

# Client Alert

FDA and Life Sciences

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## FTC and DOJ Issue Final Merger Guidelines

On December 18, 2023, the U.S. antitrust enforcers, the Federal Trade Commission (“FTC”) and the Antitrust Division of the Department of Justice (“DOJ”) (collectively, the “Agencies”), issued their final Merger Guidelines (“Guidelines”) after a four-month public comment period.<sup>i</sup> These Guidelines replace the 2010 Horizontal Merger Guidelines (“2010 Guidelines”) and the DOJ’s 2020 Vertical Merger Guidelines.

When the Agencies released the draft Guidelines in July, we noted a number of significant changes from the existing Guidelines that signaled a more aggressive enforcement posture.<sup>ii</sup> Although the Agencies have made changes, these revisions by and large reflect marginal tweaking and restructuring, and the final Guidelines still signal enhanced scrutiny from the antitrust enforcers.

The key changes we highlighted in our prior client alert remain broadly intact:

### LOWERING OF HHI MEASURES TO ESTABLISH STRUCTURAL PRESUMPTION OF HARM

As previewed in the draft Guidelines, the Agencies are returning to the pre-2010 HHI thresholds to establish a presumption of anticompetitive harm from a proposed transaction. A merger is now presumed to be unlawful if the post-merger Herfindahl-Hirschman Index (“HHI”) is greater than 1,800 with an increase of greater than 100 points. By contrast, the 2010 Guidelines set the thresholds at an HHI of greater than 2,500 with an increase of greater than 200.

In addition, the final Guidelines establish a new market share-based test. If the combined post-merger market share is greater than 30% and the HHI increases by more than 100 points, the Agencies will presume the transaction will be anticompetitive even if the target has a relatively small existing share. Both of these changes will sweep in a larger number of transactions that are presumed to be illegal, providing the Agencies with a significant advantage in enforcement actions.



The final Guidelines do eliminate the vertical merger market share test proposed in the draft version. The draft Guideline 6 proposed a presumption of harm if a merged firm controlled more than 50% of a product or service in a supply or distribution chain, for example, if a manufacturer acquires a firm that supplies an input needed by the firms competing with the manufacturer. The final Guidelines emphasize the potential competitive harm from vertical foreclosure but delete this structural presumption test.

#### CONTINUED EMPHASIS ON ADDRESSING “DOMINANCE”

Although the 2010 Guidelines discuss potential harm from the exercise of market power by a merged entity through unilateral conduct, the 2010 Guidelines do not mention the term “dominance.” By contrast, the final Guidelines extensively discuss how a merger could “entrench or extend a dominant position.” As Guideline 6 notes, such a transaction could violate Section 2 of the Sherman Act (prohibiting monopolization or attempts to monopolize) along with Section 7 of the Clayton Act (prohibiting anticompetitive mergers).

To apply this analysis, the Agencies will first evaluate whether one of the merging firms has a “dominant” position. Significantly, the final Guidelines delete the explicit market share threshold found in the draft Guidelines that a 30% share for one firm could indicate a dominant position. Instead, the final Guidelines state that the Agencies will look to market concentration more generally as well as direct evidence that demonstrates “durable market power” such as high entry barriers.

According to the Guidelines, harm from dominance should be considered over time and dynamically. The Guidelines emphasize that Agencies may examine long-term harm to competition and impact on market and industry dynamics. According to the Guidelines, a merger may raise barriers to entry or competition, further entrenching dominance in that market. Examples include increasing switching costs and interfering with the use of competitive alternatives on the part of customers, and depriving competitors of scale economies/network effects. In addition and in particular in the tech industry, Agencies may evaluate whether the merger will eliminate a “nascent competitive threat.”

With respect to extending dominance beyond the market in question, the Guidelines note that a merger may enable a dominant firm to reduce competition in a related market. This could be accomplished by tying, bundling or otherwise linking sales of two products or by raising entry barriers or eliminating nascent competition in the related market. Notably, the 2010 Guidelines did not discuss tying or bundling as possible merger-related harms.

#### IMPORTANCE OF INCREASING MARKET CONCENTRATION

The Guidelines promise increased scrutiny for M&A activity within industries already experiencing consolidation. The Agencies note that competitive concerns may be heightened for industries moving to fewer competitors or undergoing significant vertical integration. Consolidation may also be occurring as firms band together to increase bargaining leverage against trading partners, leading to a tit-for-tat wave of mergers as the trading partners themselves consolidate.

In these circumstances, the Agencies may conclude that anticompetitive effects are greater because of this trend toward consolidation. For example, the risks of coordination may be higher or fewer firms may be able to more easily increase barriers to entry or disrupt innovation.

#### WARNING ON SERIAL ACQUISITIONS

The Agencies ongoing rhetoric against anticompetitive roll ups is now memorialized in the final Guidelines. Guideline 8 states that Agencies may evaluate individual transactions “in light of the cumulative effect or related patterns or



business strategies” even if no single acquisition on its own would substantially harm competition (or even be HSR-reportable). In analyzing this possibility, likely sources of evidence include the firm’s history, strategic incentives, acquisition approach taken in various markets (even if not the market at issue) as reflected in, among other sources, documents and testimony.

### FOCUS ON LABOR MARKETS

Both the 2010 Guidelines and the final Guidelines note that mergers between competing buyers may harm sellers. However, in keeping with the Biden administration’s focus on the labor markets, the final Guidelines discuss how mergers may lessen competition for workers, potentially resulting in lower wages and worsened working conditions. Importantly, the Guidelines expressly state that efficiency benefits in downstream markets (i.e., a buyer market) cannot offset harm in the labor market (i.e., a seller market).

### CONCLUSION

The final Guidelines are in line with the draft version issued in July and set out significant new enforcement priorities and analytical frameworks. Some of the more controversial elements of the draft Guidelines have been softened or eliminated but the overarching principles remain. The Guidelines, along with the proposed reforms to the HSR process, the public statements of the Agencies’ officials and recent complaints, clearly indicate a more aggressive approach to merger enforcement.

Despite their extensive citation to prior cases, these Guidelines are not law, and it remains to be seen how readily federal courts will accept their use in litigated challenges. Both the FTC and the DOJ have lost most of their litigated merger challenges during the Biden administration so it is not clear how persuasive the Guidelines will ultimately prove to be.

Nevertheless, the Guidelines provide essential guidance to companies and practitioners as they assess antitrust risk in a proposed transaction. The Guidelines also provide an analytical roadmap as parties engage with the Agencies in discussion and advocacy. Firms operating in or considering acquisitions in consolidating industries in particular should be prepared for more extensive questioning from the Agencies during the merger clearance process and be on guard for potential enforcement challenges.



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<sup>1</sup> <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf>

<sup>2</sup> <https://www.kslaw.com/news-and-insights/ftc-and-doj-announce-new-draft-merger-guidelines>