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Considering Judicial Treatment Of The 2023 Merger Guidelines

By **Ryan Quillian and Pegah Nabili** (October 23, 2025, 5:25 PM EDT)

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As they left office, the heads of the U.S. antitrust agencies during the Biden administration touted the issuance of their new merger guidelines as one of their major accomplishments.[1] Given that there have been a number of recent judicial decisions on merger challenges, we can begin to assess the extent to which courts have changed how they analyze merger enforcement actions since the agencies issued their new set of merger guidelines on Dec. 18, 2023.

In our view, courts have so far primarily cited the 2023 merger guidelines for fundamental propositions that do not differ significantly from prior versions of the merger guidelines.

Judges generally have not engaged with the more aggressive theories identified for the first time in the new guidelines. This is, in large part, due to the fact that the agencies have not challenged transactions on those more aggressive theories since they finalized the guidelines.[2]

That said, it is too early to tell how much, if at all, the new guidelines will change how courts analyze mergers. The Trump administration decided to keep the new guidelines in place, but it is not clear that the current leadership will rely on the panoply of theories they contain.

And there has not yet been a written opinion in a litigated merger challenge brought by the agencies during the Trump administration. Going forward, it will be interesting to see whether the U.S. Department of Justice's Antitrust Division and the Federal Trade Commission challenge transactions under the more novel and aggressive set of theories identified in the 2023 merger guidelines and, if so, how courts analyze those theories.

The Changes in the 2023 Merger Guidelines

On July 9, 2021, then-President Joe Biden signed an executive order that encouraged the Antitrust Division and the FTC to review their merger guidelines and consider revising them.[3]

Almost two and a half years later, the Antitrust Division and the FTC jointly published their merger guidelines on Dec. 18, 2023.[4]

The 2023 merger guidelines differ in important ways from the versions they replaced — the horizontal merger guidelines issued in 2010 and the vertical merger guidelines issued in 2020. Some of the most significant differences include:

- Lowering back to pre-2010 levels the market concentration threshold at which the agencies are likely to presume that horizontal mergers are illegal;

- Removing statements indicating when transactions are less likely to threaten harm to competition;[5]

- Reviving the long-abandoned entrenchment theory that conglomerate mergers — those with no vertical relationship or horizontal overlap — may be anticompetitive if they risk entrenching or extending a dominant position, despite prior public statements by the agencies disavowing the theory;[6]

- Examining whether a trend toward consolidation in an industry indicates that a transaction may substantially lessen competition;

- Adding a discussion of serial acquisitions and stating that the agencies may assess the legality of a particular transaction based on the acquiring firm's history of prior acquisitions;

- Introducing concepts related to multisided platforms, including references to competition between platforms, on platforms and to displace a platform;

- Explicitly addressing the effects that a merger between buyers may have on competition for inputs, including labor;

- Discussing partial acquisitions, or minority investments, which the agencies say may allow partial owners to influence the target's competitive strategy in an impermissible manner or give the partial owners access to the target's competitively sensitive information;

- Seeking to infer the existence of a relevant antitrust market from direct evidence of substantial head-to-head competition between the merging parties, without having to specify the precise metes and bounds of the inferred market; and

- Using transaction value as a proxy for the merged firm's ability to benefit from reduced competition, not accounting for how a high transaction premium may reflect potential synergies or other procompetitive or competitively neutral motivations for the transaction.

As they did with previous iterations of the guidelines, the agencies said publicly that the 2023 merger guidelines were a statement of enforcement policy and reflected the agencies' priorities and approach in analyzing proposed transactions.[7]

That made sense at the time because the changes to the guidelines largely reflected how the Antitrust Division and FTC under the Biden administration had described their approach to investigating transactions.

And the 2023 merger guidelines were part and parcel with more aggressive anti-merger rhetoric and other policy and procedural changes that — in practice — made it more difficult and/or more costly to get transactions through agency investigations successfully.

As a result, the concerns expressed at the time about the changes in the guidelines were not limited to litigation outcomes, but also applied to the necessarily broader set of transactions that the agencies apparently intended to investigate more extensively — or transactions that may never materialize because of the deterrent effect of the agency leaders' approach to merger review and enforcement.[8]

It is less clear that the 2023 merger guidelines reflect the agencies' priorities and approach in analyzing proposed transactions under the Trump administration. In fact, there was speculation — including from Melissa Holyoak, a Republican-appointed FTC commissioner — that the Trump administration would rescind the guidelines.[9]

However, shortly after Inauguration Day, the leaders of the antitrust agencies confirmed that they would retain them.[10] It is an open question whether the Trump administration will investigate and challenge transactions using the broader set of theories listed in the 2023 merger guidelines.

Judicial Treatment of the 2023 Merger Guidelines to Date

In the past, federal judges have found the agencies' guidelines persuasive because they, among other things, reflect a consensus among the antitrust community and are based on current economics, case law and agency practice.

The 2023 merger guidelines were developed and issued by agency leaders from a single political party and, as discussed above, included significant differences compared to the iterations published by the Antitrust Division and the FTC over the course of the prior 40-plus years. As a result, it is worth examining how courts have treated the 2023 merger guidelines in written opinions since they were issued.

Almost all of the written judicial opinions that have cited the 2023 merger guidelines have done so for fundamental propositions that were also included in prior iterations of the guidelines.[11]

Most prominently, courts have cited to the 2023 merger guidelines in reference to the structural presumption.[12] The 2023 merger guidelines made two changes to the 2010 horizontal merger guidelines in terms of the structural presumption — they (1) reverted to the lower concentration levels deemed presumptively unlawful in the 1992 merger guidelines,[13] and (2) cited the U.S. Supreme Court's 1963 decision in U.S. v. Philadelphia National Bank for the proposition that transactions resulting in a market share of greater than 30% and a significant increase in concentration are presumptively unlawful.[14]

On the first point, each of the agencies' cases to date that has resulted in a written opinion where the judge cited the 2023 merger guidelines would have been presumptively illegal under the 2010 horizontal merger guidelines.[15] In other words, the agencies have not fully litigated a case that would be presumptively unlawful under the 2023 merger guidelines but not under the 2010 horizontal merger guidelines.

On the second point, prior to issuing the 2023 merger guidelines, the agencies cited Philadelphia National Bank for the structural presumption even though the 30% figure was not memorialized in the guidelines.[16] Judicial opinions similarly cited Philadelphia National Bank for this proposition.[17] Thus, both the agencies and the courts have cited Philadelphia National Bank prior to the agencies' incorporation of that point in the 2023 merger guidelines.

Courts have also cited the 2023 merger guidelines for the purposes of market definition and the hypothetical monopolist test,[18] for efficiency arguments,[19] and for how to calculate market shares.[20] All of those topics were included in the 2010 horizontal merger guidelines, and some of the courts cite to the 2010 horizontal merger guidelines and 2023 merger guidelines interchangeably on these issues.[21] This may be due, in part, to the fact that the treatment of the hypothetical monopolist test and calculations of market shares did not change significantly between the two versions of the guidelines.

As the foregoing shows, the cases that cite the 2023 merger guidelines for these fundamental propositions do not by themselves suggest a shift in the agencies' or courts' approach to merger enforcement. That is not to say that the guidelines did not reflect the Biden administration's approach to investigating transactions, and the agencies conduct many more investigations than the number of fully litigated merger challenges.

As a result, the lack of a shift in the approach by courts does not undermine the concerns expressed by some about the agencies' approach to merger enforcement under the Biden administration; rather, they appear to be a reflection of the agencies' litigation case selection in the last year of the president's term in office.

That conclusion holds even for the FTC's suit seeking to block the merger between Kroger Co. and Albertsons Cos. Inc., the one case in which a court addressed a theory explicitly incorporated in the 2023 merger guidelines for the first time: potential harm in labor markets.[22]

In that case, which was decided in December 2024, U.S. District Judge Adrienne Nelson of the U.S. District Court for the District of Oregon cited the 2023 merger guidelines' suggestion that "a merger that substantially lessens competition for workers may result in 'lower wages or slow wage growth, worsen benefits or working conditions, or result in other degradations of workplace quality' and that evidence that a merger may have any of these effects demonstrates substantial competition between firms for labor."[23]

The court stated that although "the inclusion of workers in the 2023 Merger Guidelines is new, the concept of antitrust protections that extend to workers, not just consumers, is not,"[24] and found that "labor markets are cognizable markets under the Sherman Act."[25]

Even though Judge Nelson found that the "plaintiffs present[ed] a compelling and logical case for applying traditional antitrust analysis to labor markets,"[26] the court held that the FTC did not present sufficient evidence of harm in the relevant labor market "to independently support a preliminary injunction."[27]

However, the FTC had also challenged the transaction under a traditional horizontal, unilateral effects theory that focused on harm to consumers, and Judge Nelson granted the agency's motion for a preliminary injunction on that basis.[28] Thus, Judge Nelson did not break new ground in relying on the 2023 merger guidelines, and instead relied on well-established principals of antitrust law to preliminarily enjoin the merger.

Looking Forward

The agencies under the Biden administration said that the guidelines reflected how they conducted

merger investigations by signaling the theories of harm they would consider and potentially pursue in enforcement actions.

Although the current administration has stated the 2023 merger guidelines remain in effect, it remains to be seen whether the antitrust agencies will scrutinize transactions in accordance with the broader set of theories of harm contained therein, and how those new theories will be treated by federal judges.

We may get the first indication when the courts decide the first two agency challenges under the Trump administration that appear to be heading toward written opinions.

The first is the FTC's case against GTCR BC Holdings LLC's proposed acquisition of Surmodics Inc., in which the preliminary injunction hearing in the U.S. District Court for the Northern District of Illinois ended on Sept. 2. And the second is the FTC's suit against Edwards Lifesciences Corp. and JenaValve Technology Inc., a case in which the preliminary injunction hearing is scheduled to begin Nov. 18 in the U.S. District Court for the District of Columbia.

Regardless of how the courts treat the 2023 merger guidelines in those two cases, it will be interesting to see whether these guidelines ultimately produce a change in how courts analyze mergers, or whether it will continue to be something close to the status quo ante.

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[1] See Federal Trade Commission Accomplishments June 2021–January 2025 (Jan. 19, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/ftc-accomplishments-june-2021-january-2025.pdf at 16; Assistant Attorney General Jonathan Kanter Delivers Farewell Address (Dec. 17, 2024), https://www.justice.gov/archives/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-farewell-address.

[2] See Daniel A. Crane, Neo-Brandeis Goes to Washington: A Provisional Assessment of the Biden Administration's Antitrust Record, 111 Va. L. Rev. 215, 234 (Sept. 2025) ("Looking again at the agencies' overall record in merger challenges [during the Biden Administration], the impression that emerges is that they did relatively well when pursuing conventional theories and established doctrines. Most administrations would consider that a marker of success. But for an administration whose prime directive was to disrupt antitrust's status quo, the overall outcomes can only be seen as a disappointment.").

[3] The White House, Executive Order on Promoting Competition in the American Economy (July 9, 2021), https://bidenwhitehouse.archives.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/; see also FTC Press Release, Statement of FTC Chair Lina M. Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Competition Executive Order's Call to Consider Revisions to Merger

Guidelines (July 9, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/07/statement-ftc-chair-lina-m-khan-antitrust-division-acting-assistant-attorney-general-richard-powers ("We plan soon to jointly launch a review of our merger guidelines with the goal of updating them to reflect a rigorous analytical approach consistent with applicable law.").

[4] U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines (Dec. 18, 2023), https://www.ftc.gov/reports/merger-guidelines-2023 [hereinafter "2023 Merger Guidelines"].

[5] For example, the 2010 Horizontal Merger Guidelines said that "[m]ergers involving an increase in the HHI of less than 100 points . . . [and m]ergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis." U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines, at 19 (Aug. 19, 2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010. The agencies did not include this type of language in the 2023 Merger Guidelines, and instead focused exclusively on when the presumption of illegality would be met. See 2023 Merger Guidelines, supra note 4, at 5-6.

[6] See, e.g., U.S. Dep't of Justice, Antitrust Division Submission for OECD Roundtable on Portfolio Effects in Conglomerate Mergers, at 2-3 (Oct. 12, 2001), https://www.justice.gov/sites/default/files/atr/legacy/2015/01/26/9550.pdf ("The U.S. antitrust agencies eliminated entrenchment as a basis for challenging nonhorizontal mergers in 1982 when the Department [of Justice] issued its new Merger Guidelines and the Federal Trade Commission issued its Statement on Horizontal Mergers. We did so because we recognized that efficiency and aggressive competition benefit consumers, even if rivals that fail to offer an equally 'good deal' suffer loss of sales or market share. Mergers are one means by which firms can improve their ability to compete. It would be illogical, we concluded, to prohibit mergers because they facilitate efficiency or innovation in production. Unless a merger creates or enhances market power or facilitates its exercise -- in which case it is prohibited under Section 7 -- it will not harm, and more likely will benefit, consumers.").

[7] See FTC Press Release, Federal Trade Commission and Justice Department Release 2023 Merger Guidelines (Dec. 18, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/12/federal-trade-commission-justice-department-release-2023-merger-guidelines (noting that the guidelines "provide transparency into the Agencies' decision-making process [and] identify the factors and frameworks the agencies consider when investigating mergers").

[8] See, e.g., Kate Maxwell Koegel, et al., A Summary of Comments on the 2023 Draft Merger Guidelines, American Bar Association (Dec. 22, 2023), https://www.americanbar.org/groups/antitrust_law/resources/source/2023-december/summary-comments-2023-draft-merger-guidelines/.

[9] See, e.g., Justin Wise, GOP FTC Commissioner Says She'd Consider Undoing Merger Guidance, Bloomberg Law (Oct. 30, 2024), https://news.bloomberglaw.com/antitrust/gop-ftc-commissioner-says-shed-consider-repealing-merger-rules; Robert Freedman, Merger Guidelines Will Likely Go Away Under Trump, Legal Dive (Nov. 7, 2024), https://www.legaldive.com/news/merger-guidelines-go-away-under-trump-second-term-ftc-doj-antitrust-law/732309/.

[10] Memorandum from Chairman Andrew N. Ferguson to FTC Staff on Merger Guidelines, at 1-2 (Feb. 18, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-memo-re-merger-guidelines.pdf; Memorandum from Omeed Assefi, Acting Assistant Attorney General, Antitrust Division, to Antitrust Division Staff (Feb. 18, 2025), https://www.justice.gov/atr/media/1389861/dl?inline.

[11] Several courts that issued decisions shortly after the agencies published the 2023 Merger Guidelines stated that their decisions relied on the 2010 Horizontal Merger Guidelines because the parties relied on that older iteration or the 2023 Merger Guidelines had not been briefed. See United States v. JetBlue Airways Corp., 712 F. Supp. 3d 109, 151 n.51 (D. Mass. 2024) ("The Court is aware that after the trial concluded, on December 18, 2023, the F.T.C. and DOJ issued a revised set of Merger Guidelines."); FTC v. IQVIA Holdings Inc., 710 F. Supp. 3d 329, 368 n.19 (S.D.N.Y. 2024) ("Because the parties did not have the opportunity to address whether the final version of the new guidelines would have any material effect on the analysis here, the Court considers only the 2010 Merger Guidelines."); see also Pac. Steel Grp. v. Com. Metals Co., 2024 WL 3236705, at *6 n.4 (N.D. Cal. June 28, 2024) ("The parties cite the 2010 Merger Guidelines, and have not suggested that the revised guidelines would change the analysis. Accordingly, the Court follows the parties' lead and relies on the 2010 Merger Guidelines.").

[12] See FTC v. Tapestry, Inc., 755 F. Supp. 3d 386, 458-59 (S.D.N.Y. 2024) ("Under the 2023 Merger Guidelines, which the Court deems persuasive on this point,... markets with an HHI greater than 1,800 are considered 'highly concentrated,' and... '[a] merger that creates or further consolidates a highly concentrated market that involves an increase in the HHI of more than 100 points is presumed to substantially lessen competition or tend to create a monopoly.'"); FTC v. Cmty. Health Sys., Inc., 736 F. Supp. 3d 335, 369 (W.D.N.C. 2024), op. vacated, appeal dismissed sub nom. FTC v. Novant Health, Inc., No. 24-1526, 2024 WL 3561941 (4th Cir. July 24, 2024); FTC v. Kroger Co., 2024 WL 5053016, at *15-*16 (D. Or. Dec. 10, 2024).

[13] Dep't of Justice & Fed. Trade Comm'n, 1992 Merger Guidelines, at 15-16, available at https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11250.pdf ("Where the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise."); cf. 2023 Merger Guidelines, supra note 4, at 5-6 ("Markets with an HHI greater than 1,800 are highly concentrated, and a change of more than 100 points is a significant increase. A merger that creates or further consolidates a highly concentrated market that involves an increase in the HHI of more than 100 points is presumed to substantially lessen competition or tend to create a monopoly.").

[14] 2023 Merger Guidelines, supra note 4, at 6 ("[A] merger that creates a firm with a share over thirty percent is also presumed to substantially lessen competition or tend to create a monopoly if it also involves an increase in HHI of more than 100 points.") (citing United States v. Phila. Nat'l Bank, 374 U.S. 321, 364-65 (1963)).

[15] Tapestry, 755 F. Supp. 3d at 459 (noting that the FTC's economic expert estimated a post-merger HHI of 3,646 and a change in HHI of 1,499, both of which exceed the respective thresholds in the 2010 Horizontal Merger Guidelines of 2,500 with a change of 200 points); Cmty. Health Sys., 736 F. Supp. 3d at 369 ("[B]oth experts found that the post-acquisition HHI and change in HHI exceeded the 2010 and 2023 Merger Guidelines."); Kroger, 2024 WL 5053016, at *16 ("[T]here are numerous presumptively unlawful markets under either the 2010 or 2023 thresholds, suggesting that the proposed merger is likely to substantially lessen competition under either set of guidelines.").

[16] See, e.g., Memorandum of United States in Support of Motion for Temporary Restraining Order and a Preliminary Injunction at 15, United States v. Franklin Elec. Co., Inc., No. 00–C–0334–C (W.D. Wisc. May 31, 2000) ("In Philadelphia National Bank, the Supreme Court held that a merger resulting in a single firm controlling 30% of a market in which four firms had 78% of the sales was presumptively

illegal."); Plaintiff FTC's Memorandum of Points and Authorities in Support of Motion for a Preliminary Injunction at 14, FTC v. Intercontinental Exch., Inc., No. 3:23-cv-01710-AMO (N.D. Ca. June 2, 2023) ("In Philadelphia National Bank, the Supreme Court wrote: 'Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.' 374 U.S. at 364. The [] market shares at issue take this case well beyond the thresholds discussed in Philadelphia National Bank, and lead to a clear presumption of illegality."); Memorandum in Support of Plaintiff FTC's Motion for Temporary Restraining Order and Preliminary Injunction at 9-10, FTC v. Sysco Corp., 1:15-cv-00256-APM (D.D.C. Mar. 5, 2015) ("In Philadelphia National Bank, the Supreme Court held that 'a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition' substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.' 374 U.S. at 363.").

[17] See, e.g., FTC v. Sysco Corp., 113 F. Supp. 3d 1, 55 (D.D.C. 2015) (citing Philadelphia National Bank, 374 U.S. at 364, for the proposition that a combined share of 30% "can give rise to a presumption of harm").

[18] Teradata Corp. v. SAP SE, 124 F. 4th 555, 566, 569-70 (9th Cir. 2024); Pit Row, Inc. v. Costco Wholesale Corp. , 101 F.4th 493, 505 (7th Cir. 2024); Tapestry, 755 F. Supp. 3d at 413-14; Cmty. Health Sys., 736 F. Supp. 3d at 367; Tevra Brands LLC v. Bayer Healthcare LLC, 2024 WL 2261946, at *4-*5 (N.D. Cal. May 16, 2024); Pennsylvania v. Centre Lane Partners, LLC, 2024 WL 4792043, at *4, *6 n.5 (W.D. Pa. Nov. 14, 2024); Kroger, 2024 WL 5053016, at *13.

[19] Tapestry, 755 F. Supp. at 480 (citing the 2023 Merger Guidelines for the proposition that efficiencies may rebut the presumption that a merger's effects will be anticompetitive); Kroger, 2024 WL 5053016 at *21; Steves and Sons, Inc. v. Jeld-Wen, Inc., 2024 WL 5171177, at *10-*11 (E.D. Va. Dec. 19, 2024).

[20] In re Essar Steel Minnesota LLC, 2024 WL 4047451, at *20 (Bankr. D. Del. Sept. 4, 2024) ("[T]he Merger Guidelines recommend that captive supply sales be considered by courts only 'to the extent that their inclusion accurately reflects their competitive significance.'"). Although the efficiencies defense was deemphasized to a certain extent in the 2023 Merger Guidelines, at least one court has cited the 2023 Merger Guidelines for the proposition that efficiencies are relevant. See Tapestry, 755 F. Supp. 3d at 480.

[21] See Essar Steel, 2024 WL 4047451 at *20 and n.138; Tevra Brands, 2024 WL 2261946, at *4.

[22] See Kroger, 2024 WL 5053016, at *30-*38.

[23] Id. at *30 (quoting 2023 Merger Guidelines, supra note 4, §2.10).

[24] Id. (citing Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219, 236 (1948)).

[25] Id. at *31 (citing Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 346 (7th Cir. 2012), and discussing Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 107 (2021); Ohio v. Nat'l Collegiate Athletic Ass'n, 706 F. Supp. 3d 583, 590-91, 594, 596 (N.D.W. Va. 2023); United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 40-42 (D.D.C. 2022)).

[26] Id. at *32.

[27] Id.; see also id. at *38 ("At this stage, plaintiffs have not presented sufficient evidence to establish a prima facie case that the proposed merger will substantially lessen competition for union grocery labor.").

[28] See id. at *30, *39.