

On December 18, the US Department of Justice (DOJ) and Federal Trade Commission (FTC) (collectively, the “government”), released the final [2023 Merger Guidelines](#) which set forth factors and frameworks the government will use when assessing mergers and acquisitions. The government released [draft Guidelines](#) in July for public input. Feedback was solicited during a 60-day open comment period, and at three [public workshops](#) in September, October and November. The final 2023 Guidelines consolidate, revise and replace all prior versions of the Merger Guidelines, including the [2010 Merger Guidelines](#).

In a [statement](#) accompanying the release, DOJ Attorney General Merrick Garland said “[t]hese finalized Guidelines provide transparency into how the Justice Department is protecting the American people from the ways in which unlawful, anticompetitive practices manifest themselves in our modern economy.” FTC Chair Lina Khan also emphasized the government’s view that the 2023 Guidelines were reflective of “the new realities of how firms do business in the modern economy[.]”

While the 2023 Guidelines are not legally binding, they provide important guidance on how the government may view certain transactions. The Guidelines also reflect the Biden Administration’s aggressive stance on merger enforcement. Key takeaways follow.

1. More transactions will be presumed unlawful due to lower thresholds for finding “concentrated markets.”

The 2023 Guidelines significantly lower the thresholds at which transactions are presumed to raise competition concerns. A transaction is presumptively anticompetitive under the Guidelines if it creates or further consolidates a highly concentrated market, though the final version of the Guidelines clarifies that the presumption can be rebutted (and that the strength of the evidence needed to do so increases with the level of concentration above the stated thresholds).

The government utilizes the Herfindahl-Hirschman Index (HHI)¹ to measure market concentration and changes in concentration resulting from a proposed transaction. Under the 2010 Guidelines, a market was considered highly concentrated when a transaction resulted in a post-merger HHI above 2,500 and a change in HHI of 200, while a market was considered moderately concentrated when a transaction resulted in a post-merger HHI above 1,800 and a change in HHI of 100 was considered moderately concentrated. Under the 2023 Guidelines, a post-merger HHI above 1,800 and a change in HHI of 100 is now considered highly concentrated, and thus the merger presumptively unlawful.

The government will also presume a post-merger market share above 30 percent will substantially lessen competition if accompanied by a change in HHI greater than 100. This will have significant implications for merging parties because this presumption does not consider the parties’ individual market positions. For instance, a company with a 25 percent market share acquiring a competitor with a five percent market share would be presumptively anticompetitive despite the relatively low market share of the competitor. Likewise, a company with a 30 percent market share acquiring a competitor with only a two percent market share would also be presumptively anticompetitive.

These changes are outlined in the following table.

Indicator	Prior Threshold for Structural Presumption	New Threshold for Structural Presumption
Post-Merger HHI	Market HHI greater than 2,500 AND Change in HHI greater than 200	Market HHI greater than 1,800 AND Change in HHI greater than 100
Merged Firm’s Market Share	N/A	Share greater than 30% AND Change in HHI greater than 100

2. Investors or companies engaging in serial acquisitions will face greater scrutiny from the government.

Under the 2023 Guidelines, the government will now consider the purchasing party’s prior transactions to assess the legality of the current transaction. Namely, the government will evaluate whether the deal is part of an industry trend or overall pattern or strategy by looking at the purchasing party’s “history and current or future strategic incentives.” This shift is likely to have the most impact on private equity firms and companies pursuing growth strategies based on multiple smaller acquisitions. Even if the smaller, individual transactions raise no antitrust concerns on their own, the mere existence of serial acquisitions by a merging party, or others in the industry, could invite additional scrutiny of both the current transaction and the prior transactions.

3. The government will consider labor markets when analyzing a transaction.

¹ The government uses HHI, defined as “the sum of the squares of the market shares,” to identify whether a market is concentrated and whether a merger or acquisition would increase or create undue market concentration. Determining whether a market is concentrated is the first step the government takes in assessing whether a proposed merger or acquisition will be anticompetitive.

Consistent with the government's heightened enforcement in labor markets, the 2023 Guidelines indicate that the government will examine whether a transaction may substantially lessen competition for workers when it involves competing buyers, including "employers as buyers of labor." Notably, the final Guidelines specify that the government will consider the effect on "competition for workers, creators, suppliers, or other providers" (whereas the July draft Guidelines referred to "workers or other sellers").

[Proposed changes](#) to the Hart-Scott-Rodino Act (HSR) pre-merger notification form would, if finalized, require companies to provide the government significant information on employees, including commuting zones and employee classifications. Moving forward, companies will need to consider whether potential transactions could negatively impact the labor market.

4. The 2023 Guidelines emphasize the government's concern with vertical mergers but removes unpopular structural presumptions.

The 2023 Guidelines emphasize the government's concern with potential foreclosures (or limiting access) in vertical mergers, i.e., transactions between firms operating at different levels of a supply chain. The Guidelines specifically note that the government will consider whether a vertical merger will have the potential to create barriers to entry by limiting access to dependent rivals, for example by creating a need for a rival to enter the market at multiple levels of the supply chain, and to do so with sufficient scale and scope. The Guidelines also note that the government will begin to look at whether one or both merged parties have a historical trend toward vertical integration, meaning that a prior vertical merger that did not, by itself, raise antitrust concern could later be viewed as problematic if it was part of a pattern.

A footnote in the 2023 Guidelines states that the government will generally infer harm where a company has above 50 percent share for an input used by rivals. Notably, this scales back the July draft Guidelines' presumption of illegality for such a share, which received significant criticism from the public.

5. The government will consider a transaction's entrenchment of dominant positions and impact on potential future competition.

Lastly, the government will consider whether a firm has a "dominant position," a concept that is widely used in the EU and other jurisdictions but to date has not been part of US antitrust law. A dominance determination under the Guidelines is based on "direct evidence" or "market shares showing durable market power," but again the government notably removed the July draft Guidelines' controversial structural presumption of dominance for a share above 30 percent. Mergers involving dominant firms can violate the law when they "entrench or extend" a dominant position, including by increasing entry barriers or switching costs, depriving rivals of scale or eliminating a nascent competitive threat.

The 2023 Guidelines take an expansive view of nascent threats and discuss them at length. The potential success of nascent threats may provide for a direct threat of competition or may encourage entry by other potentially complementary providers and thus serve as a competitive constraint. Nascent threats can also serve a role in "ecosystem competition," where a merging party is partially constrained by "other combinations of products and services" offered under a different business model.

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