

July 20, 2023

Draft Merger Guidelines Seek to Reshape Antitrust Enforcement Landscape

By Steven Newborn, Michael Moiseyev, Jeffrey Perry, Brianne Kucerik, Megan Granger, Rob Meyer, Kristin Sanford, Rachel Williams, and Anne Corbett

The FTC and DOJ yesterday released draft Merger Guidelines that would replace all prior agency guidance as it relates to vertical, horizontal and potential competition mergers.¹ The Draft Guidelines represent a departure from the bi-partisan consensus approach to mergers that had prevailed before the Biden administration, but are fully consistent with the philosophy of the agencies' current leadership, as reflected in their speeches, testimony and actions taken over the last two years.

The Draft Guidelines are organized around 13 core principles (themselves labeled "Guidelines") summarizing the ways in which the agencies believe mergers may harm competition. Neither the timing nor substance of the Draft Guidelines is particularly surprising. The Draft Guidelines largely re-articulate the agencies' public aggressive agenda to challenge and deter a wide range of mergers. Purportedly rooted in "binding precedent," the Draft Guidelines rely heavily on decades-old case law, which often diverges from more recent cases, and omit altogether authority for certain key provisions. This is particularly evident in the treatment of potential competition and vertical mergers, where the Draft Guidelines set out positions that were taken—and explicitly rejected—by the federal courts in the challenges to [Meta Platforms, Inc.'s acquisition of Within Unlimited, Inc.](#) and Microsoft's proposed acquisition of Activision, respectively.²

The Draft Guidelines are the product of an initiative first announced in January 2022 to re-examine the agencies' approach to merger analysis.³ Since then, the FTC and DOJ have solicited public comments and conducted four "listening sessions." Upon release of the Draft Guidelines, the agencies opened a 60-day public comment period that is set to expire on September 18, 2023 although that period may be extended.

We do not expect the agencies to meaningfully alter or pare-back the Draft Guidelines before they are made final. As a result, the Draft Guidelines (or something close to them) will likely be finalized and remain in place at least until the next change of administration.

¹ If adopted, the Draft Guidelines would replace the 2010 Horizontal Merger Guidelines ("2010 Guidelines") and 2020 Vertical Merger Guidelines.

² Weil Gotshal was counsel to Meta Platforms, Inc. in its acquisition of Within Unlimited, and also is counsel to Microsoft in its proposed acquisition of Activision. *Judge said to reject FTC effort to block Meta's VR acquisition*, Washington Post (Feb. 1, 2023) <https://www.washingtonpost.com/technology/2023/02/01/facebook-meta-app-purchase-ruling/>; *FTC Pauses Challenge To Meta-Within Deal After Court Loss*, Law360 (Feb. 10, 2023), <https://www.law360.com/articles/1575121/ftc-pauses-challenge-to-meta-within-deal-after-court-loss>.

³ *Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers*, Federal Trade Commission (Jan. 18, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers>.

This alert summarizes the most significant substantive changes to existing guidelines as well as the likely impact of the guidelines on the agencies' merger review and litigation.

Key Takeaways

- **Lower Bar for a Presumption that a Merger Is Anticompetitive.** The Draft Guidelines reset the bar and create lower thresholds – without citation to any authority – for defining concentration in markets.
 - According to the Draft Guidelines, a “relatively small” increase in concentration triggers a presumption that the merger is illegal if the merger would result in either (a) a highly concentrated market – defined as an HHI⁴ of 1800 or higher or (b) greater than 30% market share for the combined firm.
 - The Draft Guidelines break new ground by designating markets with an HHI of 1000 as “concentrated,” correlating with a market of ten equally positioned firms (compared to the 2010 Guidelines, which considered markets with HHIs below 1500 “unconcentrated” and HHIs between 1500 and 2500 as “moderately concentrated”).
 - Under the Draft Guidelines, a merger is presumed to “substantially lessen competition” if it increases the HHI in a “highly concentrated market” by 100 points (compared to 200 in the 2010 Guidelines). To illustrate what this means in practice, a merger combining the fifth- and sixth-largest firms in a six-firm market would be *presumed* unlawful if the merging firms controlled only 10% and 5% market share, respectively.⁵

Even mergers that produce concentration levels below these reduced thresholds can raise other agency concerns. For example, there is *no market share screen at all* for certain types of harm, as for example where the parties are head-to-head competitors or have a vertical relationship.

- **Potentially Reduced Significance in Court.** Historically, courts have held that while the merger guidelines are not binding, they can be instructive. It is unclear whether courts will find the Draft Guidelines similarly instructive given (1) the focus on case law interpretation, which is the province of the courts rather than expert agency analysis, and (2) the absence of legal authority while doubling down on arguments that have already failed to persuade courts.

The legal impact may be decreased further by the Draft Guidelines heavy reliance on Supreme Court cases of the 1960s and early 1970s that found almost any merger illegal under Section 7 of the Clayton Act. While it is true that “the Supreme Court has not overruled [the] precedents from that era, the Supreme Court ‘has cut them back sharply.’”⁶

- **Potential Competition.** The Draft Guidelines demonstrate that, despite the FTC’s recent loss in *Meta*, the agencies will look hard at mergers they believe eliminate potential competition. They embrace the actual potential competition theory, set the bar for future entry lower than accepted by some federal circuit courts, and dispense with the requirement that the agencies show that the entry would produce pro-competitive effects so long as the market is merely “concentrated.” For perceived

⁴ HHI refers to the Herfindahl-Hirschman Index, which is a formula used to measure the level of concentration in a given market. A market’s HHI is calculated by summing the squares of the market shares of all market participants. For example, the HHI for a market with five equal-sized firms is 2,000 ($5 \times 20^2 = 2,000$).

⁵ For example, in a market with six competitors with respective shares of 22%, 21%, 21%, 21%, 10%, and 5%. In this scenario, the premerger HHI would be 1,932 (considered highly concentrated under the Draft Guidelines), and the post-merger HHI would be 2,032, an increase of 100, resulting in a presumption that the merger is unlawful.

⁶ *United States v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990).

potential competition—the so-called “edge effect” a well-positioned potential entrant theoretically exerts on a market—the required “actual tempering effect” is replaced with a more ambiguous “reasonable market participant” test.

As we have previously discussed in our alert regarding Meta’s and Weil’s victory in the FTC’s unsuccessful challenge of the Meta/Within transaction (available here), this is not a new concept. The agencies have alleged theories of competitive harm based on the elimination of potential competition for decades, and the courts have generally been willing to accept the viability of this theory of harm. Instead, the issue for the agencies has been proving liability under this theory, including most recently in *FTC v. Meta* in January. While the Draft Guidelines seek to lighten the heavy burden the precedent case law imposes on the agencies (e.g., based primarily on objective evidence relating to the feasible means of entry), they offer scant authority and are silent about the extensive body of contrary decisions at the appellate and district court levels.

- **Vertical Mergers.** The Draft Guidelines retain the “ability-incentive” structure of the renounced 2020 Vertical Merger Guidelines, but without a threshold level of concentration to trigger scrutiny. The agencies have historically examined competition in the upstream and downstream markets to determine whether the parties have the ability and incentive to limit rivals’ access to key inputs or outlets. However, the Draft Guidelines create a “short cut” presumption of harm if the market share of the related product area exceeds 50%, but provide no safe harbor below 50%. Instead, where shares are below 50%, the Draft Guidelines provide various “plus factors” to be considered in assessing potential harm. In addition, access to competitively sensitive information may be enough to trigger concerns in a vertical transaction.
- **Merger Impact on Employees.** The Draft Guidelines appear to be the first full-throated effort to address the potential of mergers to affect workers and labor markets, although the concern is addressed implicitly in the 2010 Horizontal Merger Guidelines’ discussion of the impact of mergers of competing buyers (monopsony). The labor callout is no surprise given both agencies’ focus on labor issues in both merger and non-merger contexts over the past several years, including DOJ’s challenge to Penguin Random House’s proposed acquisition of Simon & Schuster, which DOJ successfully argued would have reduced compensation for authors.⁷

Conclusion

On their face, the Draft Guidelines appear to bring a much broader range of mergers into purview of the antitrust laws. But in practice, they do little to change the playing field. The agencies are already applying these concepts, issuing Second Requests on new and controversial theories, and issuing complaints alleging harms that have rarely, if ever, been prosecuted in the modern era of antitrust. At the same time, courts have been resistant to these departures from recent precedent, and the Draft Guidelines are unlikely to change that in any meaningful way. We therefore consider the Draft Guidelines to be yet another reminder that the antitrust enforcement landscape under the Biden Administration is unlike anything we have seen before, and caution and careful planning are required to maximize the chances of avoiding an FTC or DOJ merger challenge and, if necessary, defend a merger in court.

* * *

⁷ *Justice Department Obtains Permanent Injunction Blocking Penguin Random House’s Proposed Acquisition of Simon & Schuster*, U.S. Dep’t of Justice (Oct. 31, 2022) <https://www.justice.gov/opa/pr/justice-department-obtains-permanent-injunction-blocking-penguin-random-house-s-proposed>.

If you have questions concerning the contents of this issue, or would like more information about Weil's Antitrust/Competition practice group, please speak to your regular contact at Weil or to an author listed below.

Authors

Steven Newborn (Washington, D.C.)	View Bio	Steven.Newborn@weil.com	+1 202 682 7005
Michael Moiseyev (Washington, D.C.)	View Bio	Michael.Moiseyev@weil.com	+1 202 682 7235
Jeffrey Perry (Washington, D.C.)	View Bio	Jeffrey.Perry@weil.com	+1 202 682 7105
Brianne Kucerik (Washington, D.C.)	View Bio	Brianne.Kucerik@weil.com	+1 202 682 7034
Megan Granger (Washington, D.C.)	View Bio	Megan.Granger@weil.com	+1 202 682 7026
Rob Meyer (Washington, D.C.)	View Bio	Robert.Meyer@weil.com	+1 202 682 7193
Kristin Sanford (Washington, D.C.)	View Bio	Kristin.Sanford@weil.com	+1.202.682.7115

© 2023 Weil, Gotshal & Manges LLP. All rights reserved. Quotation with attribution is permitted. This publication provides general information and should not be used or taken as legal advice for specific situations that depend on the evaluation of precise factual circumstances. The views expressed in these articles reflect those of the authors and not necessarily the views of Weil, Gotshal & Manges LLP. If you would like to add a colleague to our mailing list, please [click here](#). If you need to change or remove your name from our mailing list, send an email to weil.alerts@weil.com