

Memorandum

Final FTC and DOJ 2023 Merger Guidelines Affirm Biden Administration's Aggressive Enforcement Agenda

December 19, 2023

On December 18, 2023, the Federal Trade Commission (“FTC”) and U.S. Department of Justice (“DOJ”) published the final version of their highly-anticipated updated Merger Guidelines, which now officially replace prior guidelines. The 2023 guidelines are the latest installation in a series of updates made over the years, starting in 1982 and most recently in 2020.¹ According to the agencies, the final Merger Guidelines “emphasize the dynamic and complex nature of competition ranging from price competition to competition for the terms and conditions of employment, to platform competition.”²

The final version largely mirrors the Draft Merger Guidelines (originally published on July 19, 2023, and which were the subject of a previous [memorandum](#) published by Simpson Thacher), and in so doing reaffirms the agencies’ commitment to the Biden Administration’s aggressive enforcement agenda. As noted in a joint DOJ/FTC press release, the Merger Guidelines have been under development since January 2022, and reflect consideration of over 30,000 public comments. As always, the press release accompanying the Merger Guidelines cautions that they “do not predetermine enforcement action by the agencies” and that “enforcement decisions will necessarily depend on the facts in any case and will continue to require prosecutorial discretion and judgment.”

The Merger Guidelines reflect two notable changes from the draft guidelines initially released, neither of which promise much relief for merging parties:

First, the Merger Guidelines do not include the prior Guideline 6, establishing a presumption that vertical mergers harm competition when one of the parties’ market share exceeds 50%—though the notion is still reflected in a footnote describing that the agencies will infer the merging firm has or is approaching monopoly power (with the ability to weaken or exclude competitors by limiting access to their products) when market share is greater than 50%. This development is neutral for merging parties: while it eliminates a presumption of harm *for now*, it leaves open the possibility that the agencies may take an even more aggressive stance down the road, particularly

¹ Prior guidelines were issued in 1982, 1984, 1992, 1997, 2010 and 2020. A predecessor to the modern chain of guidelines was also issued in 1968.

² <https://www.ftc.gov/news-events/news/press-releases/2023/12/federal-trade-commission-justice-department-release-2023-merger-guidelines>.

considering the FTC’s recent Court of Appeals victory in the *Illumina / Grail* vertical merger (which is now cited in the final Merger Guidelines).

Second, the Merger Guidelines delete the prior Guideline 13, a “catch-all” guideline prohibiting any transaction that otherwise substantially lessens competition or tends to create a monopoly. This provides little comfort to merging parties given that the Draft Merger Guidelines merely took the opportunity to note that they were “not exhaustive” and that the “Agencies look to the facts and the law in each case.” The final Merger Guidelines still note, now in the preamble, that “the factors contemplated in these Merger Guidelines neither dictate nor exhaust the range of theories or evidence that the Agencies may introduce in merger litigation” and that “[t]he Agencies follow the facts and the law in analyzing mergers as they do in other areas of law enforcement.”

On the other hand, the Merger Guidelines also make more clear that each of the scenarios described may, if factually supported, create only an *inference* that a merger may lessen competition, but that this inference may be rebutted by various forms of evidence also discussed in the Merger Guidelines. In response to criticism, the Merger Guidelines also now contain more even-handed case law citations, including recent cases lost by the government.

As we cautioned in our prior memorandum, it remains to be seen whether the courts will accept these Merger Guidelines within the facts and framework of the cases presented.

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