

## FTC and DOJ Propose Overhaul of Merger Guidelines

Alert

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On July 19, 2023, The Federal Trade Commission and the Department of Justice (the agencies) released a [draft update of the Merger Guidelines](#) that would significantly overhaul how the agencies review mergers and acquisitions. If enacted, the effect of the revisions would substantially shift the burden of proof to the merging parties and enable the agencies to block acquisitions without having to prove an anticompetitive effect. There is a 60-day public comment period that ends September 18, 2023.

The Draft Guidelines are rooted in the idea that the antitrust statute that governs mergers, Section 7 of the Clayton Act, is a preventive statute, and that concentration should be stopped in its incipiency. To that end, the Draft Guidelines state that “[t]o show that a merger is unlawful, a plaintiff need only prove that its effect may be substantially to lessen competition.”

The agencies begin their analysis by asking how competition presents itself in a market, and “might this merger risk lessening that competition substantially now or in the future?” The agencies have outlined 13 Guidelines to be applied when they review mergers. The Guidelines are not mutually exclusive, and the agencies state that in the interests of efficiency they may limit their analysis to the Guideline(s) that most readily demonstrate the risk of the transaction to competition.

The Guidelines fall into three categories and are summarized below.

Frameworks that the agencies use to assess whether a merger may substantially lessen competition or tend to create a monopoly:

- **Market Structure:** In highly concentrated markets, market structure alone may result in a presumption that a merger may substantially lessen competition.

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- **Substantial Competition Between Merging Parties:** Mergers should not eliminate substantial competition between merging parties.
- **Coordination Risk:** The agencies will presume a merger may substantially lessen competition in highly concentrated markets or markets with a history of anticompetitive coordination. Markets that are not highly concentrated will be investigated to see if there are facts suggesting that a risk of coordination exists.
- **Potential Entrants:** Mergers in a concentrated market should not eliminate potential entrants or perceived potential entrants.
- **Vertical Mergers:** Mergers should not substantially lessen competition by creating a firm that controls products or services that its rivals may use to compete. The agencies examine whether the merged party can control access to those products and services to substantially lessen competition and whether they have incentive to do so.
- **Vertical Market Structure:** Mergers should not create market structures that foreclose competition. At or near a 50% share, market structure alone indicates the merger may substantially lessen competition. Below that share level, the agencies examine whether rivals would be deprived of a fair opportunity to compete.
- **Dominant Position:** Mergers should not entrench or extend a dominant position. The agencies examine whether one of the merging parties already has a dominant position that the merger may reinforce. They also examine whether the merger may tend to create a monopoly in another market.
- **Concentration:** Mergers should not further a trend toward concentration. If a merger occurs during a trend toward concentration, the agencies examine whether further consolidation would substantially lessen competition or tend to create a monopoly.

### Issues that arise when the frameworks are applied in common settings:

- **Multiple Acquisitions:** If an acquisition is part of a series of acquisitions, the agencies will examine the whole series and consider the cumulative effect of the acquisitions.
- **Multi-sided Platforms:** When a merger involves a multi-sided platform, the agencies examine competition between platforms, on a platform, or to displace a platform. Multi-sided platforms have characteristics that can exacerbate or accelerate competition concerns.
- **Competing Buyers:** When a merger involves competing buyers, the agencies examine whether it may substantially lessen competition for workers or other sellers.
- **Partial Ownership or Minority Interests:** When an acquisition involves partial ownership or minority interests, the agencies examine its impact on competition. Acquisitions of partial control or common ownership may sometimes substantially lessen competition.

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Mergers that raise competitive concerns not covered by the other guidelines:

- Other Arbitrage: Mergers that would allow a firm to avoid a regulatory contract, exploit a unique procurement process, or reduce the ability or incentive of an acquired firm to compete.

The agencies will use the public comments to evaluate and update the draft before finalizing the guidelines.

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