



FTC & DOJ Announce Revised Merger Guidelines

On July 19, 2023, the Federal Trade Commission (FTC) and the Department of Justice (DOJ) released a draft update of its Merger Guidelines, which guides the regulatory agencies in their review of both mergers and acquisitions in evaluating compliance with federal antitrust laws.¹ The new Guidelines replace, amend, and consolidate the Vertical Merger Guidelines and Horizontal Merger Guidelines, which were published in 2020 and 2010, respectively.² This Health Capital Topics article will discuss the new Guidelines and the proposed changes to antitrust laws that may affect the future of healthcare.

Horizontal consolidation is the acquisition or merger of two companies at the same level in the supply chain, while vertical integration is the merger or acquisition of two or more companies in the same line of production, but not at the same level.³ Each type of merger has its own purpose, such as increased revenue, market share, or diversified product offerings accomplished through horizontal consolidation or increased efficiency and lower costs achieved through vertical integration.⁴ Vertical integration in the healthcare industry translates to hospitals, health systems, or insurers offering, indirectly or directly, a broad range of patient care and support services.⁵ This is seen most commonly when hospitals, health systems, and insurers buy-out or absorb physician groups. In doing so, health systems and insurers claim to increase their organizational performance and decrease costs.⁶ The U.S. healthcare industry has seen a rise in vertical integration transactions since the passage of the Patient Protection and Affordable Care Act (ACA), particularly among physician groups integrating with health systems or insurers, as providers seek to fill gaps in their continuum of care.

Federal antitrust laws, such as the Clayton Act, Sherman Act, and Fair Trade Act, govern mergers and acquisitions that may restrain trade or result in unfair compensation. Specifically, these laws prohibit any attempt or conspiracy to monopolize or unreasonably harm or restrain industry trade;⁷ further, companies and individuals may not engage in deceptive business practices.⁸ Violating one or more of these acts can result in fines up to \$1 million for individuals and up to \$100 million for corporations.⁹ The purpose of antitrust laws is to maintain healthy competition and avoid price-fixing, rigged bids, and monopolization.¹⁰ The U.S. healthcare industry's recent uptick in vertical integration

(particularly those deals whose size do not trigger regulatory review) has given rise to concerns over what mergers and acquisitions are allowed under current U.S. antitrust laws.¹¹

The draft Guidelines expand, clarify, and build on existing frameworks. They provide an overview of 13 principles meant to aid agencies in determining if mergers are anticompetitive and unlawful under current antitrust laws. Those principles are as follows:

- (1) Mergers should not increase concentration significantly in markets that are highly concentrated;
- (2) Mergers should not eliminate competition that is substantial between firms;
- (3) Mergers should not increase any risk of coordination;
- (4) Mergers should not eliminate potential entrance to a concentrated market;
- (5) Mergers should not lessen competition substantially by creating firms that control services or products that rivals may use to compete;
- (6) Vertical mergers should not create structures within a market that foreclose competition;
- (7) Mergers should not extend or entrench a dominant position;
- (8) Mergers should not further trends toward market concentration;
- (9) When a merger is part of a series of multiple acquisitions, the agencies may examine the entire series;
- (10) When mergers involve a multi-sided platform, the agencies will examine competition on a platform, between platforms, or to displace a platform;
- (11) When a merger involves buyers that are competing, agencies may examine whether it may lessen competition substantially for other sellers or workers;
- (12) When an acquisition involves minority interests or partial ownership, agencies may examine its impact on competition; and
- (13) Mergers should not lessen competition substantially or tend to create a monopoly.¹²

The new Guidelines “place an emphasis on transactions that tend to create a monopoly,” codify new thresholds regarding which transactions will be considered presumptively illegal by the regulatory agencies, and advance new harm theories relating to labor market competition.¹³ The Guidelines also suggest that regulatory agencies will focus on transactions within markets that are highly concentrated, and markets where the dealing party may hold a dominant position.¹⁴ Further details include how agencies will analyze proposed transactions to conclude if post-transaction firms would be able to decrease and degrade employee benefits, wages, and working conditions.¹⁵ New presumptions within the Guidelines also describe how proposed transactions could harm competition based on dominance in the market, relationships with suppliers, trends toward market consolidation, and market concentration.¹⁶

The DOJ and FTC’s Guidelines on mergers have not yet gone into effect and will first be subjected to a 60-day public comment period, which will conclude on September 18, 2023.¹⁷ The two agencies will then update and evaluate the draft before finalizing the Guidelines.¹⁸ On July 17, 2023, numerous industry groups, including the American Hospital Association (AHA), the Pharmaceutical Research and Manufacturers of America (PhRMA), and the Federation of American Hospitals (FAH), sent a letter to the FTC requesting that the agency extend their comment period by an additional 60 days so that industry groups could provide detailed responses.¹⁹ The agencies have yet to respond to this request.

1 “Justice Department And FTC Seek Comment on Draft Merger Guidelines” Office of Public Affairs, U.S. Department of Justice, July 19, 2023, <https://www.justice.gov/opa/pr/justice-department-and-ftc-seek-comment-draft-merger-Guidelines> (Accessed 8/17/23).

2 “US FTC and DOJ announce new merger Guidelines” By Amanda Wait, Gerald Stein, Andrew Eklund, and Marisa Madaras, Norton Rose Fulbright, July 2023, <https://www.nortonrosefulbright.com/en/knowledge/publications/6aca1153/us-ftc-and-doj-announce-new-merger-Guidelines> (Accessed 8/17/23).

3 “Horizontal Integration” By Will Kenton, Investopedia, August 27, 2022, <https://www.investopedia.com/terms/h/horizontalintegration.asp> (Accessed 8/17/23)

4 *Ibid.*

5 “Vertical Integration” By Adam Hayes, Investopedia, May 30, 2023, <https://www.investopedia.com/terms/v/verticalintegration.asp> (Accessed 8/17/23).

6 *Ibid.*

7 “The Antitrust Laws” Federal Trade Commission, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> (Accessed 8/17/23).

8 *Ibid.*

9 *Ibid.*

10 *Ibid.*

11 “Vertical Merger Enforcement Uncertainty While Antitrust Agencies Review Merger Guidelines” By Brian C. Lewis,

Health Law Weekly, March 11, 2022, <https://www.americanhealthlaw.org/content-library/health-law-weekly/article/29512ce3-bd80-4760-8449-2ad84cd61f71/Vertical-Merger-Enforcement-Uncertainty-While-Anti?Token=f304e7eb-7b0e-4b84-abbe-e4e21f9defe8> (Accessed 8/17/23).

12 Office of Public Affairs, U.S. Department of Justice, July 19, 2023.

13 “US FTC and DOJ announce new merger Guidelines” By Amanda Wait, Gerald Stein, Andrew Eklund, and Marisa Madaras, Norton Rose Fulbright, July 2023, <https://www.nortonrosefulbright.com/en/knowledge/publications/6aca1153/us-ftc-and-doj-announce-new-merger-Guidelines> (Accessed 8/17/23).

14 *Ibid.*

15 *Ibid.*

16 *Ibid.*

17 “FTC and Justice Department double down on strategy to go after corporate monopolies” By Dara Kerr and Alina Selyukh, National Public Radio, July 19, 2023, <https://www.npr.org/2023/07/19/1188353064/ftc-doj-merger-competition-Guidelines> (Accessed 8/17/23).

18 *Ibid.*

19 “FTC, DOJ propose new changes to Guidelines for reviewing anticompetitive mergers” By Dave Muoio, Fierce Healthcare, July 19, 2023, <https://www.fiercehealthcare.com/regulatory/ftc-doj-propose-new-changes-Guidelines-reviewing-anticompetitive-mergers> (Accessed 8/17/23).



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