

# FTC and DOJ Jointly Release Final Merger Guidelines

Insights

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On December 18, 2023, the Federal Trade Commission (FTC) and the U.S. Department of Justice Antitrust Division (DOJ) jointly released their final [new merger guidelines](#). These updated merger guidelines were issued by the agencies after an almost two-year drafting process, which included public listening sections, agency workshops, and review of public [comments on draft merger guidelines released on July 19, 2023](#).

While the final guidelines reflect some changes made by the agency in response to public comments, overall, the final guidelines remain consistent with the draft released in July in aligning with the Biden administration's increased interventionist approach and [stated goal](#) of "robust and reinvigorated merger enforcement." [As we wrote in August](#), the guidelines by and large reflect an increase in DOJ and FTC scrutiny of merger transactions and a willingness to pursue new enforcement theories in analyzing vertical and horizontal mergers.

Significant updates made to the final guidelines include the following:

- Adds section "How to Use These Guidelines" within the introduction, which more clearly explains the context of how the FTC and DOJ may employ the guidelines and how parties reviewed by the agencies may introduce rebuttal evidence.
- Consolidates draft guidelines 5 ("Mergers Should Not Substantially Lessen Competition by Creating a Firm That Controls Products or Services That Its Rivals May Use to Compete") and 6 ("Vertical Mergers Should Not Create Market Structures That Foreclose Competition") on vertical mergers. Notably, consolidation of these guidelines will likely not substantively affect agency analysis, as in consolidating these guidelines the agencies retained the same framework for analysis of reviewing a vertical merger that had been described in the draft guidelines.
- Deletes 30% benchmark in determining whether a merging firm has a "dominant position." Draft guideline 6 had previously asserted that a merging firm would have a "dominant position" if it possessed at least a 30% market share, which would subject the merger to heightened scrutiny. This benchmark has been replaced by a more fact-specific analysis which instructs the FTC and DOJ to instead "assess whether one of the merging firms has a dominant position based on direct evidence or market shares showing durable market power."
- Deletes draft guideline 13 ("Mergers Should Not Otherwise Substantially Lessen Competition or Tend To Create a Monopoly"). This guideline, included in the draft guidelines as something of a catch-all, has instead been replaced in the final guidelines with a more general note that the

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guidelines are not exhaustive and that certain other facts and circumstances not addressed in the guidelines may still draw scrutiny.

As finalized, the 11 merger guidelines are as follows:

- **Guideline 1:** Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market.
- **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 or Other Sellers.
- **Guideline 11:** When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition.

These updated and finalized changes to the antitrust enforcement landscape have significant application to healthcare providers. The merger guidelines should be considered by providers entering into mergers, acquisitions, collaborations, joint ventures or other similar arrangements, including health systems, independent practice associations, physician organizations, Accountable Care Organizations and other value-based enterprises. As the merger guidelines indicate, any analysis of antitrust risks and concerns of a merger will be highly dependent on the specific facts and circumstances of the arrangement.

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