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# Caution, Merging Ahead: The FTC and DOJ's New Merger Guidelines

**By Karen Hoffman Lent and Kenneth Schwartz**

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Following months of anticipation, the Federal Trade Commission (FTC) and Antitrust Division of the Department of Justice (DOJ) unveiled their new Merger Guidelines (the Guidelines) on Dec. 18, 2023. More than 30,000 stakeholders offered input on proposed changes to the Guidelines, which were previously updated in 2010. While the agencies made some modifications in response to public comment, the core elements of the final Guidelines are consistent with the draft version released in July 2023.

Promising sharper scrutiny of mergers and acquisitions, the new Guidelines formalize the Biden administration's interventionist approach to enforcement and represent the culmination of its efforts to revamp antitrust policy. Indeed, the theme of modernization pervaded the agencies' remarks upon release—FTC Chair Lina Khan declared that the Guidelines "reflect the new realities of how firms do business in the modern economy," while Attorney General Merrick Garland asserted that they protect Americans from "the ways in which unlawful, anticompetitive practices manifest themselves in our modern economy" (Press Release, Federal Trade Commission, "Federal Trade Commission and Justice Department Release 2023 Merger Guidelines" (Dec. 18, 2023)). From loosened structural presumptions to unconventional theories of harm such as "ecosystem competition" to consideration of a merger's effects on outside markets, we review some of the most noteworthy changes in the new Guidelines.

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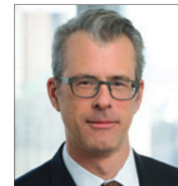

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## The Revamped Guidelines

The Guidelines are structured around 11 principles that underlie the "frameworks" by which the agencies will assess whether to challenge a transaction. Although many of the Guidelines incorporate well-established tenets of antitrust law—the Guidelines recognize, for example, that both horizontal and vertical mergers may be anticompetitive—some of the new frameworks starkly depart from the past four decades of federal antitrust enforcement. Ultimately, the Guidelines

reflect the increasingly aggressive attitude to antitrust enforcement that currently prevails both in the United States and abroad.

First, for example, the thresholds at which a merger is presumed to be anticompetitive are significantly lower than the thresholds contained in the 2010 Horizontal Merger Guidelines. The previous guidelines characterized a market with a Herfindahl-Hirschman Index (HHI) of more than 2,500 as "highly concentrated" and presumed that a merger was anticompetitive if it raised the market's HHI by more than 200 points. Marking a return to the thresholds of the 1982 Guidelines, the new Guidelines trigger the structural presumption where the market HHI is more than 1,800 and the merger raises the HHI by more than 100 points (*compare* Federal Trade Commission, Horizontal Merger Guidelines of the United States Department of Justice and the Federal Trade Commission, at 19 (Aug. 19, 2010) *with* Federal Trade Commission, Merger Guidelines, at 6 (Dec. 18, 2023)).

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Moreover, unlike the 2010 guidelines, the new Guidelines provide that any merger resulting in a firm with more than a 30% market share in any relevant market and a change in HHI greater than 100 is presumed to violate Section 7 of the Clayton Act, even if one of the merging parties has de minimis market share or the relevant market is otherwise fragmented. As a result of this change, more proposed transactions will likely receive closer scrutiny.

Second, the Guidelines prohibit transactions that enable a "dominant" firm in one market to "entrench" or "extend" its dominant position into other markets, regardless of the size of the other merging parties' share of those markets. According to the Guidelines, such transactions may violate not only Section 7 of the Clayton Act but also Section 2 of the Sherman Act. The Guidelines afford the agencies considerable latitude for determining what renders a firm "dominant," contemplating reliance on either market shares or direct evidence.

Such a firm might entrench or extend its dominant position by (i) raising barriers to entry or competition, (ii) eliminating nascent competitive threats, or (iii) tying, bundling, conditioning, or otherwise linking the sales of two discrete products. (Federal Trade Commission, Merger Guidelines (2023) (Dec. 18, 2023)).

This is where the new Guidelines introduce the concept of harm to "ecosystem competition," in which an incumbent firm that offers a wide array of products and services may be *partially* constrained by combinations of products and services from other providers. This "ecosystem" theory of harm, while novel in the United States, was recently adopted by regulators in the United Kingdom and European Union and suggests that the agencies may more closely examine a broader range of deals involving parties with limited competitive overlap.

Third, the Guidelines explain that the agencies will challenge serial acquisitions where, in the agencies' view, a firm has engaged in an "anticompetitive pattern" of multiple acquisitions, even if no single acquisition runs afoul of antitrust law. To establish such a pattern, the agencies will weigh the acquiring firm's past M&A strategy, including unconsummated deals in other markets or industries, as well as potential future acquisitions by the acquiring firm or industry peers. This section of the Guidelines targets so-called "roll-up" transactions, in which individually unproblematic acquisitions are consolidated into a larger, powerful entity.

The FTC advanced this theory of harm in its September 2023 complaint challenging the

"acquisition spree" of private equity firm Welsh, Carson, Anderson and Stowe (Welsh Carson) and the anesthesia provider it created, U.S. Anesthesia Partners (USAP). The agency alleged that Welsh Carson established USAP with the objective of stealthily acquiring "nearly every large anesthesiology practice in Texas." (USAP Press Release, Federal Trade Commission, "FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas" (Sep. 21, 2023)). This newfound emphasis on private equity aligns the federal agencies with global trends, as the Competition and Markets Authority in the United Kingdom also recently adopted a strategy of scrutinizing "roll-ups."

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Fourth, the Guidelines widen the scope of antitrust inquiry by including mergers that may substantially lessen competition in labor markets, resulting in lower wages or slower wage growth, reduced benefits or working conditions, and/or other degradations of workplace quality. The move reflects the current FTC's expansive view of its powers and its continued aspirations to address labor issues and follows the agency's proposal last year of a rule banning employer noncompete agreements. (Press Release, Federal Trade Commission, "FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition", (Jan. 5, 2023)).

Fifth, the Guidelines explain that mergers can raise competitive concerns even if they fail to conform neatly to either the horizontal or vertical paradigm. For example, the Guidelines highlight the risk from mergers that give an acquiring firm control over access to any product, service or customers that its rivals use to compete, as well as mergers involving multisided platforms, including those implicating the same company both operating and participating in a platform.

Finally, the Guidelines permit the agencies to define very narrow relevant markets within which to assess the competitive impact of an acquisition and to ignore the impact of "significant substitutes" that may not fit within tightly drawn markets. To be sure, the new Guidelines retain the Hypothetical Monopolist Test–a hallmark of market definition since 1982. But the new Guidelines support defining markets with direct evidence, like ordinary course documents and sales data that describe consumer preferences, reveal post-merger plans or substantiate head-to-head competition.

While the 2010 Guidelines recognized the value of direct evidence in cases where there are multiple plausible candidate markets and resulting market shares could lead to "very different inferences," the new Guidelines offer a more explicit endorsement of the potential for direct evidence and other "practical indicia"—such as product characteristics, distinct customers and unique production facilities—to define relevant markets, particularly where their parameters need only be "broadly characterized." (Federal Trade Commission, Merger Guidelines (2023) (Dec. 18, 2023)).

This shift reflects the skepticism with which traditional market definition practices have been met by the agencies; indeed, in 2022, Assistant Attorney General Jonathan Kanter told an audience that, "[i]n a dynamic, multi-dimensional economy, the static formalism of market definition may not always be the most reliable tool for assessing the potential harms of mergers." (Speech, Department of Justice, "Assistant Attorney General Jonathan Kanter Delivers Remarks on Modernizing Merger Guidelines", (Jan. 18, 2022)). Nonetheless, courts remain obligated to precedent which demands the definition of relevant markets.

### Abandoned Proposals

Although the new Guidelines hewed closely to the July 2023 draft, the agencies abandoned a couple of notable proposed changes.

In the draft Guidelines, the dominant firm framework specified that a merging party enjoys a dominant position when it possesses at least 30% market share. The final Guidelines do not contain that same precision but, as explained above, afford the agencies considerable latitude for determining market dominance. This change was likely a response to widespread criticism that a 30% market share, standing alone, should be insufficient to subject a merger to heightened scrutiny.

Additionally, the final Guidelines omit a catch-all provision from the draft which would have covered mergers that "otherwise substantially lessen competition or tend to create a monopoly." Instead, the new Guidelines contain a final caveat that they are not exhaustive and may be applied to challenge mergers that otherwise might avoid agency scrutiny under the reporting rules, mergers that involve unique product procurement situations favoring the bids of an acquired competitor, and mergers in concentrated markets that would dampen competitive incentives.

### Takeaways

Together, the expansive theories of harm and relaxed structural thresholds reflected in the new Guidelines indicate that transactions will likely receive greater scrutiny in 2024, increasing the time and cost associated with deal making and the likelihood and frequency of more burdensome extended investigations. Still, it is important to note that the Guidelines do not have the force of law; the agencies must convince federal courts to apply them. Indeed, the agencies have suffered a number of high-profile losses in federal court, suggesting that courts may be reluctant to embrace the novel or less-tested theories of harm reflected in these new Guidelines.

Nevertheless, the FTC enjoyed some noteworthy victories in the past couple months. The U.S. Court of Appeals for the Fifth Circuit unanimously sustained a vertical challenge filed by the FTC and ordered genetic sequencing company Illumina Inc. to divest Grail Inc., a manufacturer of cancer diagnostic tests. *Illumina v. FTC*, No. 23-60167 (5th Cir. Dec. 15, 2023). The FTC declared that the decision "recognizes how vertical deals can threaten competition and provides a clear roadmap for future cases." (Press Release, Federal Trade Commission, "Statement Regarding Illumina's Decision to Divest Grail" (Dec. 18, 2023)).

In addition, the U.S. District Court for the Southern District of New York granted the FTC a preliminary injunction preventing IQVIA's acquisition of Propel Media. *FTC v. IQVIA Holdings*, 23 Civ. 06188 (ER) (S.D.N.Y. Dec. 29, 2023). The FTC argued that the transaction would give IQVIA, a healthcare data provider, a "market-leading position" in programmatic advertising targeting healthcare professionals. (Press Release, Federal Trade Commission, "Statement on FTC Win Securing Temporary Block of IQVIA's Acquisition of Propel Media" (Jan. 3, 2024)).

Moreover, John Muir Health terminated its proposed acquisition of San Ramon Regional Medical Center after the FTC filed a complaint alleging that the deal would hinder head-to-head competition for medical services in Northern California. (Press Release, Federal Trade Commission, "Statement Regarding the Termination of John Muir's Takeover of San Ramon Regional Medical Center from Tenet Healthcare" (Dec. 18, 2023)).

These recent developments could potentially offer a boost to the new Guidelines and will almost certainly encourage the agencies to continue pursuing their vigorous antitrust oversight of the healthcare industry, among others.

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