

CLIENT ALERT

U.S. Antitrust Agencies Issue Final Merger Guidelines Confirming Aggressive Approach to Enforcement

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On December 18, 2023, the U.S. Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) jointly issued their [final](#) 2023 Merger Guidelines (the “2023 Guidelines”).¹ The DOJ and FTC (the “Agencies”) had released a draft version of the Guidelines in July 2023 (the “Draft Guidelines”), which we reviewed in a [July 2023 Client Alert](#), explaining that the restrictive profile of the Draft Guidelines matched the Agencies’ aggressive enforcement practice under the Biden Administration. The 2023 Guidelines are largely unchanged from the Draft Guidelines.

The Eleven ‘Guidelines’

The 2023 Guidelines are organized around a list of eleven key principles, or guidelines. These guidelines are consistent with the Agencies’ recent litigation focus on concentrated markets, vertical integration, acquisition of potential entrants, and multi-sided platforms. These eleven guidelines are as follows:

Guideline 1: Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market.

¹ U.S. Department of Justice and the Federal Trade Commission, Merger Guidelines (2023) (hereinafter the “2023 Guidelines”), available at <https://www.ftc.gov/news-events/news/press-releases/2023/12/federal-trade-commission-justice-department-release-2023-merger-guidelines>.

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Guideline 2: Mergers Can Violate the Law When They Eliminate Substantial Competition Between Firms.

Guideline 3: Mergers Can Violate the Law When They Increase the Risk of Coordination.

Guideline 4: Mergers Can Violate the Law When They Eliminate a Potential Entrant in a Concentrated Market.

Guideline 5: Mergers Can Violate the Law When They Create a Firm That May Limit Access to Products or Services That Its Rivals Use to Compete.

Guideline 6: Mergers Can Violate the Law When They Entrench or Extend a Dominant Position.

Guideline 7: When an Industry Undergoes a Trend Toward Consolidation, the Agencies Consider Whether It Increases the Risk a Merger May Substantially Lessen Competition or Tend to Create a Monopoly.

Guideline 8: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.

Guideline 9: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform.

Guideline 10: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers, Creators, Suppliers, or Other Providers.

Guideline 11: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition.

Expanded Use of Presumptions of Illegality

The 2023 Guidelines seek to construct a litigation-like, burden-shifting procedure. They explain that:

Guidelines 1–6 describe distinct frameworks the Agencies use to identify that a merger raises *prima facie* concerns, and Guidelines 7–11 explain how to apply those frameworks in several 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.²

² 2023 Guidelines at 2.

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The 2023 Guidelines³ express the “*prima facie* case” strongly in Guideline 1 as a “presumption of illegality,” relying on the 1963 Supreme Court decision in *United States v. Philadelphia Nat’l Bank*.⁴ The presumption of illegality arises if the merger increases the Herfindahl-Hirschman Index (“HHI”) by 100 points and the market HHI is then greater than 1,800. A presumption of illegality will also be applied if a merged firm’s market share is greater than 30% and the increase in HHI is greater than 100.⁵

By contrast, the 2010 Merger Guidelines did not invoke “presumptions of illegality,” but rather identified concentration levels at which anticompetitive effects would be likely.⁶ In addition, the HHI thresholds in the 2010 Guidelines that were identified as raising a likelihood of anticompetitive effects were a post-merger HHI of 2,500 and a post-merger increase in the HHI of 200.⁷ The 2023 Guidelines thus set lower concentration thresholds for concern and raise a stronger and more formal inference of illegality than did the 2010 Guidelines.

Once the presumption of illegality under *Philadelphia National Bank* is invoked on the basis of “undue concentration,” the burden would shift to the merging parties to rebut that presumption.⁸

In Guidelines 2–6, the Agencies identify a variety of circumstances other than increases in concentration that they assert support a “*prima facie* case” under Section 7 of the Clayton Act. In describing those circumstances, the 2023 Guidelines repeatedly refer to “rebuttal evidence,” thus implying the application of the same burden-shifting mechanism that courts have developed under the *Philadelphia National Bank* concentration presumption.⁹ The Agencies apparently intend to invite courts to extend presumptions of illegality beyond the circumstance of undue concentration to those identified in Guidelines 2–6.

The Agencies would achieve significant litigation advantages if courts permit the Agencies to establish a burden-shifting, *prima facie* case under both the reduced HHI thresholds within Guideline 1 and the additional theories of harm within Guidelines 2–6. It remains to be seen, however, whether the judiciary will follow with the Agencies’ proposed approach.

³ 2023 Guidelines at 5–6.

⁴ 374 U.S. 321, 363 (1963).

⁵ 2023 Guidelines at 5–6. The 2023 Guidelines state that the degree to which a merged firm’s concentration exceeds the HHI or market-share thresholds under Guideline 1 is proportionate to the merger’s risk to competition. As such, the 2023 Guidelines suggest that there is a higher bar of rebuttal evidence for mergers that significantly exceed these thresholds and a lower bar for mergers that just clear the thresholds.

⁶ U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines (2010), available at <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf>, at 19.

⁷ *Id.*

⁸ 2023 Guidelines at 5–6. See also *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982–83 (D.C. Cir. 1990).

⁹ See, e.g., *Baker Hughes Inc.*, 908 F.2d at 982–83.

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A Focus on Vertical Mergers and Foreclosure of Rivals

The 2023 Guidelines also devote substantial attention to vertical mergers. Notably, the Agencies indicate that they view at least some vertical mergers that provide the merged entity with the “ability and incentive” to foreclose its rivals as presumptively illegal. The Agencies identify four relevant factors for evaluating a merged entity’s “ability and incentive” to foreclose. These are: (i) the availability of substitutes for the related products, (ii) the competitive significance of the related product, (iii) the importance of the firms that might be foreclosed for competition in the relevant market, and (iv) the competition between the merged firm and the firms that might be foreclosed.¹⁰ The Agencies will “generally infer” market power sufficient to demonstrate the merging firm’s ability to foreclose its rivals if the merging firm has a share greater than 50% of the related product market.¹¹

Throughout the vertical merger section, the 2023 Guidelines repeatedly cite the Fifth Circuit’s recent decision in the *Illumina/Grail* case.¹² There, the Fifth Circuit agreed with the FTC that a *prima facie* case under a foreclosure theory could be made under the analytical framework that the FTC has adopted in administrative litigation by showing concentration in the input market and a few other factors.¹³ Additionally, the Fifth Circuit accepted the FTC’s view that a merged entity could foreclose competitors without losing goodwill from other customers in the input market by implementing this strategy quietly—“such as by making late deliveries or by subtly reducing the level of support services.”¹⁴ The Fifth Circuit, however, did not affirm the FTC’s decision against *Illumina/Grail* but remanded the case for a further assessment under a corrected legal standard of the merging parties’ proposed contractual offer to *Illumina* customers that was designed to mitigate any foreclosure effects from the transaction.¹⁵

Nascent Competitive Threats and Trends Towards Consolidation

The 2023 Guidelines contain novel theories of how mergers may pose competitive harm. Two of the more striking theories involve nascent competitive threats and trends toward consolidation.

Nascent Competitive Threats. The 2023 Guidelines state that a merger involving a dominant firm purchasing a “nascent competitive threat” may be presumptively unlawful—regardless of concentration (or lack thereof) in the relevant market. The

¹⁰ 2023 Guidelines at 14.

¹¹ 2023 Guidelines at 16, n.30.

¹² *Illumina Inc. v. FTC*, No. 23-60167 (5th Cir. Dec. 15, 2023) (Slip Op).

¹³ Slip Op. at 22.

¹⁴ Slip Op. at 18.

¹⁵ Slip Op. at 22-29; *id.* at 29 (“To rebut Complaint Counsel’s *prima facie* case, *Illumina* was only required to show that the Open Offer sufficiently *mitigated* the merger’s effect such that it was no longer likely to *substantially* lessen competition. *Illumina* was not required to show that the Open Offer would negate the anticompetitive effects of the merger entirely.”). The parties have abandoned their merger, so no re-assessment of the contract offer will occur. *Illumina to divest cancer test maker Grail after antitrust battles*, REUTERS, Dec. 18, 2023, available at <https://www.reuters.com/markets/deals/illumina-divest-cancer-test-maker-grail-2023-12-17/>.

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2023 Guidelines explain that a nascent threat may be an “ecosystem” competitor— i.e., a competitor with partially overlapping customer segments, niche product offerings, etc.—with potential to threaten the dominant firm in the long run.¹⁶ Relatedly, the 2023 Guidelines state that a dominant firm’s acquisition may be unlawful, even if it improves the products or services offered by that firm in the short run, if the long-run impact on “market power and industry dynamics” is likely to be harmful.¹⁷

Trends Towards Consolidation. The 2023 Guidelines also state that the Agencies will consider any trends towards consolidation in the relevant market when analyzing a merger’s likely effect on competition (Guideline 7). Specifically, the Agencies will examine the following consolidation trends: (i) whether the merger is occurring in a sector with an overall trend towards horizontal concentration; (ii) whether there is a “trend towards vertical integration”; (iii) whether the merger would increase frequency of the consolidation such that there appears to be an “arms race for bargaining leverage”; and (iv) if dealing with multiple concurrent mergers or a succession of mergers, the agencies may assess multiple deals as part of a “combined trend toward concentration.”¹⁸

The notion that any trend towards consolidation in an industry is *ipso facto* evidence of anticompetitive behavior, and not a reflection of economies of scale, reflects a mode of analysis that predates the “economic turn” in antitrust law. Notably, the Agencies draw on case law from the 1960s and 70s to support their discussion of trends towards consolidation.¹⁹

Potential Entry Can Support a *Prima Facie* Case but Not a Rebuttal Case

The Agencies also apply different standards to the importance of potential entry in assessing *prima facie* and rebuttal cases. On the rebuttal side, “[w]hen evaluating a potentially unlawful merger of current competitors, the Agencies will assess whether entry by other firms would be timely, likely, and sufficient to replace the lost competition using the standards discussed in Section 3.2.”²⁰ The “timely, likely, and sufficient” rebuttal standard has been notoriously difficult for the merging parties to meet.

When assessing whether a *prima facie* case arises from the acquisition of a potential entrant, however, “[t]he existence of a perceived or actual potential entrant may not meet that standard when considering a merger between firms that already participate in the relevant market.”²¹ “[B]ecause concentrated markets [i.e., a market with an HHI greater than 1,000]²² often lack robust competition, the loss of even an attenuated source of competition such as a potential entrant may substantially lessen competition in such markets.”²³

¹⁶ 2023 Guidelines at 20–21.

¹⁷ 2023 Guidelines at 18–19.

¹⁸ 2023 Guidelines at 22–23.

¹⁹ 2023 Guidelines at 22, n.40, 41.

²⁰ 2023 Guidelines at 12.

²¹ 2023 Guidelines at 12.

²² 2023 Guidelines at 10, n.21.

²³ 2023 Guidelines at 13.

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Conclusion

While the 2023 Guidelines confirm the Agencies' aggressive approach to antitrust enforcement, their practical effect remains to be determined. To date, the Agencies have lost most of the cases brought under novel theories of harm similar to those described in the 2023 Guidelines.²⁴ As noted in our [July 2023 Alert](#), the Agencies' ability to maintain an enforcement agenda commensurate with the 2023 Guidelines will likely be restricted by (i) an inclination to focus on high profile cases, (ii) judicial precedent, (iii) resource constraints, and (iv) other practical factors.

The 2023 Guidelines also come on the heels of the Agencies' recent proposed rulemaking under the Hart-Scott-Rodino ("HSR") Act. The proposed rules would require that merging parties submit substantially more information and documentation as part of comprehensive premerger notification filings.²⁵ The proposed HSR changes may enable the Agencies to ascertain information they need to bring cases under the novel theories of harm formalized in the 2023 Guidelines.

Willkie attorneys are well-situated to assist clients with navigating antitrust uncertainty and devising a strategic approach that accounts for the Agencies' current understanding of the potential anticompetitive harms posed by mergers. We are happy to discuss the 2023 Guidelines and the impact they may have for certain industries, investors, and transactions in more detail.

²⁴ See, e.g., *Fed. Trade Comm'n v. Microsoft Corp.*, No. 23-CV-02880-JSC, 2023 WL 4443412 (N.D. Cal. July 10, 2023); *Fed. Trade Comm'n v. Meta Platforms Inc.*, No. 5:22-CV-04325-EJD, 2023 WL 2346238 (N.D. Cal. Feb. 3, 2023); *United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118 (D.D.C. 2022); *United States v. United States Sugar Corp.*, No. CV 21-1644 (MN), 2022 WL 4544025 (D. Del. Sept. 28, 2022), *aff'd*, No. 22-2806, 2023 WL 4526605 (3d Cir. July 13, 2023).

²⁵ Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178 (June 29, 2023) available [here](#). We summarized and analyzed the key changes to the HSR filing system contained in the proposed rules in a June 29, 2023 memorandum, available [here](#).

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