

FTC and DOJ Propose New Merger Guidelines

by Michael A. Lindsay, Anthony P. Badaracco, Jaime Stilson, and Scott Mah

On July 19, 2023, the Federal Trade Commission (“FTC”) and Department of Justice (“DOJ”) released a long-awaited draft update¹ to their Merger Guidelines. This draft is the latest entry in a long series of guidelines that describe the agencies’ approach in reviewing proposed mergers and acquisitions. Among other things, the proposed update would combine the previously separate Horizontal Merger Guidelines and Vertical Merger Guidelines into a single document, explicitly address multi-sided platforms, describe how the agencies analyze the impact of transactions on labor markets, and include new materials on potential entrants into concentrated markets. The draft is now subject to public review and comment.²

In announcing the release of this draft, the FTC said that the purpose of the Merger Guidelines is to “enhance transparency and promote awareness” of how the agencies fulfill their charge to protect competition through enforcement of the antitrust and other federal competition statutes when the agencies investigate mergers and acquisitions.³ FTC Chair Lina Khan added that the new guidelines will “update our enforcement manual to reflect the realities of how firms do business in the modern economy.”⁴ On its face, the draft suggests that the agencies intend to challenge more transactions.

The FTC and DOJ released the original merger guidelines in 1968. Since then, they’ve issued revised guidelines in 1982, 1984, 1992, 1997, 2010, and 2020. In January 2022, the agencies announced an initiative to evaluate potential revisions to the then-current Horizontal Merger Guidelines (last updated in 2010) and Vertical Merger Guidelines (last updated in 2020). In the January 2022 announcement, the agencies solicited comments on the guidelines. More than 5,000 comments were submitted by individuals, state governments, professors, businesses, trade associations, antitrust lawyers, and others.

The newly released draft identifies 13 guiding principles:

- Guideline 1: Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets.

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- Guideline 2: Mergers Should Not Eliminate Substantial Competition between Firms.
- Guideline 3: Mergers Should Not Increase the Risk of Coordination.
- Guideline 4: Mergers Should Not Eliminate a Potential Entrant in a Concentrated Market.
- Guideline 5: Mergers Should Not Substantially Lessen Competition by Creating a Firm That Controls Products or Services That Its Rivals May Use to Compete.
- Guideline 6: Vertical Mergers Should Not Create Market Structures That Foreclose Competition.
- Guideline 7: Mergers Should Not Entrench or Extend a Dominant Position.
- Guideline 8: Mergers Should Not Further a Trend Toward Concentration.
- Guideline 9: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.
- Guideline 10: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform.
- Guideline 11: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers.
- Guideline 12: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition.
- Guideline 13: Mergers Should Not Otherwise Substantially Lessen Competition or Tend to Create a Monopoly.

Merger Guidelines serve at least two valuable purposes. First, they educate merger parties about how the agencies *actually* think about transactions (regardless of how courts may think about transactions). As guidelines age, they sometimes drift away from the agencies' actual but evolving investigative approaches. An accurate update therefore helps with transparency—even where the substance of the update reflects significant changes in the agencies' approach.

Second, guidelines can help shape the law as the courts enforce it—but *only* if the guidelines are persuasive. The draft guidelines, for the first time, cite Supreme Court merger cases that the agencies contend support their views. The draft guidelines make clear that the agencies continue to press for toughening antitrust enforcement in several ways, including the following:

1. Changing the test for evaluating whether a market is “concentrated” so that it captures lower concentration levels than those stated in the operative (2010) Horizontal Merger Guidelines (basically a reversion to the 1992 guidelines);
2. Adopting a number of “structural presumptions” that mergers with certain characteristics are anticompetitive;
3. Highlighting considerations unique to transactions involving “digital platforms”;
4. Emphasizing that the agencies will continue to investigate the impact of proposed transactions on labor markets; and
5. Memorializing the agencies' willingness to look beyond a proposed transaction in isolation (with a clear eye toward private equity roll-ups).

The FTC's announcement of the draft guidelines includes an invitation to the public to provide comments on them for a period of 60 days—until September 18, 2023.^[5] Dorsey & Whitney LLP is happy to assist clients who may have an interest in submitting comments during the public comment period.

¹ The draft update is available here: [Draft FTC-DOJ Merger Guidelines for Public Comment \(2023\)](#).

² The proposed update is separate from the FTC's notice of proposed rulemaking that would overhaul the U.S. merger control reporting process (commonly call the "HSR" process), described in more detail [here](#).

³ The FTC's July 19, 2023 press release announcing the draft guidelines is available here: [FTC and DOJ Seek Comment on Draft Merger Guidelines | Federal Trade Commission](#).

⁴ *See id.*

⁵ *See id.*