

# Clients & Friends Memo

## FTC and DOJ Jointly Issue Draft Merger Guidelines

July 19, 2023

Proposing a radically different conception of government enforcement merger guidelines, the Federal Trade Commission (“FTC”) and the Department of Justice (“DOJ”), on July 19, 2023, jointly issued draft merger guidelines (“[Draft Guidelines](#)”) that would replace current Merger Guidelines, which were revised last in 2010. Stating that the “goal of this update is to better reflect how the agencies determine a merger’s effect on competition in the modern economy,” the structure of the Draft Guidelines replaces the step-by-step economically analytical approach to merger analysis with a manifesto of 13 doctrinaire statements that will instead guide the Agencies’ analysis. *See [FTC/DOJ Press Release](#)* dated July 19, 2023.

The Draft Guidelines will apply to all mergers, horizontal and vertical, but specifically call out mergers of tech platforms and PE roll-up strategies and include other novel and throw-back merger enforcement concepts.

- The Draft Guidelines retain the use of the Hirfindahl-Hirschman Index (“HHI”) to measure market concentration, but replace the higher 2010 HHI thresholds with those that hark back to the first guidelines of 1982. Other than a bald assertion that more “permissive” higher HHI brackets led to more concentrated and less competitive markets, the Draft Guidelines provide no economic basis for reverting to lower HHI thresholds to trigger a transaction challenge.
- According to an FTC/DOJ Fact Sheet issued with the Draft Guidelines, “[n]otably, these are the first merger guidelines to cite case precedents ... to ensure it is rooted in the law.” However, the reference to precedents is far from comprehensive. For example, Guideline 6 on vertical mergers fails to cite the Agencies’ recent court defeats in the United Healthcare/Change Healthcare and Microsoft/Activision cases. The reliance on legal principles that are not generally supported by case law is likely to lead to expensive litigation for proposed buyers of businesses, and possibly further Government litigation losses. *See [Fact Sheet – 2023 Draft Merger Guidelines for Public Comment](#)*.
- Without specifically naming the private equity industry, which the agencies have targeted in numerous speeches in the past several years, the Draft Guidelines clearly take aim at the PE practice of portfolio company “roll-ups.” “A firm that engages in 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 risk substantially lessening competition or tending to create a monopoly.” See Draft Guidelines at 22 and Guideline 9. The Draft Guidelines also reflect for the first time the agencies’ intentions to investigate the controversial question of whether and how an investor’s “partial ownership or minority interests” in competitors may influence competition. See Guideline 12.

- The Fact Sheet states, “[p]latform markets present distinct competitive considerations from the traditional market structures of the 20th century economy, as they often preset high entry barriers and are likely to tip in ways that entrench dominant firms.” See Fact Sheet.
- In an expected departure from past antitrust merger enforcement, the Draft Guidelines “build on th[e] principle [of consumer harm] and explain that the agencies will evaluate the impact of a merger on labor as a stand-alone basis to challenge a transaction.” *Id.*

The “thirteen guidelines” that the Agencies propose to govern a transaction’s competitive analysis are as follows:

Guideline 1: Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets.

Guideline 2: Mergers Should Not Eliminate Substantial Competition between Firms.

Guideline 3: Mergers Should Not Increase the Risk of Coordination.

Guideline 4: Mergers Should Not Eliminate a Potential Entrant in a Concentrated Market.

Guideline 5: Mergers Should Not Substantially Lessen Competition by Creating a Firm That controls Products or Services That Its Rivals May Use to Compete.

Guideline 6: Vertical Mergers Should Not create Market Structures That Foreclose Competition.

Guideline 7: Mergers Should Not Entrench or Extend a Dominant Position.

Guideline 8: Mergers Should Not Further a Trend Toward Concentration.

Guideline 9: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.

Guideline 10: When a merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform.

Guideline 11: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially lessen Competition for Workers or other Sellers.

Guideline 12: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition.

Guideline 13: Mergers Should Not Otherwise Substantially Lessen Competition or Tend to Create a Monopoly.

The Draft Guidelines will be open for public comments until September 18, 2023 (60 days). Thereafter, the Agencies will evaluate whether to make changes to the Draft Guidelines before finalizing them.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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