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### Merger guidelines strengthening the guardrails on the commercial highway of business diversity and growth

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Mergers and acquisitions are an important part of a business's vitality. They are intended to increase the value of a company by diversifying into new markets, improving market share, and overall business growth. The primary purpose of the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) Merger Guidelines (2023 Merger Guidelines) and the federal antitrust laws—such as the Sherman Act, the Clayton Act, and the FTC Act—is to promote fair competition and protect consumers from anti-competitive business transactions and unsavory business practices. This article will briefly summarize the merger notification and review process, discuss the 2023 Merger Guidelines DOJ and FTC are currently using to analyze mergers, and provide examples of when agencies will intervene when a merger is anti-competitive.

#### Merger notification and review process

The Hard-Scott-Rodino Act requires buyers and sellers of large mergers and acquisitions to file a premerger notification with DOJ and FTC.<sup>[1]</sup> A review of the filing thresholds will determine whether notification will be required. Clearance to the one antitrust agency is the second step. In the clearance process, one of the two agencies, DOJ or FTC, determines which will review the merger. The agency receiving clearance begins obtaining detailed information regarding the proposed merger and starts its review. The agency investigation and review begin the third step: the waiting period.

After the reviewing agency has completed its initial review of the merger, it can either grant an early termination of the waiting period; it can allow the initial waiting period to expire; or it can issue a second request for additional information. If the waiting period expires or is terminated early, the buyer and seller are free to close their merger. If there is a second request—the fourth step—the waiting period is extended until both parties substantially comply with the additional request and observe another waiting period. Once both parties have substantially complied with the second request, the reviewing agency has an additional 30 days to review all materials and move to the fifth and final step. In the final step, once the additional 30 days expire for the second review, the reviewing agency can close the investigation and allow the merger to proceed; it can enter into a negotiated consent agreement with the companies to restore competition; or it can file a preliminary injunction in federal court to stop the entire transaction. The next section of this article discusses the most current guidelines the agencies use to determine the legality of the merger under review.

#### The 2023 Merger Guidelines

The 2023 Merger Guidelines provide a framework for how agencies address the overarching issue of whether a

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proposed merger threatens to substantially lessen competition or tends to create a monopoly.<sup>[2]</sup> Each guideline provides agencies with an analytical framework to determine whether there is a sufficient level of risk to warrant an enforcement action. Although the guidelines are not legally binding, courts have relied on them in their decision-making process.

The following are the guidelines used to determine the legality of a merger:

1. Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market.
2. Mergers Can Violate the Law When They Eliminate Substantial Competition Between Firms.
3. Mergers Can Violate the Law When They Increase the Risk of Coordination.
4. Mergers Can Violate the Law When They Eliminate a Potential Entrant in a Concentrated Market
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.
6. Mergers Can Violate the Law When They Entrench or Extend a Dominant Position.
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.
8. When a Merger is Part of Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.
9. When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform.
10. When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers, Creators, Suppliers, or Other Providers.
11. When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact of Competition.

There are a few notable changes in the 2023 Merger Guidelines. First, it lowers the threshold of a post-close Herfindahl-Hirshman Index (HHI) from 2,500 to 1,800. Furthermore, if the change in the HHI is greater than 100 points, there is a presumption that the merger is illegal.<sup>[3]</sup> Second, the 2023 Merger Guidelines have a greater concern with mergers that entrench or extend a dominant position. Third, the concern about the adverse impact of labor markets and workers was not addressed in previous guidelines. The 2023 Merger Guidelines are concerned that large mergers may lower wages or slow wage growth, worsen benefits or working conditions, or result in other degradations of workplace quality.

## Illustrations

Instances when an agency has intervened provide the best illustration of how the agencies apply the guidelines. Mergers in the healthcare market seem to have the greatest adverse impact on business, workers, and patients. The healthcare market concentration is highly associated with predatory pricing by hospitals, payers, and insurance companies. The high charges are passed to the patients. The patients, in turn, skip needed healthcare because of escalating prices. Furthermore, monopolies that could be created from improper mergers de-incentivize companies from improving services to better compete for more patients.

On January 25, 2024, FTC sued to block Novant Health Inc.'s \$320 million acquisition to acquire two North Carolina hospitals from Community Health Systems, Inc.<sup>[4]</sup> Novant is one of the largest and most expensive hospitals systems in the Southeastern United States, including North Carolina. The proposed acquisition would allow Novant to control nearly 65% of the market for inpatient general acute services. Henry Liew, director of FTC's Bureau of Competition stated, "Hospital consolidations often lead to worse outcomes for nurses and doctors, result in higher prices, and can have life and death consequences for patients." FTC also argues that the increase in the healthcare costs would be passed down to patients. Furthermore, the deal would reduce Novant's incentive to compete to attract patients by improving its facilities, service offerings, and quality of care.

Another example of the FTC intervening is when a potential merger provided strong proof that it could create a monopoly (Guideline 7). A monopoly occurs when one company and its product dominate an entire industry, there is little to no competition, and consumers may purchase specific goods or services from the one company. On February 26, 2024, FTC and nine states sued to block the largest proposed supermarket merger in U.S. history: Kroger Company's \$24.6 billion acquisition of Albertsons Companies, Inc. Kroger and Albertsons are the country's two largest supermarket chains.<sup>[5]</sup> FTC argues that Kroger's purchase of its biggest grocery store rival would form a colossus that would lead to higher prices, lower-quality products and service, and eliminate fierce competition for both shoppers and workers. Kroger argued that FTC's rejection of the merger would lead to higher food prices, and fewer grocery stores. Both Kroger and Albertsons agreed to sell hundreds of stores in overlapping markets to show that the merger would not reduce local competition. Both companies also stated that they were committed to retaining the stores, existing workers, and promising to recognize the union workforce and keep all collective bargaining agreements. However, executives for both supermarkets have conceded that Kroger's acquisition of Albertsons is anti-competitive with one executive reacting candidly to the proposed deal: "You are basically creating a monopoly in grocery with the merger."

A third example of FTC intervening in a merger is when it filed an administrative complaint and authorized a federal court lawsuit to block Illumina's \$7.1 billion proposition acquisition of Grail, a maker of noninvasive, early detection, liquid biopsy test that can screen for multiple types of cancer in asymptomatic patients at very early stages by using DNA sequencing.<sup>[6]</sup> Illumina is the only provider of DNA sequencing that is the best option for multi-cancer early detection (MCED) tests in the U.S. The FTC complaint alleges that the Illumina-Grail acquisition would diminish innovation the U.S. market for MCED tests. MCED testing can be used to detect up to 50 types of cancer, many of which are screened for today. The Fifth Circuit opined that there was substantial evidence that the acquisition was anti-competitive, vacated FTC's order, and remanded the case for additional proceedings based on the standard FTC applied when reviewing Illumina's rebuttal evidence. Illumina eventually announced it would divest Grail.

Mergers are essential business transactions designed to diversify companies and promote business growth. DOJ and FTC use federal laws and the 2023 Merger Guidelines to ensure the legality and impact that these transactions can have on another business, its workforce, and its customers.

## Takeaways

- The 2023 U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) Merger Guidelines focuses on how the agencies identify mergers that may violate the federal anti-trust laws.
- Although the guidelines are not binding, courts have relied on them in decision-making when consistent with case law.
- The 2023 Merger Guidelines lower the threshold of the post-close Herfindahl-Hirshman Index (HHI) index from 2,500 to 1,800. If the change in the HHI post-close is greater than 100 points, that is a prima

facie case that the merger is anti-competitive.

- The 2023 Merger Guidelines articulates a concern regarding the adverse impact of labor markets not addressed in previous versions.
- Both DOJ and FTC use the guidelines to determine whether mergers substantially lessen competition or tend to create a monopoly.

<sup>1</sup> Federal Trade Commission, “Premerger Notification and the Merger Review Process,” accessed June 5, 2024, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review-process>.

<sup>2</sup> U.S. Department of Justice and the Federal Trade Commission, “Merger Guidelines,” December 18, 2023, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2023\\_merger\\_guidelines\\_final\\_12.18.2023.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf).

<sup>3</sup> Dechert LLP, “U.S. Antitrust Agencies Finalize New Merger Guidelines Intended to Reinvigorate Merger Enforcement,” December 27, 2023, <https://www.dechert.com/knowledge/onpoint/2023/12/u-s--antitrust-agencies-finalize-new-merger-guidelines-intended-.html>.

<sup>4</sup> Federal Trade Commission, “FTC Sues to Block Novant Health’s Acquisition of Two Hospitals from Community Health Systems,” news release, January 25, 2024, <https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-sues-block-novant-healths-acquisition-two-hospitals-community-health-systems>.

<sup>5</sup> Alina Selyukh, “FTC and 9 states sue to block Kroger-Albertsons supermarket merger,” NPR, February 26, 2024. <https://www.npr.org/2024/02/26/1232948796/ftc-lawsuit-krogers-albertsons-grocery-merger>.

<sup>6</sup> Federal Trade Commission, “Illumina, Inc., and GRAIL, Inc., in the Matter of,” last updated February 27, 2024, <https://www.ftc.gov/legal-library/browse/cases-proceedings/201-0144-illumina-inc-grail-inc-matter>.

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