

DOJ and FTC Submit Draft Updated Merger Guidelines

Publications

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On July 19, 2023, the US Department of Justice (DOJ) and Federal Trade Commission (FTC) released a draft update of the Merger Guidelines and invited public comments. If adopted, the Proposed Guidelines would represent a substantial change in the way the US antitrust agencies analyze the competitive effects of mergers. The agencies propose 13 separate guidelines. Below we identify just a few key proposed changes.

The Proposed Guidelines seek to integrate previously separate standards for horizontal and vertical mergers. Horizontal mergers are mergers between firms who both operate in the same antitrust market, while vertical mergers are those between firms at different levels in the supply chain. Historically, two different sets of guidelines and practices have governed the review of each type of merger, but the Proposed Guidelines integrate them into one set. This change reflects that in increasingly complex markets, it is often difficult to distinguish between purely horizontal or vertical theories of harm.

The Proposed Guidelines lower the market share threshold that would trigger a “structural presumption” that a horizontal merger will harm competition to pre-2010 levels. The Proposed Guidelines also include a structural presumption that vertical mergers will harm competition if the combined firm will have greater than a 50 percent share of the relevant upstream or downstream market. Additionally, the Proposed Guidelines identify as potentially harmful transactions that would entrench or extend a dominant position, defined as a market share of 30 percent or more. The Proposed Guidelines also call out transactions that further a trend toward concentration, meaning that mergers will likely receive additional scrutiny if they occur in markets that are consolidating.

These are just some of the potentially groundbreaking changes in the Proposed Guidelines. Even though they are not final, they provide insight into how the agencies are reviewing transactions.

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