

A Whole New World? U.S. Antitrust Agencies Propose Tough New Merger Guidelines

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For the second time in as many months, the U.S. Federal Trade Commission (the “FTC”) and the U.S. Department of Justice’s Antitrust Division (the “DOJ”) have shaken up U.S. merger review with their proposed revisions to longstanding practice.¹ On July 19, 2023, the FTC and DOJ announced and released their proposed overhaul of the U.S. merger guidelines.² These new guidelines reflect the U.S. antitrust agencies’ attempt to reshape certain antitrust legal standards and deemphasize the economic analysis that not only has governed antitrust practice over the last several decades, but has become enshrined in the case law. These guidelines, which are not final and remain subject to a 60-day public comment period, reflect sweeping changes that seek to memorialize the Biden Administration’s tough stance toward mergers.

BACKGROUND ON THE U.S. MERGER GUIDELINES

First published in 1968, the U.S. merger guidelines have described and guided how the U.S. antitrust agencies analyze the competitive impact of proposed mergers. Over the years, the antitrust agencies have periodically updated the merger guidelines to reflect their updated thinking on merger enforcement. The current horizontal merger guidelines were last updated in August 2010. The current vertical merger guidelines were last updated in June 2020 and remain in place at the DOJ, although the FTC withdrew its approval of them in September 2021.³ Once final, the new proposed guidelines will supersede these prior versions.

¹ See also Debevoise Update: FTC Proposes Sweeping Changes to HSR Rules and Filing Notification Requirements (June 29, 2023), available at <https://www.debevoise.com/insights/publications/2023/06/ftc-proposes-sweeping-changes-to-hsr-rules>

² Draft FTC-DOJ Merger Guidelines for Public Comment (July 19, 2023), available at https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf

³ Press Release, Fed. Trade Comm’n, Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary (Sept. 15, 2021) available at <https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary>; Press Release, Dept. of Justice, Justice Department Issues Statement on the Vertical Merger Guidelines (Sept. 15, 2021) available at <https://www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines>

The merger guidelines lack the force of law. However, courts in deciding merger challenges historically have looked to them for guidance. Given the drastic changes proposed by the new guidelines, it remains to be seen whether courts will accept these new guidelines as influential.

THE DRAFT MERGER GUIDELINES' KEY CHANGES

For the first time, the draft merger guidelines consolidate the vertical and merger guidelines into one document. This update is not intended to cover all of the details in the 51-page draft, but the key changes are detailed below:

- **A New Organizing Framework**: The draft guidelines begin with and are organized around 13 principles that the antitrust agencies may use when determining whether a merger is unlawful. This differs from the prior merger guidelines, which acted more as a rubric for how the antitrust agencies evaluate a merger. The organizing principles include sweeping statements such as that “Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets,” “Mergers Should Not Substantially Lessen Competition by Creating a Firm That Controls Products or Services That Its Rivals May Use to Compete,” “Mergers Should Not Further a Trend Toward Concentration,” “Vertical Mergers Should Not Create Market Structures That Foreclose Competition,” and “When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.” The principles reinforce, however, that the guidelines are not exhaustive of the ways that a merger may substantially lessen competition or tend to create a monopoly.
- **A Lowered Bar for When a Merger Is Presumptively Illegal**: The antitrust agencies in practice tend to seek to block horizontal mergers only if there is a “structural presumption” under the guidelines, which is triggered based on the parties’ market shares and the changes in market concentration post-merger. The draft guidelines deemphasize analysis of economic effects and rely more heavily on market structure. They significantly lower the bar for when the agencies believe the presumption should be triggered and attempt to set a bright line barring mergers based on increases in concentration alone. For example, the draft guidelines state that if a merger “significantly increases concentration” and the combined entity’s market share is greater than 30%, then that “presents an impermissible threat of undue concentration regardless of the overall level of market calculation.”
- **Vague and Broad Guidance for When Mergers Otherwise Substantially Eliminate Competition**: The draft guidelines lay out the agencies’ position that where market shares are either difficult to measure or understate the parties’

competitive significance the antitrust agencies will view a merger as unlawful even if the (now-lowered) market share thresholds are not met. While the draft guidelines identify a series of indicators on how to identify substantial competition, they are vague and broad. For example, they point to whether the parties monitor each other's marketing campaigns or facility locations as evidence of competition.

- **Expanded Analysis of Potential Competition:** Along with an expanded treatment of the effects of mergers with potential competitors as compared to prior guidelines, the draft guidelines warn that the antitrust agencies will consider whether the acquisition of a nascent competitor violates the antitrust laws.
- **New Topics Addressed:** For the first time, the draft guidelines address topics that have been of particular interest to the antitrust agencies during the Biden administration. Specifically:
 - **Rollup Strategies:** Although the draft guidelines do not mention private equity explicitly, they do state that “a pattern or strategy of multiple small acquisitions in the same or related business lines may violate [the antitrust laws], even if no single acquisition on its own would risk substantially lessening competition or tending to create a monopoly.” As a result, the agencies will “consider acquisitions in light of the cumulative effect of related patterns or business strategies” and examine historical acquisition practices (whether consummated or not) and current and future strategies.
 - **Transactions Involving Multi-Sided Platforms:** The draft guidelines address mergers involving multi-sided platforms. A multi-sided platform provides different products or services to two or more groups. For example, it may provide brands a place to sell their goods and consumers a place to buy those goods. The draft guidelines make clear that the antitrust agencies want to protect competition *between* platforms (e.g., by preventing one platform's acquisition of another), competition *on* platforms (e.g., by preventing platform operators and platform participants from acquiring each other), and competition to *displace* platforms or their services (e.g., by preventing a platform from acquiring a non-platform service that may lessen dependence on the platform by providing an alternative).
 - **Protection of Labor:** The draft guidelines have a section focused on the impact of a deal on labor. In particular, they state the agencies' position that any loss of competition in the labor market, which may result in lowered wages, slowed wage growth, worsened benefits or working conditions, or other degradations of workplace quality, “is not offset by purported benefits in a separate downstream product market.”

WHAT HAPPENS NEXT

The proposed guidelines are subject to a 60-day public comment period, with a current deadline of September 18, 2023. Assuming no extension is granted, after those 60 days, the antitrust agencies will review the public comments to evaluate and update the draft before finalizing the guidelines.

HOW DEBEVOISE CAN HELP

Debevoise lawyers are well versed in pre- and post-filing U.S. merger control. We are closely keeping an eye on these developments and are available to advise parties regarding submission of public comments and how the new merger guidelines will affect their current and future deals.

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Please do not hesitate to contact us with any questions.

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