Merger Guidelines

U.S. Department of Justice and the Federal Trade Commission

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1. Overview

These Merger Guidelines ~~explain how~~identify the procedures and enforcement practices the Department of Justice and the Federal Trade Commission (the "Agencies") ~~identify potentially illegal~~most often use to investigate whether mergers~~. They are designed to help the public, business community, practitioners, and courts understand~~ violate the ~~factors and frameworks the Agencies consider when investigating mergers.~~

antitrust laws. The Agencies enforce the federal antitrust laws, specifically Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45; and Sections 3, 7, and 8 of the Clayton Act,[1]~~;~~ 15 U.S.C. §§ 14, 18, 19.[2] Congress has charged the Agencies with administering these statutes as part of a national policy to promote open and fair competition, including by preventing mergers and acquisitions that would violate these laws. "Federal antitrust law is a central safeguard for the Nation's free market structures" that ensures "the preservation of economic freedom and our free-enterprise system."[3] It rests on the premise that "[t]he unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."[4]

Section 7 of the Clayton Act ~~is the antitrust law that most directly addresses mergers and acquisitions.[5]~~ ("Section 7") prohibits mergers and acquisitions where "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."~~[3] Section 7 is a preventative statute that reflects the "mandate of Congress that tendencies toward concentration~~ Competition is a process of rivalry that incentivizes businesses to offer lower prices, improve wages and working conditions, enhance quality and resiliency, innovate, and expand choice, among many other benefits. Mergers that substantially lessen competition or tend to create a monopoly increase, extend, or entrench market power and deprive the public of these benefits. Mergers can lessen competition when they diminish competitive constraints, reduce the number

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[1] As amended under the Celler-Kefauver Antimerger Act of 1950, ~~Public Law~~Pub. L. No. 81-899, 64 Stat. 1125~~,~~ (1950), and the HartScott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.

[2] Although these Guidelines focus primarily on Section 7 of the Clayton Act, the Agencies consider whether any of these statutes may be violated by a merger. The various provisions of the Sherman, Clayton, and FTC Acts each have separate standards, and one may be violated when the others are not.

[3] North Carolina State Bd. of Dental Examiners v. FTC, 574 U.S. 494, 502 (2015).

[4] NCAA v. Board of Regents, 468 U.S. 85, 104 n.27 (1984) (quoting Northern Pac. R. Co. v. United States, 356 U.S. 1, 4-5 (1958)); see also NCAA v. Alston, 141 S. Ct. 2141, 2147 (2021) (quoting Board of Regents, 468 U.S. at 104 n.27).

~~[5] Mergers may also violate, *inter alia*, Sections 1 and 2 of the Sherman Act or Section 5 of the FTC Act. [3] 15 U.S.C. § 18.~~

or attractiveness of alternatives available to trading partners, or reduce the intensity with which market participants compete.

~~in industry are~~Section 7 was designed to ~~be curbed~~arrest anticompetitive tendencies in their incipiency~~.”~~.[6]

[7][8] The Clayton Act therefore requires the Agencies to assess ~~the~~whether mergers present risk to competition~~ from mergers. As the~~. The Supreme Court has explained~~,~~ that “Section 7 itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect ‘may be substantially to lessen ~~competition.’”~~[9] ~~This is because “[t]he grand design of…Section 7, as~~ competition’” or to ~~stock acquisitions [and] the acquisition of assets, was to arrest incipient threats to competition which the [more broadly applicable] Sherman Act did not ordinarily reach.”~~tend to create a monopoly.[10] Accordingly, ~~in analyzing a proposed merger,~~ the Agencies do not ~~seek~~attempt to predict the future or ~~the~~calculate precise effects of a merger with certainty. Rather, the Agencies ~~assess the risk that the merger may lessen competition substantially or tend to create a monopoly based on~~examine the totality of the evidence available ~~at~~to assess the ~~time of~~risk the ~~investigation~~merger presents.

~~Across the economy, competition plays out in many ways and on a variety of dimensions. In recognition of this fact, “Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry.”[11] The Agencies therefore begin their merger analysis with the question: how does competition present itself in this market and might this merger risk lessening that competition substantially now or in the future?~~

~~The Agencies apply the following Guidelines to help answer this question. In some cases, “it is possible…to simplify the test of illegality” by focusing on discrete facts that, when present, suggest a merger is “so inherently likely to lessen competition substantially that it must be~~

[6] See, e.g., Brown Shoe Co. v. United States, 370 U.S. 294, ~~346~~318 nn.32-33 (1962~~) (“~~); see also United States v. AT&T, Inc., 916 F.3d 1029, 1032 (D.C. Cir. 2019) (Section 7 “halt[s] incipient monopolies and trade restraints outside the scope of the Sherman Act.” (quoting Brown Shoe~~”).~~, 370 U.S. at 318 n.32)); Saint Alphonsus Medical Center-Nampa v. St. Luke’s, 778 F.3d

[7] , 783 (9th Cir. 2015) (Section 7 “intended to arrest anticompetitive tendencies in their incipiency.” (quoting Brown Shoe,

[8] U.S. at 322)); Polypore Intern., Inc. v. FTC, 686 F.3d 1208, 1213-14 (11th Cir. 2012) (same). Some other aspects of Brown Shoe have been subsequently revisited.

~~[9] *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) (quoting 15 U.S.C. § 18 with emphasis) (citing *Brown Shoe*, 370 U.S. at 323).~~

[10] ~~*United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 170-71 (1964).~~ California v. Am. Stores Co., 495 U.S. 271, 284 (1990) (quoting 15 U.S.C. § 18 with emphasis) (citing Brown Shoe, 370 U.S. at 323).

~~[11] *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 498 (1974) (quoting *Brown Shoe*, 370 U.S. at 321-22) (“*Gen. Dynamics*”).~~

~~enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."~~~~[12]~~

~~Guidelines 1-8 identify several frameworks that the Agencies use to assess the risk that a merger's effect may be substantially to~~ Competition presents itself in myriad ways. To assess the risk of harm to competition in a dynamic and complex economy, the Agencies begin the analysis of a proposed merger by asking: how do firms in this industry compete, and does the merger threaten to substantially lessen competition or to tend to create a monopoly?

The Merger Guidelines set forth several different analytical frameworks (referred to herein as "Guidelines") to assist the Agencies in assessing whether a merger presents sufficient risk to warrant an enforcement action. These frameworks account for industry-specific market realities and use a variety of indicators and tools, ranging from market structure to direct evidence of the effect on competition, to examine whether the proposed merger may harm competition.

How to Use These Guidelines: When companies propose a merger that raises concerns under one or more Guidelines, the Agencies closely examine the evidence to determine if the facts are sufficient to infer that the effect of the merger may be to substantially lessen competition or to tend to create a monopoly~~. Guidelines 9-12~~ (sometimes referred to as a "prima facie case").[13] Section 2 describes how the Agencies apply these Guidelines. Specifically, Guidelines 1-6 describe distinct frameworks the Agencies use to identify that a merger raises prima facie concerns, and Guidelines 7-11 explain ~~issues that often arise when the Agencies~~how to apply those frameworks in several ~~common settings. Guideline 13 explains how the~~ specific settings. In all of these situations, the Agencies will also examine relevant evidence to determine if it disproves or rebuts the prima facie case and shows that the merger does not in fact threaten to substantially lessen competition or tend to create a monopoly. Section 3 identifies rebuttal evidence that the Agencies consider ~~mergers and acquisitions that raise competitive concerns not addressed by the other Guidelines~~, and that merging parties can present, to rebut an inference of potential harm under these frameworks.[8] Section 4 sets forth a non-exhaustive discussion of analytical, economic, and evidentiary tools the Agencies use to evaluate facts, understand the risk of harm to competition, and define relevant markets.

These Guidelines are not mutually exclusive, as a single transaction can have multiple effects or ~~trigger concern~~raise concerns in multiple ways. To promote efficient review, for any

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~~[12] *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362-63 (1963) (*Phila. Nat'l Bank*).~~

[13] See, e.g., United States v. AT&T, Inc., 916 F.3d at 1032 (explaining that a prima facie case can demonstrate a "reasonable probability" of harm to competition either through "statistics about the change in market concentration" or a "fact-specific" showing (quoting Brown Shoe, 370 U.S. at 323 n.39)); United States v. Baker Hughes, 908 F.2d 981, 982-83 (D.C. Cir. 1990). [8] These Guidelines pertain only to the Agencies' consideration of whether a merger or acquisition may substantially lessen competition or tend to create a monopoly. The consideration of remedies appropriate for mergers that pose that risk is beyond the Merger Guidelines' scope. The Agencies review proposals to revise a merger in order to alleviate competitive concerns consistent with applicable law regarding remedies.

given transaction the Agencies may limit their analysis to any one Guideline or subset of Guidelines that most readily demonstrates the risks to competition from the transaction.

Guideline 1: Mergers ~~**Should Not**~~Raise a Presumption of Illegality When They Significantly Increase
Concentration in a Highly Concentrated ~~**Markets.**~~[14] ~~Concentration refers to the number and relative size of rivals competing to offer a product or service to a group~~Market. Market concentration is often a useful indicator of ~~customers.~~a merger's likely effects on competition. The Agencies ~~examine whether a merger~~ therefore presume, unless sufficiently disproved or rebutted, that a merger between competitors ~~would~~that significantly ~~increase~~increases concentration and ~~result in~~creates or further consolidates a highly concentrated market~~. If so, the Agencies presume that a merger~~ may substantially lessen competition ~~based on market structure alone.~~.

Guideline 2: Mergers ~~**Should Not**~~Can Violate the Law When They Eliminate Substantial Competition ~~**between**~~Between Firms.[10] The Agencies examine whether competition between the merging parties is substantial~~,~~ since their merger will necessarily eliminate any competition between them.

Guideline 3: Mergers ~~**Should Not**~~Can Violate the Law When They Increase the Risk of Coordination.[15] The Agencies examine whether a merger increases the risk of anticompetitive coordination. A market that is highly concentrated or has seen prior anticompetitive coordination is inherently vulnerable and the Agencies will ~~presume~~infer, subject to rebuttal evidence, that the merger may substantially lessen competition. In a market that is not ~~yet~~ highly concentrated, the Agencies investigate whether facts suggest a greater risk of coordination than market structure alone would suggest.

Guideline 4: Mergers ~~**Should Not**~~Can Violate the Law When They Eliminate a Potential Entrant in a Concentrated Market.[16] The Agencies examine whether, in a concentrated market, a merger would (a) eliminate a potential entrant or (b) eliminate current competitive pressure from a perceived potential entrant.

Guideline 5: Mergers ~~**Should Not Substantially Lessen Competition by Creating**~~ Can Violate the Law When They Create a Firm That ~~**Controls**~~ May Limit Access to Products or Services That Its Rivals ~~**May**~~ Use to Compete.[17] When a merger ~~involves~~ creates a firm that can limit access to products or services that its rivals use to compete, the Agencies examine ~~whether~~the extent to which the merger creates a risk that the merged firm ~~can control~~will limit rivals' access ~~to those products~~, gain or ~~services to substantially lessen competition and whether they have the~~

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[14] ~~*See, e.g.*, *Phila. Nat'l Bank*, 374 U.S. at 363, *modified by Gen. Dynamics*, 415 U.S. at 498 (see Section IV).~~ [10] ~~*See, e.g.*, *ProMedica Health System, Inc. v. FTC*, 749 F.3d 559, 568-70 (6th Cir. 2014), *cert. denied*, 575 U.S. 996 (2015).~~

[15] ~~*See, e.g.*, *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1387-89 (7th Cir. 1986) (Posner, J.).~~

[16] ~~*See, e.g.*, *United States v. Marine Bancorp.*, 418 U.S. 602, 623-26 (1974).~~

[17] ~~*See United States v. AT&T*, 916 F.3d 1029, 1035-36 (D.C. Cir. 2019).~~

~~incentive to do so.~~increase access to competitively sensitive information, or deter rivals from investing in the market.

Guideline 6: ~~**Vertical Mergers Should Not Create Market Structures That Foreclose Competition.**[18] The Agencies examine how a merger would restructure a vertical supply or distribution chain. At or near a 50% share, market structure alone indicates the merger may substantially lessen competition. Below that level, the Agencies examine whether the merger would create a "clog on competition…which deprives rivals of a fair opportunity to compete."[19]~~

~~**Guideline 7: Mergers Should Not Entrench or Extend a Dominant Position.**[20]~~Mergers Can Violate the Law When They Entrench or Extend a Dominant Position. The Agencies examine whether one of the merging firms already has a dominant position that the merger may reinforce~~.~~, thereby tending to create a monopoly. They also examine whether the merger may extend that dominant position to substantially lessen competition or tend to create a monopoly in another market.

Guideline ~~**8: Mergers Should Not Further**~~7: When an Industry Undergoes a Trend Toward ~~**Concentration.**[21] If a merger occurs during~~Consolidation, the Agencies Consider Whether It Increases the Risk a Merger May Substantially Lessen Competition or Tend to Create a Monopoly. A trend toward ~~concentration, the Agencies examine whether further~~ consolidation ~~may substantially lessen~~can be an important factor in understanding the risks to competition ~~or tend to create a monopoly.~~presented by a merger. The Agencies consider this evidence carefully when applying the frameworks in Guidelines 1-6.

Guideline ~~**9**~~8: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.[22] If an individual transaction is part of a firm's pattern or strategy of multiple acquisitions, the Agencies consider the cumulative effect of the pattern or strategy when applying the frameworks in Guidelines 1-6.

Guideline ~~**10**~~9: 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 problems. The Agencies consider the distinctive characteristics of multi-sided platforms ~~carefully~~ when applying the ~~other~~frameworks in Guidelines 1-6.

Guideline ~~**11**~~10: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May

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~~[18] *See, e.g.*, *Ford Motor Co. v. United States*, 405 U.S. 562 (1972).~~

~~[19] *Brown Shoe*, 370 U.S. at 324.~~

~~[20] *See, e.g.*, *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577-78 (1967).~~

~~[21] *See, e.g.*, *Gen. Dynamics*, 415 U.S. at 497-98; *United States v. Pabst Brewing Co.*, 384 U.S. 546, 552–53 (1966).~~

~~[22] *See* H.R. Rep. No. 1191, 81st Cong., 2d Sess. 12-13 (1950).~~

Substantially Lessen Competition for Workers, Creators, Suppliers, or Other ~~**Sellers.**~~[23] ~~Section 7 protects competition among buyers and prohibits mergers that may substantially lessen competition in any relevant market.~~Providers. The Agencies ~~therefore~~ apply ~~these~~ the frameworks in Guidelines 1-6 to assess whether a merger between buyers, including employers, may substantially lessen competition or tend to create a monopoly.

Guideline ~~12~~11: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition.[20] ~~Acquisitions~~ The Agencies apply the frameworks in Guidelines 1-6 to assess if an acquisition of partial control or common ownership may ~~in some situations~~ substantially lessen competition.

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

~~[23] *See, e.g.*, *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948).~~ ~~[20] *See, e.g.*, *Denver & Rio Grande v. United States*, 387 U.S. 485, 504 (1967).~~