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# WHITE PAPER

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# DOJ and FTC Radically Revise Antitrust Merger Guidelines: FAQs for Business

The Federal Trade Commission ("FTC") and U.S. Department of Justice Antitrust Division ("DOJ") recently introduced proposed revisions to the existing merger guidelines. The new draft guidelines, if enacted in a form similar to the current draft, would represent a seismic shift in how the agencies approach antitrust merger investigations. They expand the types of transactions expected to result in additional scrutiny and lower the threshold for market shares that may be considered problematic. Ultimately, the new guidelines are likely to lead to additional merger challenges.

While the merger guidelines do not have the force of law, courts have traditionally looked to the guidelines as persuasive authority. The marked change characterized by the new guidelines may limit their persuasiveness for courts, but companies should be aware of the significant shift in merger enforcement the draft guidelines represent.

DOJ and FTC have published draft new Merger Guidelines, reflecting the profound change in antitrust enforcement we have seen under the Biden administration. In this *White Paper*, we address important questions they raise, and at the end present a table with more details on key provisions.

## WHAT ARE THE MERGER GUIDELINES? WHY ARE THEY IMPORTANT?

Since 1968, DOJ and FTC have issued and occasionally updated merger guidelines to help businesses understand the agencies' approach to merger enforcement and to provide agency staff and counsel with a framework within which to analyze mergers. The guidelines are not binding law, but courts have treated the guidelines as persuasive, largely because the guidelines, historically, reflected generally accepted legal theories and current economic thinking.

In July 2023, DOJ and FTC published a draft of new merger guidelines ("Draft Guidelines"). These Draft Guidelines would be the seventh iteration of the horizontal merger guidelines (not counting the separate non-horizontal merger guidelines and vertical merger guidelines), replacing the 2010 horizontal merger guidelines and the 2020 vertical merger guidelines. The Draft Guidelines are a significant departure from the current guidelines, recent case law, and modern economic principles, instead heavily relying on outdated legal precedents—largely drawn from the 1960s—an approach that reflects the Biden appointees' interpretation of what merger law should be, not necessarily what it is.

Once the guidelines are finalized, DOJ and FTC leadership will expect agency staff to approach merger investigations in accordance with them. The shift in approach already has been underway. The agencies' recent merger challenges make clear that agency leadership is pursuing the aggressive enforcement philosophy contemplated by the Draft Guidelines. Nevertheless, the agencies' recent litigation losses suggest courts will be reluctant to embrace such a radical shift in approach.

## TO WHAT TYPES OF MERGERS DO THE GUIDELINES APPLY?

The merger guidelines apply to all mergers and acquisitions, including those large enough to require a filing under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), nonreportable transactions, and even completed deals. In recent years, the agencies have used separate "horizontal merger guidelines" and "vertical merger guidelines," with the horizontal guidelines driving modern antitrust review. The Draft Guidelines cover all types of transactions, horizontal and vertical mergers, as well as so-called conglomerate mergers (more on those below).

## WHY DID THE AGENCIES DECIDE TO REVISE THE GUIDELINES?

DOJ and FTC have criticized what they perceive as having been, for the last four decades, systemic underenforcement of the antitrust laws and overreliance on economic models in merger review, which they claim are divorced from market realities. They have said these failures have resulted in "many industries across the economy ... becoming more concentrated and less competitive." The agencies announced in January 2022 their intention to "modernize" the merger guidelines to improve the agencies' ability to deter and challenge illegal mergers and acquisitions. Following four listening sessions and more than 5,000 comments, the agencies issued the Draft Guidelines to "reflect the realities of how firms do business in the modern economy."

## WHAT ARE KEY TAKEAWAYS, THE MOST SIGNIFICANT CHANGES TO THE GUIDELINES?

The Draft Guidelines are part of an effort to fundamentally shift how the United States reviews mergers. The Draft Guidelines indicate that the agencies—at least in the current administration—will challenge deals using not only traditional theories of antitrust harm but also a laundry list of new (and some long-discredited) theories of how deals may harm competition.

These are the most significant changes from prior guidelines:

**Purpose of the Guidelines**

The Draft Guidelines represent what current agency leadership believe the antitrust laws should be, rather than what the actual law is and what modern economic theory would support. Furthermore, while prior guidelines sought to provide guidance to businesses on what transactions likely would draw scrutiny and what information would be analyzed in that assessment, the Draft Guidelines focus on the current administration's priorities and appear to be intended to chill deal activity, corral agency staff, and push th e courts toward a more aggressive jurisprudence.

**Move Away From Focus on Consumer Harm and Focus on Structure**

Over the last 40 years, the accepted antitrust benchmark for evaluating a merger has been whether it harms consumers by increasing price. Recent progressive commentators and now current agency leadership have been hostile to this "consumer welfare standard." For the most part, the Draft Guidelines do not explain how the new theories protect against consumer harm, instead focusing on protecting competitors, relying on presumptions, and adopting a "know it when I see it" approach.

The Draft Guidelines rely heavily on structural presumptions related to market shares and concentration. Though long significant factors in merger review, the 2010 Guidelines required much higher market shares and greater concentration before presuming a merger unlawful. With lower thresholds, transactions that at one time would not have attracted scrutiny are more likely to face in-depth investigations.

**Expanded Theories of Harm**

Most modern antitrust enforcement has focused on deals involving competitors, so-called "horizontal" transactions. Although the Draft Guidelines certainly cover combinations between competitors, they spill bottles of ink on non-horizontal theories of harm and emphasize issues that historically were less worrisome in merger review. Each theory is discussed in the table at the end of this paper, including:

- Conglomerate or portfolio effects.
- Entrenching a "dominant position" or extending a dominant position to a new market.
- Mergers that bring control over access to a product, service, customers, or data that rivals use to compete.
- Mergers that continue a "trend toward concentration" and serial acquisitions (multiple acquisitions in the same space).
- Monopsony or buyer power, especially in labor markets.
- Any merger that "otherwise substantially lessens competition or tends to create a monopoly."

**Lower Bar for Vertical and Potential Competition Cases**

The agencies have, in the past, challenged vertical mergers and acquisitions involving potential competitors, but they have struggled to succeed, finding it difficult to show these transactions likely would harm competition. The Draft Guidelines try to lower the bar for blocking such deals. The Draft Guidelines presume vertical mergers to be illegal if either party has a 50% market share (contrary to *AT&T/Time Warner*, in which the court rejected the use of market share presumptions in vertical cases). For transactions between potential competitors, they propose a lower burden of proof by requiring only a showing that it was "reasonably likely" a party would enter but for the transaction and then presuming that entry would have had a market effect (shifting the burden away from the agencies, which is inconsistent with recent caselaw, e.g., *Meta/Within*).

**Less Economic Analysis**

The proposed guidelines reduce reliance on economic analysis, suggesting only that it "can be informative." No longer a foundation of the guidelines, econometric analysis is relegated to the Draft Guidelines' appendices.

## WHAT KIND OF MERGERS WILL FACE INCREASED SCRUTINY UNDER THE DRAFT GUIDELINES?

The Draft Guidelines are so broad in scope that all but the most benign deals could be questioned. Horizontal transactions that may lead to high combined market shares will continue to face scrutiny, but the Draft Guidelines significantly lower the threshold for what the agencies consider "high market shares" and "undue concentration," reaching horizontal deals that in the past would have been considered unlikely to result in competitive harm. Perhaps the most significant changes apply to non-horizontal deals that traditionally would have faced little question, including conglomerate transactions and certain vertical transactions.

As a practical matter, we can expect agencies still to prioritize combinations presenting the greatest risk—due to the sheer volume of deals, agency resource limitations and other priorities (e.g., non-merger conduct and consumer protection investigations), court and political pushback, and potentially staff reluctance to pursue theories that are not grounded in economics and the law.

## WILL THE NEW GUIDELINES AFFECT THE DEAL TIMING?

The Draft Guidelines do not contemplate changes to the HSR process. Thus, parties should not expect any significant changes to timing for deals that are investigated—a process that already averages almost a year for intense investigations. Timing, of course, will be affected for deals that in the past would have received little or no review but now may face fuller investigation.

The agencies recently proposed changes to the HSR rules that would dramatically expand the information required to be submitted in an HSR filing. We detailed those changes in our July 2023 *White Paper*, "DOJ/FTC Propose Massive Changes to HSR Premerger Filings: What You Need to Know." The proposed new filing form includes information requests designed to help DOJ and FTC identify and investigate new issues in the Draft Guidelines.

## WHAT TYPES OF DOCUMENTS AND DATA WILL THE AGENCIES COLLECT UNDER THE NEW GUIDELINES? WILL REQUESTS BE MORE BURDENSOME?

The Draft Guidelines describe a variety of evidence the agencies may collect and the rationale for considering these materials:

**Evidence From the Companies**
The agencies may seek documents, testimony, and data from the merging parties. Evidence created in the normal course of business is typically considered more probative than evidence created after the company began anticipating a merger review. Predictions offered to allay competition concerns are given less weight.

**Evidence From Customers, Workers, Industry Participants, and Observers**
Information from these stakeholders can provide a variety of insights, ranging from information about purchasing behavior and choices to views about the effects of the merger. The agencies may consider the relationship between these stakeholders and the merging parties when evaluating this evidence; customer competition concerns have traditionally carried significant weight with the agencies. The Draft Guidelines call out information from "workers and representatives from labor organizations" about compensation and working conditions, reflecting the agencies' increasing focus on labor.

**Econometric Analysis and Economic Modeling**
The agencies still may consider econometric analysis of data and other types of economic modeling to evaluate the potential effects of a merger on competition, giving more weight to high-quality data and rigorous methodology.

**Transaction Terms**
The agencies claim the financial terms of the transaction can provide insights into the merger's impact on competition. For instance, the Draft Guidelines say a purchase price that exceeds the standalone market value of the acquired firm might (or in fact might not) indicate that the acquiring firm expects to benefit from reduced competition.

**Market Effects in Consummated Mergers**
If the merger already has closed, the agencies would treat as highly probative the fact of postmerger price increases or worsening competitive conditions. But the agencies also will consider the same types of evidence as they would for proposed mergers, even where no competitive harm is evident, under the supposition that a recently merged firm may moderate its conduct while anticipating a postmerger antitrust review.

Much of this is consistent with past practice, but now that the agencies are probing new theories of harm, they may request more expansive and detailed information from the parties and third-party industry participants, as they already have been doing recently.

## WHAT DEFENSIVE ARGUMENTS AND EVIDENCE ARE AVAILABLE TO MERGING PARTIES?

The absence of evidence supporting an agency challenge, or evidence indicating that a transaction is not likely to reduce competition, will continue to be important factors for deal clearance. However, the greater use of presumptions stacks the deck against the parties: The Draft Guidelines warn that a merger that triggers a presumption "must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such effects." To that end, while many of the defensive arguments traditionally considered available to parties remain, though some narrowed, those arguments may be given less weight at the agencies.

**Procompetitive Efficiencies**

Parties can argue that the merger will lead to cost savings or other efficiencies that will enhance competition, but the Draft Guidelines reflect increased agency skepticism and narrow the efficiencies they will consider by requiring:

- The efficiencies could not be achieved without the merger, such as through organic growth, contracting between the parties, or another, not-anticompetitive merger.
- The benefits are verifiable using reliable methodology and evidence, not crediting vague or speculative claims.
- Cost savings or other benefits will pass through to consumers to improve competition in the relevant market or prevent it from being lessened within a short period.
- The efficiencies do not accelerate concentration or result from the anticompetitive worsening of terms for trading partners.
- Only procompetitive benefits within the same market will be credited.

**Entry and Repositioning**

Parties can argue that any reduction in competition from a merger would attract new entry into the market, preventing the merger from substantially lessening competition. The agencies will examine whether that entry would be timely (although timeliness is not defined), likely, and sufficient to deter or counteract the competitive effects of concern. As written, this comparable to the 2010 Guidelines, but parties should expect a skeptical reception for such defensive arguments.

**Failing Firms**

If one of the merging firms is in a weak financial position and the firm will exit the market absent the deal, this can be used to counter a lessening of competition. This "failing firm defense" must meet three conditions:

- The failing firm faces a grave probability of business failure, e.g., the firm would be unable to meet its financial obligations in the near future.
- The chances for reorganization to save the firm are dim or nonexistent, despite actual attempts to resolve debt with creditors.
- No less anticompetitive buyer is available after a good-faith attempt to find one.

Again, as written, this is comparable to the 2010 Guidelines.

**Structural Barriers to Coordination**

Parties can argue that postmerger anticompetitive coordination is impossible due to structural market barriers. But to rebut a presumption of coordinated effects, these barriers must be significantly greater in the merging parties' industry than in other industries. The agencies note that in their experience, such conditions are "exceedingly rare in the modern economy."

## HOW WILL CHANGES TO THE GUIDELINES AFFECT THE LAW OF MERGER REVIEW?

When the government brings litigation asking a court to block a merger, it largely relies on Clayton Act § 7, which prohibits mergers where the effect "may be substantially to lessen competition, or to tend to create a monopoly." Courts have developed the details of antitrust law over time based on the facts of each deal and then-current understandings of economics, when deciding if a merger may substantially lessen competition.

Since the first version in 1968, the merger guidelines have contributed to the development of § 7 case law by providing a framework, consistent with current law, for agencies to decide what deals to investigate and prosecute and for merging parties to respond. The guidelines do not have force of law, although in some cases courts have adopted the guidelines framework. Over the decades, the law has changed, not because of the guidelines, but reflecting the factors that have been presented to courts and litigants' and courts' understandings of business and economics.

If this administration's antitrust enforcers are able to nudge the law in new directions, it will be because they have brought enforcement actions that convince courts to adopt more-aggressive interpretations of precedent. New guidelines are a part of that effort, and some courts may adopt ideas or language from the guidelines to support their decisions. But it is individual lawsuits, not the agencies publishing a new version of the guidelines, that moves the needle the most. So far, the current enforcers have lost more merger challenges than they have won, indicating courts have not agreed that the facts of those mergers justify finding them unlawful under current law nor been persuaded that the law should be different. And aggressive use of novel guidelines in support of weak lawsuits is likely to undercut the new guidelines' credibility with courts.

As we noted above, the new guidelines also will make some difference as they will influence how agency staff thinks about enforcement. To close an investigation, staff typically must prepare a memo for leadership explaining how the transaction will not harm competition. DOJ and FTC leadership are already requiring staff to address issues such as labor markets and monopsony in investigations.

## WHEN WILL THE GUIDELINES BE IMPLEMENTED?

The final version of the guidelines likely will not be published until 2024. There is a 60-day public comment period, ending on September 18, 2023, if not extended. The agencies also have announced they are holding three workshops on the guidelines; the first was on September 5. The agencies then will review the public comments and outcomes of the workshops and consider whether changes to the proposed guidelines are necessary. It took the agencies four months to finalize the last version of the guidelines in 2010, so we would not expect the guidelines to take effect until early 2024.

Over the last few years, it has become commonplace for the antitrust agencies to withdraw and eventually replace guidance published in a prior administration. While past merger guidelines were spared, when a Republican next takes the White House, the merger guidelines published by the Biden administration, and certainly its enforcement approach, very well may change.

## SHOULD I DO ANYTHING NOW TO PREPARE FOR THE GUIDELINES? WHAT ABOUT IF I HAVE A DEAL ON THE HORIZON?

The Draft Guidelines are useful as a comprehensive statement of the investigation and enforcement approach of the current enforcers. Companies and their counsel should carefully consider how the facts of a possible transaction may fit the guidelines' criteria and therefore draw an intense investigation and possible enforcement action. More than ever, companies should address the antitrust issues early in consideration of a possible transaction, long before it is committed to the deal. Today this should include early consideration of whether a "fix it first" divestiture would help avoid government opposition and whether the companies are willing to litigate if needed.

Starting the antitrust process early will be especially important with the new HSR filing requirements that the government also has proposed. Revised HSR forms would require that the parties detail extensive information on their operations up front, provide a substantive discussion of the deal's rationale and competitive issues, submit larger sets of data and documents that could help the agencies address competition issues (and some distinctly noncompetition issues like labor, foreign ownership, and government contracts), and preserve documents related to the transaction—all even for small transactions that will present no antitrust question. This will increase the time needed to prepare the HSR submissions, which today could be done within a couple of weeks. The good news is that these new requirements likely will not come into effect until 2024.

Thinking ahead to future dealmaking, a company should be aware of how documents in its files can undercut a fair presentation of a new transaction to enforcers. An effective antitrust compliance program will not only help employees avoid conduct that may violate antitrust laws, but also will educate them on antitrust issues so that they do not inadvertently create documents or have communications that incorrectly suggest there may be an anticompetitive situations or conduct.

Since the new guidelines will present a greater range of situations that may attract enforcers' attention, employees should be more attuned to the risks. The guidelines themselves will be a template for a careful compliance program. For example, since the Draft Guidelines emphasize presumptions of unlawfulness based on market shares, companies should be cautious before estimating "market shares" that may not be based on an antitrust analysis of markets and shares. Likewise, given the emphasis on vertical transactions, companies should not exaggerate the effect of a merger on competitors by, for example, being able to "control" inputs used by rivals.

## DETAILS ON THE DRAFT GUIDELINES' THEORIES OF HARM

The table below lays out the theories of harm presented in the Draft Guidelines and the implications of each.

| Theory of Harm | Key Provisions and Changes from Prior Guidelines |
|---|---|
| **Horizontal Competition** (Guidelines 1 and 2) | Under the Draft Guidelines, a merger is presumptively unlawful if it would cause "even a relatively small increase in concentration" in a highly concentrated market. This can be shown in one of two ways:<br>• The post-merger Herfindahl Hirschman Index ("HHI") is greater than 1800, with a change of more than 100; or<br>• The merged firm would have a market share of more than 30% and the HHI would increase by more than 100.<br>Guideline 1 represents a significant change from the 2010 Guidelines. The 2010 Guidelines recognize a structural presumption of harm only if the post-merger HHI exceeds 2500 and the merger increases the HHI by at least 200. |
| **Coordinated Effects** (Guideline 3) | Coordinated effects is the theory that a merger may increase the likelihood that post-merger, the remaining firms would be more likely and able to agree (either tacitly or explicitly) on price or other terms of competition. The agencies will presume that a merger increases the risk of coordination (or will make existing coordination more stable or effective) if *any one* of three "primary" factors is present:<br>• High concentration.<br>• Evidence of prior coordination.<br>• The elimination of a "maverick" competitor.<br>The agencies will also consider "secondary" factors related to coordination, including lesser degrees of concentration, rivals' incentives, and competitive responses, and whether collusion would be profitable.<br>Along with unilateral effects, coordinated effects has long been a theory of harm in antitrust law. The 2010 Guidelines stated that the agencies were likely to challenge a deal under a coordinated effects theory only if three factors were present: moderate to high concentration, vulnerability to coordination, and credible evidence that the merger will "enhance that vulnerability." Guideline 3 removes that guidance and replaces it with the "primary-secondary" analysis involving more factors. |
| **Actual Potential Competition** (Guideline 4) | Actual potential competition is the theory that a merger could lessen competition by eliminating a probable future entrant. The agencies assess:<br>• Whether one or both merging firms had a reasonable probability of entering the relevant market other than through an anticompetitive merger.<br>• Whether such entry offered "a substantial likelihood of ultimately producing deconcentration of [the] market or other significant procompetitive effects."<br>This typical theory of potential competition has been applied in prior cases and is the basis of a number of agency complaints. |

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| Theory of Harm | Key Provisions and Changes from Prior Guidelines |
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| **Perceived Potential Competition**<br>(Guideline 4) | Perceived potential competition is the theory that a merger could harm competition by eliminating the threat that one of the merging parties will enter the market in the future. The agencies will assess:<br>• Whether a current market participant "could reasonably consider one of the merging companies to be a potential entrant."<br>• Whether that potential entrant has a likely influence on existing competition.<br>Unlike actual potential competition, for *perceived* potential competition, Guideline 4 does not require that a merging party actually be reasonably likely to enter for the agency to claim competitive harm from the merger. |
| **Harming a Rival's Ability to Compete**<br>(Guideline 5) | The agencies will assess whether a transaction "involving access to products, services, or customers rivals use to compete" could give the merged firm the *ability* and *incentive* to "make it harder for rivals to compete and thereby harm competition."<br>In addition, the agencies will assess whether a merged firm may gain access to its rivals' competitively sensitive information and whether such access to competitively sensitive information would:<br>• Undermine competition, by allowing the merged firm to "preempt, appropriate, or otherwise undermine" a rival's procompetitive actions; or<br>• Facilitate coordination between the merged firm and its rivals.<br>Guideline 5 is focused on whether competitors may be harmed but does not address in any detail the situations where such alleged harm would actually harm end consumers. Unlike many other sections of the Guidelines, which at least cite antiquated case law (sometimes misleadingly), the agencies cite almost no case law to support Guideline 5. |
| **Vertical Foreclosure**<br>(Guideline 6) | Vertical foreclosure involves mergers in a company's vertical supply chain. It is the theory that a company can deny a competitor access to a critical input or downstream market either by withholding access entirely, raising that rival's costs, or partially degrading access. Under the Draft Guidelines, if the merged firm's foreclosure share (i.e., market share in either the upstream or downstream market) is above 50%, the agencies will presume that the merger is unlawful. If the merged firm's foreclosure share is below 50%, the agencies will consider certain "plus factors" when assessing whether a vertical merger still may be likely to "deprive rivals of a fair opportunity to compete," including:<br>• The market or related markets show a trend toward vertical integration.<br>• The "nature and purpose" of the merger is to foreclose rivals.<br>• The relevant market is already concentrated.<br>• The merger increases barriers to entry.<br>Guideline 6 represents a significant departure from existing case law and prior agency practice. Except where the foreclosure share "approaches monopoly proportions," courts have never recognized a structural presumption in vertical cases. |
| **Dominance / Conglomerate Effects**<br>(Guideline 7) | Under Guideline 7, the agencies will assess whether one of the merged firms already has a "dominant" position, and whether the merger may entrench that position or extend market power into a new market. A firm has a "dominant" position if:<br>• There is "direct evidence" that it "has the power to raise price, reduce quality, or otherwise impose or obtain terms that [it] could not obtain but-for that dominance," or<br>• It possesses at least 30% market share.<br>Without analogy in prior guidelines, Guideline 7 is an expansive theory that could be used to capture acquisitions by large companies, where a transaction might create conditions that could limit competition, such as by increasing entry barriers, depriving competitors of scale, or leading to bundling or tying. |

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| Theory of Harm | Key Provisions and Changes from Prior Guidelines |
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| **Furthering a Trend Toward Consolidation**<br>(Guideline 8) | Under this theory, a merger in a market with a "trend toward consolidation" can harm competition, although the guidelines do not explain how a trend toward consolidation by itself could harm competition. Guideline 8 does state that the agencies will consider two factors when assessing whether a merger would further a trend toward consolidation "sufficiently that it may substantially lessen competition":<br>• First, the agencies will evaluate whether the merging parties' industry already is seeing a trend toward "horizontal concentration" (which the agencies define to mean an industry where the HHI has "steadily increased" above 1000 and toward 1800) or vertical integration.<br>• Second, the agencies will assess whether the merger would "increase the existing level of concentration or the pace of that trend."<br>The agencies suggest that a change in HHI of more than 200 would satisfy the second prong but leave open the possibility that "other facts" may suffice to establish that a merger would "increase the pace of concentration."<br>The 2010 Guidelines contain no discussion of trends toward consolidation or vertical integration. Guideline 8 reflects a significant change in enforcement strategy. |
| **Serial Acquisitions**<br>(Guideline 9) | An "anticompetitive pattern or strategy of multiple small acquisitions in the same or related business lines" may violate Section 7, even if no single acquisition on its own would present a substantial risk of competitive harm in any relevant market. The agencies may evaluate the series of acquisitions as part of an industry trend (*see* Guideline 8), or evaluate the "cumulative effect" of the serial acquisitions by the acquiring firm under Guidelines 1–7.<br>This theory of harm has no counterpart in the 2010 Guidelines. It finds no support in either the statutory text, which requires the agencies to prove that the transaction at issue would likely harm competition in at least one antitrust market, or the relevant case law. |
| **Multi-Sided Platforms**<br>(Guideline 10) | This proposed Guideline addresses several issues unique to transactions involving multi-sided platforms, which occur when technology or other product or service acts as an intermediary between sellers and buyers, often to facilitate transactions.<br>• Except in "rare" cases involving "simultaneous transaction platforms," like credit card payment systems, the agencies will analyze harm that may occur on either side of a two-sided platform.<br>• Depending on the specifics of a given transaction, the agencies will analyze competition *between* platforms, competition *on* a platform, or competition to *displace* a platform.<br>• The agencies preview an aggressive approach that focuses on whether an incumbent firm could "entrench" its position or deprive rivals of access to key inputs or distribution channels.<br>• The agencies specifically identify self-preferencing as a potential competitive issue in cases where a merging party both operates and participates on a platform: A "conflict of interest stems from the operator's interest in operating the platform as a forum for competition and its interest in winning competition on it."<br>Guideline 10 is new, as the 2010 Guidelines do not address mergers involving multi-sided platforms, which were less prevalent in 2010. |

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| Theory of Harm | Key Provisions and Changes from Prior Guidelines |
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| **Harm to Upstream Competition and Labor Markets**<br>(Guideline 11) | When assessing whether a merger of competing buyers may substantially lessen competition, the agencies will apply the same or "analogous" tools that they use when assessing a merger between competing sellers. Guideline 11 also identifies principles for assessing competition for labor:<br>• Harm to labor competition may result in lower wages or slow wage growth, worse benefits or working conditions, or "other degradations of workplace quality."<br>• Labor markets "are often relatively narrow."<br>• Harm to competition in labor markets is not "offset" by cost savings or competitive benefits in downstream product or service markets.<br>Guideline 11 reflects a significant shift in enforcement policy. Although the 2010 Guidelines recognize that "mergers of competing buyers can enhance market power on the buying side of the market," the 2010 Guidelines do not discuss labor competition and reflect a less-strident attitude toward buy-side harm (i.e., monopsony harm). By contrast, Guideline 11 claims, without explanation or example, that "the level of concentration at which competition concerns arise may be lower in buyer markets than in seller markets, given the unique features of certain buyer markets." |
| **Harm from Partial Acquisitions**<br>(Guideline 12) | The agencies will investigate concerns with "cross-ownership" (where one firm holds a noncontrolling interest in a competitor) and "common ownership" (where individual investors hold noncontrolling interests in competing firms), including:<br>• A partial owner could influence the competitive conduct of the target firm, through board seats, governance rights, or otherwise.<br>• A partial acquisition would reduce the acquiring firm's incentives to compete.<br>• A partial acquisition would give the acquiring firm access to the target firm's competitively sensitive information.<br>Guideline 12 expands upon a similar provision in the 2010 Guidelines. It suggests the agencies may focus more resources on partial acquisitions or transactions that result in one company holding a noncontrolling stake in two or more competitors. |
| **Scenarios Not Otherwise Covered in the Guidelines**<br>(Guideline 13) | The final Guideline notes that the prior guidance is not exhaustive and therefore that the agencies will assess the facts in each matter to determine if a potential violation may occur. Guideline 13 provides three examples of where the agencies in the past have alleged harm that does not otherwise fit into the Guidelines described above:<br>• A merger that would enable firms to avoid a regulatory constraint because that constraint was applicable to only one of the merging firms.<br>• A merger that would enable firms to exploit a unique procurement process that favors the bids of a particular competitor who would be acquired in the merger.<br>• In a concentrated market, a merger that would dampen the acquired firm's incentive or ability to compete due to the structure of the acquisition or the acquirer.<br>The significance of Guideline 13 will depend on how this catch-all is used. Its breadth highlights the new flexibility that is found throughout the Draft Guidelines, which overall do not restrain the agencies within a structure reflecting the current caselaw, accepted principles, or recent precedent. |

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