

New Merger Enforcement Toolkit: FTC and DOJ Release Final 2023 Merger Guidelines

December 27, 2023 | Blog | By [Bruce D. Sokler](#), [Joseph M. Miller](#), [Robert G. Kidwell](#), [Payton T. Thornton](#), Matthew Tikhonovsky

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Introduction

On December 18, 2023, the Federal Trade Commission (“FTC”) and the Department of Justice (“DOJ”) (collectively, the “Agencies”) published the long-awaited final 2023 Merger Guidelines. The 2023 Merger Guidelines are informed by almost two years of considerable engagement between antitrust regulators, practitioners, economists, and the general public. The final 2023 Guidelines were updated by the Agency in response to public comment after the release of an initial draft in July 2023, but the final version of the Guidelines remain largely unchanged in substance from the summer draft. The new Guidelines reflect a [more aggressive approach](#) to merger review that has been espoused by the Agencies’ leaders and the Biden Administration. The Guidelines are one large piece of a broader push from the Agencies to strengthen merger enforcement in recent years, including by ending the early termination program and requiring prior approval provisions in settlements with merging parties. The final 2023 Guidelines come 13 years after the publication of the 2010 Horizontal Merger Guidelines,^[1] which were influential in merger litigation, and the 2020 Vertical Merger Guidelines, which were in effect for only a short time before being repealed in early 2021.

FTC and DOJ Initiative to Modernize the Guidelines

The process to revise the existing merger guidelines began on January 18, 2022, when FTC Chair Lina Khan and DOJ Assistant Attorney General Jonathan Kanter published a [Request for Information \(“RFI”\) on Merger Enforcement](#). Aimed at strengthening enforcement against illegal mergers, the RFI was foreshadowed by the Biden Administration’s July 2021 [Executive Order on Competition](#) which called on the FTC and DOJ to revise the merger guidelines. Following the RFI, the Agencies held [five listening sessions](#) on the effects of mergers between March and June 2022. On July 19, 2023, the Agencies published the [Draft 2023 Merger Guidelines](#), followed by a 60-day comment period and three [Merger Guidelines Workshops](#) that ultimately informed the final 2023 Merger Guidelines.

The final 2023 Merger Guidelines, like previous iterations, are intended to provide transparency regarding Agency decision-making and are *not* binding law, although they have been cited as persuasive authority by some federal courts. The guidelines have been periodically revised – in 1982, 1984, 1992, 1997, and 2010 – to better reflect the Agencies’ evolving views on merger enforcement and market realities. The Agencies released short-lived Vertical Merger Guidelines in 2020, which were [withdrawn](#) by the FTC in the early days of Chair Khan’s tenure and are replaced with the current 2023 Merger Guidelines by both Agencies.

Although previous guidelines have carried persuasive weight in federal court over recent decades, it remains to be seen whether judges will credit the 2023 Merger Guidelines given their aggressive approach to merger analysis and selective focus on dated caselaw. Undoubtedly, the new 2023 Guidelines—in conjunction with [proposed changes](#) to Hart-Scott-Rodino merger filing requirements—will likely result in both an increased number of deals examined by the Agencies and higher scrutiny of certain transactions in the new year and moving forward.

Key Takeaways from the Final 2023 Guidelines

The following key takeaways are important for any dealmaker to be aware of:

Presumption of Illegality: The new HHI presumption is set at a post-merger HHI of 1,800. This is significantly lower than the 2010 Guidelines and will likely result in more deals facing hurdles and potential changes from the Agencies. A deal resulting in a combined 30% market share and change in HHI of greater than 100 is also presumed by the Agencies to violate Section 7 of the Clayton Act.

Rebuttal Evidence: The legal presumption arising from excess concentration may be rebutted, and the evidence to be considered will "depend on the nature of the threat to competition or tendency to create a monopoly resulting from the merger."

Market Definition: The Guidelines provide a "flexible approach" to market definition and reflect the Agencies' increased reliance on the *Brown Shoe* practical indicia to define a market in addition to direct evidence and the hypothetical monopolist test, which played a prominent role in the 2010 Guidelines. The Agencies will look at (1) direct evidence of substantial competition between the parties, (2) direct evidence of the exercise of market power, (3) evidence of observed market characteristics or "practical indicia," and (4) the HMT when defining a relevant market.

Private Equity Focus: Guideline 7 focuses on industries trending toward consolidation, including multiple mergers in succession by various players in the industry. Guideline 8 focuses on series of multiple acquisitions by one firm over time which have the cumulative effect of concentrating a market. Guideline 11 focuses on minority investments or partial control acquisitions which may present significant competitive concerns. Additional, serial acquisition strategies may further invite liability under Section 5 of the FTC Act. Dealmakers should be aware that the Agencies may look at past and concurrent acquisitions by a firm as part of the analysis of whether a particular deal may substantially lessen competition in a given market. The Agencies may also examine a firm's forward-looking acquisition strategies as part of their analysis.

Modern Analysis with Old Caselaw: The final 2023 Guidelines cite decades-old merger caselaw, which has been heavily criticized in the academic literature and sidestepped by the courts of appeals when the precedent created tension with the Supreme Court's more current reliance on the consumer welfare standard's emphasis on market efficiency and low prices to consumers. It remains to be seen whether the Guidelines will be influential in federal court, as previous Guidelines have been.

Expanded Theories and Stakeholders to be Protected by the Clayton Act: The new Guidelines highlight vertical foreclosure concerns, application of the *Brown Shoe* practical indicia, and potential competition theories. Of particular importance is Guideline 10, which relates to mergers that may substantially lessen competition for workers, creators, suppliers, or other providers. Labor markets and vertical theories of harm have been a guiding focus for the Agencies over the past two years, so the 2023 Guidelines provide transparency for businesses and practitioners who were relying on the 2010 Guidelines, which have been outdated since 2021.

Return to Economics? The final Guidelines re-integrate economic analysis into the body of the main discussion, where it was previously relegated to the appendices in the July draft. The head economists at the Agencies noted that the final Guidelines intend to strike a balance between legal references and the presentation of economic tools used to conduct merger analysis. It was "critical for the revision process to be informed by the accumulation of the Agencies' experience as well as by advances in economic tools and evidence" to achieve their primary goal of updating the Guidelines to reflect the evolution of market realities since the 2010 Guidelines^[2]. The head economists at the Agencies reasoned that the restructuring of the Guidelines from draft to final was meant to implement a comprehensive approach, and "broadly applicable rebuttal considerations and evidentiary, economic, and analytical tools get their own section [in the final Guidelines] as resources for applying any of the Guidelines."

Removal of Vertical Foreclosure Presumption: The final 2023 Guidelines remove the proposed guideline which created a presumption that a foreclosure share above 50% in a vertical case is enough alone to conclude that the effect of the merger may be to substantially lessen competition. The original Guideline 6 was removed from the final version, and the Agencies' thinking on vertical foreclosure is interspersed through the body of the rest of the Guidelines.

Potential Competition: Guideline 4 focuses on when mergers that eliminate a potential entrant in a concentrated market can be illegal, which includes a detailed analysis of actual potential competition, perceived potential competition, and the sufficiency of entry and potential entry as a defense. The Guideline favors expansion into a concentrated market via internal growth rather than by acquisition and notes the types of evidence that the Agency will credit when examining whether a firm is a perceived potential entrant and is affecting market participants' strategic decision-making. The Guideline also notes that the Agencies will assess whether entry is timely, likely, and sufficient to replace lost competition when evaluating entry as a rebuttal.

Dominance: Guideline 6 details when a merger may violate the law if it entrenches or extends a dominant position and the factors the Agencies will evaluate when determining whether a merger would result in anticompetitive entrenchment as opposed to growth or development through competitive merit. This concept is new for the Guidelines and particularly new to the U.S. competition system. Dealmakers should be aware that the Agencies may look at whether or not a transaction would result in extension of a dominant position into new markets, which may include markets external to the relevant market at issue in the proposed transaction.

Platforms: Guideline 7 expounds on when mergers involving multi-sided platforms may be illegal, including when a conflict of interest may arise for a firm that is both a platform operator and platform participant that incentivizes the firm to preference its own products. New language in the Guideline focuses on how this can lead to a lessening of competition between platforms.

Observations

The final 2023 Merger Guidelines adopt a softer tone in response to criticisms that the July 2023 draft expressed hostility by the Agencies to M&A generally and relied too heavily on caselaw that predates the incorporation of economic analysis into antitrust cases. Moreover, the final Merger Guidelines appear to be more of an enforcement toolkit for the Agencies – providing a categorical list of reasons a deal may be challenged – rather than their traditional function of explaining the analytical framework for how Agency staff (and courts) should evaluate transactions. The 2010 Guidelines were organized around the unifying concept of market power – the ability of a firm to raise price, reduce output, diminish quality, or stifle innovation. The new Guidelines articulate a broader range of theories and aim to protect a wide array of stakeholders, sometimes with little caselaw or economic theory in support.

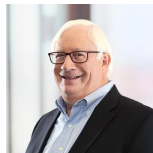
The 2023 Guidelines provide transparency, as the Agencies have moved beyond the 2010 Guidelines over the past 18 months. Practitioners have been advising clients to prepare arguments on a range of theories, and as the Agencies push the boundaries of the law more cases are going to trial. The 2023 Guidelines affirm that enforcement posture and we expect to see more of the same for the duration of the Biden Administration.

The Mintz Antitrust Section continues to monitor changes in federal merger enforcement, including the proposed HSR filing requirement updates. If you have questions about the 2023 Merger Guidelines or federal merger review in general, please contact one of the attorneys listed above or your regular Mintz attorney.

[1] See U.S. Dep't of Justice & Fed. Trade Comm'n., Horizontal Merger Guidelines (Aug. 19, 2010), available [here](#).

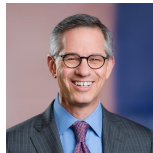
[2] See DOJ and FTC Chief Economists Explain the changes to the 2023 Merger Guidelines, ProMarket (Dec. 19, 2023), available [here](#).

Authors



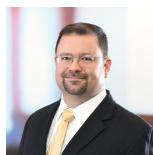
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