Simpson Thacher

Memorandum

FTC and DOJ New Merger Guidelines Position Agencies for Continued Aggressive Enforcement Under Wide Range of Theories

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On July 19, the FTC and DOJ (the "Agencies") jointly published highly anticipated draft merger guidelines (the "Draft Merger Guidelines") laying out their approach to merger enforcement.[1] The Draft Merger Guidelines confirm the Biden Administration's continued commitment to and prioritization of rigorous antitrust enforcement. The guidelines follow much of the prior guidance for horizontal mergers, albeit adopting lower market share and concentration thresholds for deeming a merger presumptively anticompetitive. They also reflect recent Agency enforcement actions based on more progressive theories—covering topics such as elimination of potential competition (*Meta/Within*), vertical foreclosure (*Microsoft/Activision*), access to competitively sensitive information (*UHG/Change*), extension of a dominant position (*Amgen/Horizon*), platform considerations (*Facebook/WhatsApp/Instagram* and *IQVIA/Propel*), and concentrations among purchasers or employers (*Penguin Random House/Simon & Schuster*). As such, the Draft Merger Guidelines exhibit an effort to transparently communicate current enforcement practices to the market rather than signal a change in approach. That said, in areas like "trends towards concentration" and "series of multiple acquisitions" (Guidelines 8 and 9, below), it remains to be seen how the Agencies will enforce these in practice. Finally, they feature citations to decades-old case precedent, with a goal of anchoring reinvigorated enforcement principles to historical legal precedent ("these guidelines . . . cite binding propositions of law to explain core principles . . ."), despite the more limited success that the Agencies have seen in pressing some of these theories in the courts.

The Draft Merger Guidelines are organized into 13 specific principles, each called a "guideline," describing the range of scenarios in which a merger may be considered problematic:

1. Mergers should not *significantly increase concentration* in highly concentrated markets.
2. Mergers should not *eliminate substantial competition* between firms.
3. Mergers should not *increase the risk of coordination*.
4. Mergers should not e*liminate a potential entrant* in a concentrated market.
5. Mergers should not *substantially lessen competition by creating a firm that controls products or services that its rivals may use* to compete.

[1] DOJ Press release available here; FTC press release available here.

6. Vertical mergers should not *create market structures that foreclose competition*.
7. Mergers should not *entrench or extend a dominant position*.
8. Mergers should not *further a trend toward concentration*.
9. When a merger is part of a series of multiple acquisitions, *the agencies may examine the whole series*.
10. When a merger involves a multi-sided platform, *the agencies examine competition between platforms, on a platform, or to displace a platform*.
11. When a merger involves competing buyers, the agencies examine whether it may *substantially lessen competition for workers or other sellers*.
12. When an acquisition involves *partial ownership or minority interests*, the agencies examine its impact on competition.
13. Mergers should not otherwise substantially lessen competition or tend to create a monopoly.

In this memorandum, we discuss the key provisions of the new guidelines, describe the ways in which they align with or differ from prior iterations, and discuss implications for future merger review.

The Draft Merger Guidelines are available for public comment until September 18, 2023 (unless the period is extended), following which the Agencies will draft and publish the final version.

The Draft Merger Guidelines Articulate a Wide Range of Theories of Harm That Reflect Biden Administration Case Record

The Draft Merger Guidelines include a wider range of articulated theories of harm to competition than appeared in the 2010 Horizontal Merger Guidelines ("2010 Merger Guidelines") or any prior iterations. In addition to the horizontal unilateral and coordinated effects theories of harm identified in earlier versions of the guidelines, these Draft Merger Guidelines incorporate non-horizontal concerns, including vertical foreclosure; entrenchment of a monopoly position; harms to competition from roll-up acquisitions; and harms to platform competition and labor competition.

While some theories of competitive harm were not reflected in prior merger guidelines, they are largely consistent with the theories articulated in Agency complaints brought by the Biden Administration and apparent in recent investigations. Accordingly, while they are a departure from prior guidelines, they do not represent a fundamental shift in how the Agencies are evaluating mergers in the current antitrust landscape. Rather, they seek to memorialize the Administration's enforcement policies and priorities.

Below are some examples of the theories of harm articulated in the Draft Merger Guidelines, and corresponding recent cases the Agencies have brought or settled relating to these theories. In spite of their reliance on historical case law cited throughout the Draft Merger Guidelines, in several recently litigated cases, the Agencies' non-

horizontal theories of harm have been rejected by the courts, at least based on those cases' facts. Although the 2010 Merger Guidelines were frequently cited favorably by the courts, despite being non-binding, they did not cover non-horizontal theories of harm and it is an open question whether the courts will adopt the revised guidelines once they are made final.

GUIDELINE 4: MERGERS SHOULD NOT ELIMINATE A POTENTIAL ENTRANT IN A CONCENTRATED MARKET

Building on the 2010 Merger Guidelines, which concisely address the concern that the acquisition of a maverick firm may eliminate potential competition, the Draft Merger Guidelines expand the Agencies' framework for determining whether an acquisition may eliminate actual potential competition (*i.e.*, a reasonable probable future entrant) and explain that mergers may substantially lessen competition by eliminating even a *perceived* new entrant. Under the perceived potential competition theory, competitors in a concentrated market are constrained by the perceived threat of entry by a potential, significant competitor.

- *Meta/Within*: In June 2022, the FTC sued under both actual and perceived potential competition theories to block Meta's proposed acquisition of Within Unlimited and its virtual reality dedicated fitness app, Supernatural. The complaint alleged that Meta was a potential entrant in the virtual reality dedicated fitness app market, and that the mere possibility of Meta's entry likely influenced competition in the virtual reality dedicated fitness app market, which would be dampened by the acquisition. The FTC lost its bid for a preliminary injunction in federal district court in February 2023, and subsequently dismissed its administrative complaint.

GUIDELINE 5: MERGERS SHOULD NOT SUBSTANTIALLY LESSEN COMPETITION BY CREATING A FIRM THAT CONTROLS PRODUCTS OR SERVICES THAT ITS RIVALS MAY USE TO COMPETE (INCENTIVE AND ABILITY TO FORECLOSE)

The Draft Merger Guidelines explain that the Agencies will evaluate whether a merger may substantially lessen competition by giving a firm control over access to a product, service, or customers that its rivals use to compete. In assessing the likelihood of anticompetitive effects, the Agencies will consider the merged firm's ability and incentive to weaken or exclude rivals, and mergers that may lessen competition by granting access to rivals' competitively sensitive information. Both of these theories of harm were previously addressed in the 2020 Vertical Merger Guidelines (rescinded by the FTC in September 2021). The Draft Merger Guidelines also caution that the Agencies will give little weight to the merging parties' rebuttal claims that are not supported by an objective analysis, including, for example, speculative claims about reputational harms. Importantly, the Agencies are unlikely to credit claims or commitments to protect or otherwise avoid harming their rivals that do not align with the firm's economic incentives.

To assess competitive effects from a vertical merger, the Agencies advise they will assess whether the merged firm may have an incentive to worsen rivals' terms, including by weighing evidence about the structure, history, and probable future of the market, such as: (1) the extent to which the merged firm competes with its rivals that use

the related product or service, (2) the merging parties' prior actions to limit rivals' access to products they used to compete, and (3) internal documents prepared by the merging parties identifying instances where the firms believe they have incentives to raise rivals' costs.

- *Microsoft/Activision*: In December 2022, the FTC sued to block Microsoft from acquiring video game developer Activision Blizzard, alleging that the transaction would enable Microsoft to suppress competitors to its Xbox gaming consoles and subscription content and cloud-gaming business by foreclosing access to Activision's popular content to Microsoft's gaming rivals. In July 2023, a federal district court denied the FTC's request for a preliminary injunction, ruling that the FTC failed to show Microsoft's incentive to foreclose, citing among other factors, the risk of reputational harm to Microsoft from the alleged foreclosure and the contractual commitments that Microsoft made to expand access of Activision content to other console manufacturers. The FTC has appealed the district court decision to the Ninth Circuit, however the Ninth Circuit denied a motion by the FTC seeking to block the deal pending the appeal.

GUIDELINE 5: MERGERS SHOULD NOT SUBSTANTIALLY LESSEN COMPETITION BY CREATING A FIRM THAT CONTROLS PRODUCTS OR SERVICES THAT ITS RIVALS MAY USE TO COMPETE (RIVALS' COMPETITIVELY SENSITIVE INFORMATION)

The Draft Merger Guidelines also address the possibility that a merger may substantially lessen competition if it would grant the firm access to rivals' competitively sensitive information, which it might use to either (1) undermine competition from the rival, or (2) facilitate coordination by giving the merging firm efficient access to its rivals competitive strategies.

- *UnitedHealth Group/Change*: In February 2022, the DOJ sued to block UnitedHealth Group's acquisition of Change Healthcare, alleging that the acquisition would harm competition in commercial health insurance markets by allowing United to use competitively sensitive healthcare claims data to undermine rival health insurers. A federal district court denied the DOJ's bid to stop the merger in September 2022, finding that the government failed to show United's post-merger incentives aligned with this theory of harm, and noting that United would have to uproot its entire business strategy, violate longstanding firewall policies, flout existing contractual commitments, and sacrifice reputational interests to do so.

GUIDELINE 7: MERGERS SHOULD NOT ENTRENCH OR EXTEND A DOMINANT POSITION

The Draft Merger Guidelines expand the scope of potential competitive harms beyond horizontal and vertical effects concerns to cover mergers that would entrench a monopolist or allow it to extend its dominant position into new markets.

The Agencies will consider whether (1) one of the merged firms already has a dominant position, and (2) the merger may entrench or extend that position. As a threshold to determine if one of the firms already has a dominant position, the Agencies will look to whether there is direct evidence of market power, or (2) one of the merging firms possesses at least *30%* market share.

If one of the merging firms possesses a dominant position, the Agencies will examine whether the merger may entrench that position by increasing barriers to entry, increasing switching costs, interfering with competitive alternatives, depriving rivals of scale economies or network effects, or eliminating a nascent competitive threat. This theory of harm is most likely to be used in connection with mergers in markets where the merged firm can allegedly use bundling or tying to delay or prevent competition from nascent competitors, such as in life sciences (*e.g.*, *Amgen/Horizon Therapeutics* (below)).

- *Amgen/Horizon Therapeutics:* In May 2023, the FTC sued to block Amgen Inc.'s purchase of Horizon Therapeutics plc, alleging that the transaction would allow Amgen to leverage its portfolio of blockbuster drugs in negotiations with insurance companies and pharmacy benefit managers ("PBMs"). The complaint does not allege that the parties are competitors in any relevant markets; rather, the transaction allegedly would allow the combined firm to engage in bundling to entrench the monopoly position of Horizon's drugs to treat thyroid eye disease and chronic gout. The case is currently pending in federal district court in Illinois and in the FTC's administrative court.

GUIDELINE 8: MERGERS SHOULD NOT FURTHER A TREND TOWARDS CONCENTRATION

Also departing from earlier versions of the Guidelines, the Draft Merger Guidelines explain that a merger may substantially lessen competition if it contributes to a *trend* toward concentration. The Agencies will look for two factors to indicate whether a merger would further a "trend toward concentration" sufficiently that it may substantially lessen competition. *First*, whether the merger would occur in a sector where there is a tendency toward concentration, such as a steadily increasing Herfindahl-Hirschman Index ("HHI") (between 1000 and 1800) or the exit of significant players. *Second*, whether the merger would increase the existing concentration level or pace of the trend, such as by an increase in HHI greater than 200. The Agencies reduced the HHI threshold for concentrated and highly concentrated markets (*see* Market Concentration below), creating a presumption consistent with Agency enforcement actions and speeches highlighting their concerns with private equity "roll-up" strategies.[2]

- *JAB Consumer Partners/National Veterinary Associates:* In June 2022, the FTC filed a complaint and entered into a consent order with JAB, requiring it to divest certain veterinary clinics and to seek prior approval from the FTC before acquiring additional veterinary clinics in close proximity to its existing clinics anywhere in the county. The complaint cites the growing trend towards consolidation in the emergency and specialty veterinary services markets across the United States in recent years by large chains. The contemporaneous statement issued by FTC Chair Lina Khan explains how the prior approval and prior notice provisions required by the Commission will allow the FTC to better address "stealth roll-ups by private equity firms . . . and serial acquisitions by other corporations."

[2] *See e.g.,* Stefania Palma and James Fontanella-Khan, "Crackdown on buyout deals coming, warns top US antitrust enforcer," *Financial Times* (05.18.2022), available here; Stefania Palma, Mark Vandevelde, and James Fontanella-Khan, "Lina Khan vows 'muscular' US antitrust approach on private equity deals," *Financial Times* (06.08.2022), available here.

GUIDELINE 10: WHEN A MERGER INVOLVES A MULTI-SIDED PLATFORM, THE AGENCIES EXAMINE COMPETITION BETWEEN PLATFORMS, ON A PLATFORM, OR TO DISPLACE A PLATFORM

The Draft Merger Guidelines distinguish competition *between platforms* (*e.g.*, to attract participants) from competition *on platforms* (giving the example of a platform operator combining with a platform participant that sells products or services on that platform—and the resulting incentive for the platform operator to favor the now-affiliated participant as a seller) and competition to *displace a platform* (in many ways a potential competition or nascent competitor concept, looking to prevent established platforms from stifling would-be alternatives or workarounds).

- ***Facebook/WhatsApp/Instagram:*** In December 2020, the FTC sued Facebook seeking to unwind its acquisitions of WhatsApp and Instagram. The FTC alleges that the acquisitions amplified the "strong network effects" creating "high barriers to entry" and "leave[] consumers with few choices for personal social networking." The matter is still pending.
- ***IQVIA/Propel Media:*** In July 2023, the FTC sued to block IQVIA's acquisition of Propel Media. The FTC alleged the combination would combine two of the largest providers of demand-side platforms for programmatic advertising. Coupled with IQVIA's data assets (which the FTC calls the "gold standard"), the FTC alleges the acquisition would not only eliminate head to head competition between the platforms but also "disadvantage current or emerging rival[]" platforms. The matter is also still pending.

GUIDELINE 11: WHEN A MERGER INVOLVES COMPETING BUYERS, THE AGENCIES EXAMINE WHETHER IT MAY SUBSTANTIALLY LESSEN COMPETITION FOR WORKERS OR OTHER SELLERS

While explaining that a merger between powerful buyers can harm any manner of sellers/suppliers, consistent with Biden Administration priorities the Draft Merger Guidelines focus in particular on labor markets as "important buyer markets," noting that they frequently have characteristics that "exacerbate the competitive effects of a merger between competing employers."

- ***Penguin Random House/Simon & Schuster:*** In November 2021, the DOJ successfully sued to block Penguin Random House's acquisition of Simon & Schuster on "buyer power" grounds, alleging it would diminish competition between publishers to sign authors of "anticipated best sellers" (*i.e.*, those receiving cash advances over $250,000). Focusing on the market structure and in particular the market shares of the parties in the relevant market, the district court agreed, and the merger was prohibited.

Market Concentration: Much Broader View of "Concentrated Markets" Consistent With Recent Aggressive Enforcement

The Draft Merger Guidelines also use a much wider lens through which to view market concentration. According to the Draft Merger Guidelines, the lower thresholds at which markets may be deemed concentrated aim to revert

to the thresholds in versions of the Guidelines prior to 2010. Under the Draft Merger Guidelines, “concentrated” markets are those markets in which the post-merger HHI exceeds 1000, and “highly concentrated” markets are those with an HHI over 1800.[3] In addition to reverting to these lower thresholds, the Draft Merger Guidelines also add two market share tests that create a presumption of harm to competition. For horizontal mergers, the presumption captures mergers in which the combined firm’s share is greater than 30% and the change in HHI is over 100. This would capture as presumptively anticompetitive, for example, the acquisition by a 30% market share holder of only a 2% market share holder. For vertical mergers, the presumption is triggered at foreclosure shares over 50%.[4] This is a departure from the 2010 Merger Guidelines, which contained no market share-based presumptions. The revised structural presumptions are summarized in the table below.

Indicator	Threshold for Structural Presumption
Post-Merger HHI	HHI >1800 AND Δ HHI >100
Merged Firm's Market Share	(i) Share >30% AND Δ HHI >100 (horizontal merger) OR (ii) Foreclosure Share >50% (vertical merger)

The revised thresholds and presumptions in the Draft Merger Guidelines cast a wide net over the categories of transactions that may be scrutinized more closely by the Agencies (including increased scrutiny of mergers resulting in a post-merger HHI of 1000 or above). This view, however, is consistent with the Agencies’ more aggressive enforcement over the past two years and now provides a more specific quantification that parties may use to assess enforcement risk.

Market Definition, Coordinated/Unilateral Effects, and Affirmative Defenses: Approach Remains Largely Unchanged

MARKET DEFINITION: TOOLS CONTINUE TO EXPAND AND MOVE FROM HMT TO DIRECT FORMS OF EVIDENCE

The Draft Merger Guidelines continue the trend started in the 2010 Merger Guidelines away from the Hypothetical Monopolist Test for market definition (the “HMT”) and towards more direct forms of evidence. Under the Draft Merger Guidelines, the HMT is merely one of four equally situated tools that the Agencies may rely on to demonstrate a relevant antitrust market:

[3] The HHI is defined as the sum of the squares of the market shares (*e.g.*, the HHI for a market of five equal firms is 2,000 ($5 \times 20^2 = 2{,}000$)).

[4] The Draft Merger Guidelines define “foreclosure share” as “the share of the related market that is controlled by the merged firm, such that it could foreclose rival’s access to the related product on competitive terms.”

1. **Direct evidence of substantial competition between the merging parties** can demonstrate that a merger may substantially lessen competition, even if the precise metes and bounds of the market are not specified;
2. **Direct evidence of the exercise of market power** can be used to identify market power and "the rough contours of the relevant market";
3. **Practical indicia** of market characteristics, such as the seven cited in the Supreme Court's decision in *Brown Shoe*; and
4. The **HMT**, *i.e.*, whether a hypothetical monopolist could impose a small but significant non-transitory increase in price or worsening of terms (*e.g.*, 5% or more).

When the Agencies do choose to use the HMT, the Draft Merger Guidelines supplement the HMT in ways that enhance its applicability to the non-horizontal theories of harm in the Draft Merger Guidelines (discussed above), such as by expanding it to account for non-price effects (*e.g.*, reduction in quality or service, or depression of wages) and to include products and services that do not yet exist, such as in innovation markets.

COORDINATED/UNILATERAL EFFECTS

In general, the Draft Merger Guidelines do not substantially depart from the earlier Merger Guidelines as it relates to traditional horizontal unilateral and coordinated effects theories.

Guideline 2 (Mergers Should Not Eliminate Substantial Competition Between Firms)

The guideline explains that the Agencies examine a variety of indicators to identify whether a merger may result in the loss of substantial competition, including whether the parties' ordinary course documents demonstrate that they monitor or react to one another's pricing, marketing, facility locations, improvements, products, capacity, and innovation plans. The Agencies may also consider entry and exit events, customer substitution, and the impact of a competitive action by one of the merging parties on the other merged firm. Appendix 2 to the Draft Merger Guidelines provides further detail on the types of evidence and tools the Agencies consider when assessing competition between firms, including economic tools such as merger simulations, calculation of diversion ratios to measure customer substitution, and upward pricing pressure, largely adopting the same framework and tools described in the 2010 Merger Guidelines.

Guideline 3 (Mergers Should Not Increase the Risk of Coordination)

This guideline discusses how a merger may increase the likelihood, stability, or effectiveness of coordination. The Draft Merger Guidelines explain that Agencies presume that post-merger conditions are susceptible to coordinated effects if any of three primary factors are present: (1) a highly concentrated market (*see* Market Concentration above), (2) prior actual or attempted coordination, and (3) elimination of a maverick. The Draft Merger Guidelines also address certain "secondary" factors that may meaningfully increase risk of coordination, even absent the primary factors, including (1) markets that are not "highly concentrated" but are still susceptible to coordination with an HHI above 1000, (2) market transparency, (3) markets in which a firm's prospective competitive award from attracting customers away from rivals would be significantly diminished by the responses

from its rivals, (4) aligned incentives, and (5) profitability or other advantages of coordination for rivals. The Draft Merger Guidelines also note that "[b]ecause tacit coordination may be difficult to address under Section 1 of the Sherman Act, vigorous enforcement of Section 7 of the Clayton Act to prevent market structures conducive to such coordination is especially critical."

AFFIRMATIVE DEFENSES AVAILABLE TO PARTIES ARE BROADLY UNCHANGED BUT NARROWED IN CERTAIN CIRCUMSTANCES

Fundamentally, the types of defenses recognized by the Draft Merger Guidelines are unchanged from 2010, and include the "failing firm" defense, arguments regarding likely "new entry" into the market, and procompetitive benefits (such as efficiencies). However, the Draft Merger Guidelines also take steps to narrow each of these principles.

- ***Failing Firm:*** The Draft Merger Guidelines are consistent with previous guidance in emphasizing that this will be accepted only in the most extreme of circumstances. In all cases the proposed transaction must represent the only alternative for the assets (*i.e.*, no other plausible buyers are available). The Draft Merger Guidelines express particular skepticism regarding claims that the doctrine should be applied to a single non-profitable division of a business.
- ***New Entry:*** Restate the long-held requirements that new entry be timely, likely and sufficient to eliminate the threat a merger presents.
- ***Procompetitive Efficiencies:*** Hold the merging parties to a high bar; among other things, they must be merger-specific (specific to *that particular buyer and seller*, rather than a merger more generally), and they must demonstrably result in likely pass-through of benefits to consumers, rather than simply captured and kept by the merging firms.

Takeaways

In releasing their Draft Merger Guidelines, the Agencies announced three goals for the new guidance. *First*, that it reflect and cite to relevant legal precedent. *Second*, that the Draft Merger Guidelines offer transparency on the framework and the underlying legal precedent to identify potentially illegal mergers. And, *finally*, the Agencies sought to update the analytical tools used to assess the merits of a merger using guidelines that reflect the commercial realities of the modern economy.

Although the Draft Merger Guidelines offer a few new twists, the twists have largely been foreshadowed in the Biden Administration enforcement actions to date. These new guidelines largely stick to the prior guidance for horizontal mergers—endorsing the same analytical tools, evidence, and framework—while expanding the scope to explicitly cover potential competitive harms to workers and reverting the HHI thresholds to guidance that predates the 2010 Merger Guidelines. Most of the new guidance relates to non-horizontal mergers based on legal precedent that is several decades old. It remains to be seen whether the courts will accept these Draft Merger Guidelines within the facts and framework of the cases presented.

For further information regarding this memorandum, please contact one of the following authors:

WASHINGTON, D.C.

Karen Kazmerzak
+1-202-636-5996
karen.kazmerzak@stblaw.com

Preston Miller
+1-202-636-5822
preston.miller@stblaw.com

Sara Y. Razi
+1-202-636-5582
sara.razi@stblaw.com

Lindsey C. Bohl
+1-202-636-5908
lindsey.bohl@stblaw.com

Allison Davido
+1-202-636-5570
allison.davido@stblaw.com

Geoffrey Schmelkin
+1-202-636-5885
geoffrey.schmelkin@stblaw.com

NEW YORK CITY

Peter Guryan
+1-212-455-2750
peter.guryan@stblaw.com

Richard J. Jamgochian
+1-212-455-3019
richard.jamgochian@stblaw.com

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