previous guidelines as a "**helpful tool**" or "**as persuasive authority**" and have relied on them in certain respects. For example, courts have relied on the market concentration thresholds reflected in the 2010 guidelines in determining whether the agencies were entitled to an initial structural presumption of harm. Similarly, courts have availed themselves of the general approach and economic tools formulated in prior versions of the guidelines to define “markets” in which to evaluate the effects of a merger.

Significantly, however, earlier iterations of the guidelines were considered more neutral in approach, hewed more closely to case law and reflected incremental change from prior versions, arguably making them a more persuasive source of authority for the courts.

Even so, courts have declined to extend any particular deference to prior agency guidelines, especially where they lacked support or were inconsistent with the case law. For example, in *United States v. Anthem*, in 2017, the acquiring company argued that a 2001 opinion holding that purported efficiencies must be merger-specific did not apply because the DOJ and FTC modified their standards through adoption of the 2010 Horizontal Merger Guidelines. In rejecting that position, the US District Court for the District of Columbia held that “[n]o court has revised the legal test in the wake of the 2010 revision to the Guidelines.” In *New York v. Deutsche Telecom AG*, in 2020, the US District Court for the Southern District of New York declined to adopt the 2010 guidelines’ two-year time frame for analyzing potential entry by other firms, noting that the guidelines “should not carry any talismanic force.” Courts also have declined to adopt the agencies’ standard for evaluating the sufficiency of remedies. [1]

In contrast to prior iterations, the new guidelines represent a significant departure from prior guidance and read more like legal advocacy. They cite extensively to old precedent that is widely viewed as outdated and include minimal discussion and cites to cases in which the agencies lost. Against this backdrop, courts may give them less weight.

In particular, it remains to be seen whether the agencies will get any traction with their lower concentration thresholds and new bases for structural presumptions based on market share – 30% combined share for horizontal mergers and 50% for vertical mergers – particularly after years of encouraging judicial reliance on higher thresholds as the sole basis for a structural presumption of harm. Similarly, the agencies may face challenges obtaining judicial buy-in on the novel and less-proven theories discussed above.

Courts also may discount the persuasiveness of the new guidelines as having become politicized. The guidelines follow the publication of the 2020 Vertical Merger Guidelines, which the FTC approved by a 3-2 party-line vote under the Trump administration. The new 2023 Merger Guidelines also are the first merger guidelines adopted by the FTC in which all sitting FTC commissioners were of the same political party at the time of adoption. While the FTC at full strength has five commissioners, no more than three from any one political party, two seats have remained vacant since 2022.

In short, the principles set forth in the new guidelines will inevitably be contested in court, and their persuasive value in litigated merger challenges remains to be seen.

Takeaways for dealmakers

The 2023 Merger Guidelines continue the Biden administration’s push to ramp up antitrust enforcement. While their full impact remains to be seen, we expect the agencies to use the guidelines as leverage in bringing, or threatening to bring, aggressive enforcement actions. Given the novel theories and more aggressive approaches to concentration reflected in the guidelines, these actions will likely push the boundaries of enforcement.

With this uncertainty, we expect to continue to see increased use of risk-shifting mechanisms, such as reverse termination fees. Dealmakers should be prepared to work through less traditional theories of harm and use creative remedies to solve for potential concerns.

Additionally, parties should think carefully about litigation risk, as the agencies will be pursuing test cases to enshrine the guidelines through the courts and solidify their approach.

Note

1. The agencies have historically insisted both in guidance and in courts that merger remedies must “restore the pre-[merger] level of competition” or “negate the anticompetitive effects of the merger entirely.” But, in recent cases, courts have rejected this approach as too exacting and have held that requiring defendants to prove a remedy “would preserve exactly the same level of competition that existed before the merger … [and] would effectively erase the word ‘substantially’ from Section 7,” which prohibits only those mergers that are likely to **substantially** lessen competition.

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