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Draft Revised Merger Guidelines Foreshadow More Aggressive Antitrust Enforcement

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On July 19, 2023, the US Department of Justice and Federal Trade Commission **released draft revised merger guidelines** in an effort to support the Biden administration's aggressive antitrust enforcement agenda.

The draft guidelines, which are subject to public comment for 60 days, spell out novel theories of harm that the Biden DOJ and FTC have pursued in recent enforcement actions and speeches.

Of particular note, the draft guidelines:

- Lower the concentration thresholds, and introduce a 30% combined share threshold, to trigger a presumption that a merger is anticompetitive.
- Create a structural presumption of unlawfulness for vertical mergers when a firm controls 50% or more of a related market such that it could foreclose rivals' access to a related product on competitive terms.
- Seek to prevent the acquisition of potential competitors with a "reasonable probability" of entering a concentrated market.
- Focus on roll-up strategies and serial acquisitions.
- Address competition in labor markets to block mergers that may result in lower wages, benefits or layoffs.
- Highlight concerns raised by minority or partial ownership.
- Address multisided platforms to limit Supreme Court precedent requiring analyses of all sides of such platforms.

The proposed guidelines would replace separate horizontal and vertical merger guidelines.
Government merger guidelines, first issued in 1968 and last revised in 2010 and 2020, have historically been valuable tools explaining the government's analysis and influential to the extent they have been perceived as persuasive, though not binding on courts. **According to the DOJ**, "[t]he goal of this update is to better reflect how the agencies determine a merger's effect on competition in the modern economy."

It remains to be seen whether these guidelines, if made final in their current form, will have such influence, as they attempt to introduce new structural presumptions while relying on older case law and ignoring more recent precedents.

Unlike recently announced changes to the **Hart-Scott-Rodino form**, which will only be effective once the agencies issue a final rule, these proposed guidelines will not be made final for several months, after the public comment period. However, as they are reflective of the DOJ and FTC's current thinking, companies should be taking them into account immediately with regard to proposed transactions.

Highlights from draft revised merger guidelines

The draft guidelines purport to analyze "how does competition present itself" and how might a proposed transaction "risk lessening that competition substantially now or in the future." The guidelines spell out 13 principles that the DOJ and FTC may use when analyzing a transaction. We've provided some key highlights below.

1. Adopting lower market share and concentration thresholds to support 'presumption' of harm

The draft guidelines lower the market concentration thresholds that trigger a presumption by the agencies that a merger is anticompetitive.

Concentration remains measured by the Herfindahl-Hirschman Index (HHI, defined as the sum of the squares of individual firms' market shares), but the threshold would be reduced from 2,500 to 1,800, from which the threshold was raised in 2010 to reflect actual enforcement more accurately. The draft guidelines also adopt a new 30% market share threshold, to stop mergers said to present an "impermissible threat of undue concentration regardless of the overall level of market concentration."

Anticompetitive presumption	2010 horizontal merger guidelines	2023 draft revised merger guidelines
Indicator 1	HHI greater than 2,500	HHI greater than 1,800 and HHIΔ greater than 100
Indicator 2	N/A	Combined share greater than 30% and HHIΔ greater than 100

While using market concentration statistics as a proxy to assess the competitive impact of a transaction is not new, the draft guidelines lower the concentration threshold and place more emphasis on the merging parties' combined market share as an indicator that may independently support a presumption that a merger is anticompetitive. In recent years, the guidelines' thresholds largely have been understood to establish safe harbors and the starting point for analysis, not as creating strong presumptions.

The draft guidelines endorse a more rigid reliance on these indicators, and they state that any merger meeting the relevant indicators "triggers a structural presumption that the merger may substantially lessen competition or tend to create a monopoly" (i.e., the standard for when a merger is anticompetitive under the Clayton Act). In contrast, the 2010 guidelines provided that mergers meeting the relevant thresholds "will be presumed to be likely to enhance market power," but noted that the "purpose of these thresholds is not to provide a rigid screen to separate competitively benign mergers from anticompetitive ones."

The draft guidelines focus on whether the firms have engaged in head-to-head competition, but also advise that a merger that "eliminates even a relatively small competitor creates undue risk that the merger may substantially lessen competition."

Even where a market is not highly concentrated, the revised guidelines still attribute risk of anticompetitive effects in markets that are moderately "concentrated" (which, for example, includes a market with 10 firms all having a roughly 10% share). If adopted, the change could lead the agencies to investigate transactions that would have been previously deemed low risk.

2. Adding structural 'presumption,' new theories of harm for vertical transactions

The draft guidelines introduce a 50% bright-line rebuttable presumption for when a vertical merger should be deemed unlawful.

The guidelines reason that there is a sufficient basis to conclude a merger is anticompetitive where a combined firm will hold more than 50% share in a market for a “product, service, or customer that rivals use to compete” (i.e., a related product or service).

The revised guidelines identify two theories of competitive harm:

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

Importantly, it is unclear whether the guidelines’ new structural presumption and theories for vertical mergers will gain traction with the courts. The structural presumption in particular has no support in case law. To date, courts have largely rejected the government’s efforts to block vertical mergers, in part because the theories of harm in such cases are more abstract – and the benefits are often clearer than in mergers between competitors.

3. Protecting potential competition

The draft guidelines suggest the antitrust agencies will increase efforts to block acquisitions by “dominant” firms of nascent and potential competitors. The draft defines a firm as “dominant” if it has a 30% or higher market share **(following the European Union’s approach to mergers)** or can take unilateral action to raise price, reduce quality, or impose favorable terms that it could not achieve but for its market position. The draft defines a firm as a “nascent competitor” if it “could grow into a significant rival, facilitate other rivals’ growth, or otherwise lead to a reduction in dominance.”

The guidelines advise that a merger involving a firm with a 30% share will get a close look, and “the higher the market concentration, the lower the probability of entry that gives rise to concern.” The government is thereby signaling an intent to seek to block mergers involving even early stage research and development and pipeline products in highly concentrated markets by firms with a large market share. Whether this approach will gain traction in the courts, which have been skeptical of potential competition claims, is unclear.

4. Entrenching a dominant position

The draft guidelines suggest strict scrutiny for mergers involving a “dominant” incumbent (e.g., with 30% or higher market share), whether the merger is characterized as horizontal or vertical. The guidelines advise that concerns from mergers involving dominant firms can arise in any way that may entrench or extend the dominant position. The guidelines focus on bundling that may make it more difficult for customers to switch away from the dominant firm’s product or service.

5. Roll-up strategies and serial acquisitions

The draft guidelines call out serial acquisitions and roll-up strategies as warranting particular scrutiny, with the agencies asserting that they may analyze historical evidence of acquisition practices of merging parties “both in the markets at issue and in other markets, to reveal any overall strategic approach to serial acquisitions.”

While the concept that the agencies will review the current transaction in light of past acquisitions, both by the parties and by others in the industry, is not new, the guidelines go further by providing that the agencies will investigate “pattern[s] or strateg[ies] of multiple small acquisitions … **even if no single acquisition on its own would**” (emphasis added) be anticompetitive, taking into account even unconsummated acquisitions and future plans. The guidance also suggests that an acquirer’s history of consolidating other industries would inform the analysis.

6. Assessing harm to labor markets

The draft guidelines for the first time set forth how the agencies will assess the competitive effects of a merger in labor markets. The revisions indicate that the government will challenge mergers that may substantially lessen competition for workers, including through lower wages, slower wage growth, diminished benefits or working conditions, or workplace quality.

Just as defining a relevant product or service market has been a necessary predicate to analyzing the lawfulness of mergers in output product and service markets, the revisions contemplate defining labor input markets. The guidelines advocate that labor market definitions account for alternative job opportunities by employers supplying the relevant type of labor, geographies based on worker preference, and employee willingness to switch jobs based on wage and nonwage related criteria. The draft guidelines assert that “labor markets are often relatively narrow” based on unique characteristics, such as switching costs and worker needs and preferences. We expect that that scrutiny likely will be greater where the merging firms’ employees have highly specialized skills (e.g., specialized engineering or technical skills) such that the merger may reduce the employment options for such employees.

7. Concerns regarding minority or partial ownership

The draft guidelines analyze minority or partial acquisitions largely as in the current guidelines, focusing on:

- Control or influence of the target firm.
- The incentive to compete with the target firm.
- Access to nonpublic competitively sensitive information that may facilitate coordination.

The draft guidelines include two notable expansions. First, they suggest that **even nonvoting interests** may “provide opportunities to prevent, delay, or discourage important competitive initiatives, or otherwise impact competitive decision making.” Second, they suggest that 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 draft guidelines theorize that access can dampen the target firm’s incentives to innovate, thereby reducing competition between them over time.

8. Assessing competition in deals involving multisided platforms

For the first time, the draft guidelines address mergers involving 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 – which include such diverse products as newspapers, magazines and television stations serving readers or viewers as well as advertisers, to ride-sharing platforms serving drivers and riders.

The agencies assert their intention to comprehensively account for harm to competition whether it is “between platforms,” “on a platform,” or “to displace the platform.”

The draft guidelines suggest that harm to competition **between** platforms may occur through:

- Elimination of head-to-head competition between platforms, including up-and-coming platforms with specialized technology or services.
- The acquisition of platform participants.
- The acquisition of firms facilitating participation on competing platforms.
- The acquisition of firms providing inputs to competing platforms.

The draft guidelines highlight that self-preferencing as a harm to competition **on** platforms may occur when a platform operator acquires a platform participant. Such an acquisition may raise conflicts with respect to advantaging the controlled participant vis-à-vis noncontrolled participants. The guidelines also suggest harm to competition to **displace** a platform may occur by acquiring nonplatform firms that compete with less than the full platform (i.e., a service provided by the platform).

The draft guidelines attempt to cabin the Supreme Court's 2018 decision in *Ohio v. American Express*, which held that "[e]valuating both sides of a two-sided transaction platform is … necessary to accurately assess competition," to platforms satisfying narrow criteria, to allow the agencies to assess only one side of a platform where evidence suggests a harm to competition on just one side of the platform.

Implications for dealmakers

The draft guidelines reflect the Biden administration's efforts to expand and aggressively enforce the antitrust laws. The draft follows the FTC's announcement of dramatic changes to the HSR form itself, and on the tail of lawsuits that push the boundaries of the existing law.

While there will no doubt be extensive comments submitted criticizing the draft revised guidelines, if past is prologue, final revised guidelines will be issued before the end of the Biden administration.

In the meantime, it is clear that the guidelines reflect the DOJ and FTC's current thinking regarding merger review and the theories that the agencies will pursue in investigations. What level of influence the guidelines will have over the courts once issued, however, will remain an open question.

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