

## Merger Guidelines Should Provide For Competition Trustees

By **Susan Braden** (August 1, 2023, 5:40 PM EDT)

On July 19, the Department of Justice and Federal Trade Commission announced proposed revised merger guidelines.[1]

Immediately, negative critique appeared in the legal and business press,[2] despite the fact that it is highly unlikely these draft guidelines will be substantively changed for political reasons.[3]

The proposed guidelines list 13 factors that alone or in combination likely will initiate an investigation and potential challenge in a federal district court:

1. Mergers should not significantly increase concentration in highly concentrated markets;
2. Mergers should not eliminate substantial competition between firms;
3. Mergers should not increase the risk of coordination;
4. Mergers should not eliminate a potential entrant in a concentrated market;
5. Mergers should not substantially lessen competition by creating a firm that controls products or services that its rivals may use to compete;
6. Vertical mergers should not create market structures that foreclose competition;
7. Mergers should not entrench or extend a dominant position;
8. Mergers should not further a trend toward concentration;
9. When a merger is part of a series of multiple acquisitions, the agencies may examine the whole series;
10. When a merger involves a multisided platform, the agencies examine competition between platforms, on a platform, or to displace a platform;
11. When a merger involves competing buyers, the agencies examine whether it may substantially lessen competition for workers or other sellers;



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12. When an acquisition involves partial ownership or minority interests, the agencies examine its impact on competition; and

13. Mergers should not otherwise substantially lessen competition or tend to create a monopoly.[4]

Of course, predicting the actual consequences of a merger with any degree of reasonable certainty is not a science, but an art, and one that necessarily is highly speculative.

Alas, antitrust enforcers are mere mortals, as are federal trial judges. The primary tool of the judicial trade is antitrust case law, most of which concerned mergers that took place decades ago when markets were largely domestic and market share tended to remain constant for substantial time periods.

Nevertheless, federal district court judges are asked to render decisions that will affect consumers, investors and workers, without much concrete evidence other than testimony from well-rehearsed highly compensated experts, with conflicting views. With the stakes so high, this procedure is ripe for improvement.

In the press release announcing the new merger guidelines, Attorney General Merrick B. Garland, a former federal judge, observed: "Unchecked consolidation threatens the free and fair markets upon which our economy is based." [5]

The attorney general makes a valid point about the need for a check on mergers the antitrust agencies believe could result in anti-competitive behavior or have adverse market consequences. That check could be a court-appointed competition trustee, instead of the blunt implementation of an injunction blocking a merger.

If the antitrust agencies believe an injunction is warranted, they should work with the affected companies to craft a consent decree for a specified time period that would allow the merger to proceed,[6] but under the supervision of a competition trustee, whom the parties would select, but subject to the approval of and responsible only to the federal district judge.

The competition trustee would be compensated by the parties proposing to merge and responsible for preparing at least semiannual reports for the court, the parties the public.

Each report would address at least the 13 factors listed in the proposed merger guidelines and advise the court, if judicial intervention was deemed warranted at any time. In addition, the court could also convene a public compliance hearing to address the findings in each report and provide the competition trustee with an opportunity to answer questions raised by the court or parties.

The competition trustee could be a retired federal judge with substantial expertise with antitrust law, perhaps with prior service in one of the enforcement agencies, or a retired former DOJ attorney general or FTC commissioner, with no pecuniary or other potential conflicts of interest.

The competition trustee would have the authority to retain economic, marketing, or other specialized industry expertise to assist in monitoring and evaluating the effect of the merger on consumers and the market.

The competition trustee would also be provided with relevant internal company documents, subject to a

confidentiality order, and access to company personnel, including C-suite executives and the board of directors.

The appointment of competition trustee will obviate expensive and potentially lengthy litigation and inherent market uncertainty, while enabling the court and federal enforcement agencies to ensure that mergers do not threaten "free and fair markets."<sup>[7]</sup>

In addition, the appointment of a competition trustee will allow businesses to take advantage of efficiencies and fresh management and give them the opportunity to scale, as well as provide consumers with new competitively priced products and employees with better prospects for long-term job security.

Most importantly, the appointment of a competition trustee will enable U.S. companies to better compete against foreign competitors that too often enjoy substantial economic subsidies, submarket labor costs, and favorable monetary policy that enhance their ability to dominate international markets.

U.S. merger policy has a critical role in ensuring competition, but it should not impair our nation's economic prosperity. The appointment of a competition trustee can help the federal enforcement agencies and courts accomplish these objectives.

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[1] Available at <https://www.regulations.gov/docket/FTC-2023-0043>.

[2] See, e.g., Sean Heather, Senior Vice President, International Regulatory Affairs & Antitrust, U.S. Chamber of Commerce, "New Merger Guidelines Undercut Competitiveness" (July 24, 2023) <https://www.uschamber.com/finance/antitrust/new-merger-guidelines-undercut-competitiveness>; Herbert Hovenkamp, "Competitive Harm and the 2023 Draft Merger Guidelines" (July 27, 2023) <https://www.promarket.org/2023/07/27/herbert-hovenkamp-competitive-harm-and-the-2023-draft-merger-guidelines>; Brian Albrecht, "New Merger Guidelines Are As Expected. That's Not A Compliment" (July 19, 2023) <https://truthonthemarket.com/2023/07/19/new-merger-guidelines-are-as-expected-thats-not-a-compliment>; Jason Furman and Carl Shapiro, "How Biden Can Get Antitrust Right," Wall Street Journal (July 28, 2023) <https://www.wsj.com/articles/how-biden-can-get-antitrust-right-khan-ftc-justice-department-guidelines-11364639>.

[3] See <https://www.whitehouse.gov/cea/written-materials/2023/07/19/protecting-competition-through-updated-merger-guidelines>.

[4] *Supra* note 1 at 3-4.

[5] See <https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines> at 1.

[6] In certain circumstances, the acquiring firm may agree to operate the acquired firm as a subsidiary or separate entity for a time period.

[7] Supra note 5.