



## Federal Antitrust Regulators Announce Proposed New Merger Guidelines

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On July 18, 2023, the DOJ Antitrust Division and the Federal Trade Commission released new Guidelines detailing the principles that they intend to apply when reviewing mergers. The Guidelines, issued in draft form for public comment, fulfill a pledge made in early 2022 to “update” the 2010 Merger Guidelines to address “the way our economy operates today.”

While the regulators have stated that “at least in their view” the new Guidelines simply set forth the current state of merger law, and do not change the way in which mergers should be assessed in any material respect, there are several new and notable changes from the prior guidelines. For example, the Guidelines would, for the first time, specifically address how mergers in so-called “Digital Platform” markets – a market in which antitrust regulators have previously had little success when bringing merger challenges – should be analyzed. And, to provide greater weight to the views expressed in the Guidelines (which themselves do not have the force of law), the new Guidelines – again for the first time – cite Supreme Court merger decisions that the regulators contend demonstrate that the principles set forth in the Guidelines are firmly anchored in the law.

Similarly, for the first time, the proposed new Guidelines would address both *vertical* mergers and *horizontal* mergers in the same document. In the past, vertical mergers were the subject of a separate set of guidelines, but those guidelines were withdrawn by the regulators early during the Biden administration and not replaced until now. The issuance of guidance on how vertical mergers should be assessed is notable because “as in the case with Digital Platform markets” the regulators have been unsuccessful in challenging vertical mergers in the courts in the last several years. Again, aided by the citation to Supreme Court cases to support their views, the regulators clearly anticipate that the new Guidelines will increase the likelihood that future challenges will be more successful.

Another significant change in the new Guidelines is the specific focus on competition in the market for hiring employees, or “worker markets.” While earlier Guidelines noted that competitive concerns in “buyer” markets (including worker markets) provided an appropriate basis for a merger challenge, the prior guidelines were clearly more focused on the more traditional concerns raised in “seller” markets –

specifically, would a merger permit the merging parties to increase prices to consumers? The proposed new Guidelines make clear that harm to workers created by a proposed merger – for example, a significant decrease in employment opportunities and/or reduced wages – can constitute the sort of harm to competition that the merger laws are intended to address and thus constitute an appropriate basis for a regulator challenge. Once again, by giving greater prominence to worker markets in the new guidelines, the regulators are likely hoping that, going forward, this theory will be embraced more wholeheartedly by reviewing courts.

In addition to adding some new guidance and elaborating on some prior principles, the new Guidelines also contain some material changes to past guidance. Most notably, the proposed new Guidelines would alter the test for determining whether a market is “concentrated” to levels *lower* than those expressed in the 2010 Guidelines. This is important because mergers in concentrated markets are more likely to raise competitive concerns, and thus mergers in concentrated markets are more likely to result in regulator challenges. While the regulators have been quick to point out that their proposal would be consistent with the tests applied in the 1982 Merger Guidelines, the new Guidelines would clearly be a significant change from the 2010 Guidelines on this issue. In addressing this issue, the regulators justify this change by characterizing the 2010 Guidelines as being “more permissive” than appropriate “based on [then current] agency practice, rather than changes in the law.” Finally, another significant change in the proposed new Guidelines is guidance indicating that the regulators will not view each proposed transaction in isolation, and that a “series of acquisitions,” even small acquisitions, can give rise to competitive concerns. This change also appears to be intended to address the perceived past failures of antitrust regulators successfully to challenge smaller acquisitions in Digital Platform markets and private equity.

While the regulators received thousands of comments on the merger guidelines in 2022, after announcing their intention to create new Guidelines, now that the proposed new Guidelines have been issued the public has a 60-day period (until September 18, 2023) to provide additional written comments. Once the comments window closes, the comments will be reviewed, and some potential changes to the current proposal are possible. However, it is unlikely that there will be *significant* changes made to the current draft. Accordingly, merging parties should anticipate that their transactions are likely to be subject to these new Guidelines by early 2024, if not sooner, and should begin planning now for that eventuality.

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