



Strengthening Enforcement Against Illegal Mergers: Comment Letter on Proposed Merger Guidelines

Submitted to the Federal Trade Commission and the
Justice Department's Antitrust Division
September 18, 2023

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Re: Draft Merger Guidelines (Docket FTC-2023-0043)

Dear Assistant Attorney General Kanter, Chair Khan, and Commissioners,

Thank you for the opportunity to offer comments on the Draft Merger Guidelines the agencies published July 19, 2023. The Institute for Local Self-Reliance is a 49-year-old research and advocacy organization. Our work examines how policy can structure the economy to foster thriving, equitable, and democratic communities.

The Draft Merger Guidelines are a significant and important improvement over the current, 2010 edition of the guidelines. We commend the agencies, their leadership, and staff for drafting merger guidelines that better align with the law. We also believe the draft guidelines leave the agencies and courts far better equipped to identify and address competition issues in the modern economy and create crucial pathways for today's highly-concentrated markets to deconcentrate over time.

Our comment letter seeks to both support the significant and necessary changes contained in the agencies' Draft Merger Guidelines, and suggest ways the agencies should amend their draft guidelines to better discern and block harmful mergers, promote a decentralized economy, safeguard American liberty, and fulfill the aims of the antitrust laws enacted by Congress.

The sections in this comment letter are organized with those goals in mind. We intend for this letter to be viewed as an addendum to [our comprehensive comment to the agencies](#) last year, which detailed the history of the anti-merger law, the failed enforcement of recent decades, and the changes we believe would help the agencies and courts adhere to Congressional intent, promote competition, and safeguard the vitality of our communities and democracy.

Our comment is organized in two parts. Part I examines the ways the proposed guidelines are a significant improvement to assessing and addressing the effects of concentration in today's economy. Part II outlines a series of crucial revisions to ensure the merger guidelines reflect the letter of the law.

I. The Proposed Guidelines Better Align Enforcement Policy with the Law and Provide Significantly Improved Frameworks for Analyzing Mergers in the Context of Today's Economy

We wish to particularly highlight several aspects of the draft guidelines that offer significant and crucial improvement over the current guidelines:

- *Attending to the Relationship Between Industry Structure, Firm Size, and Market Power* — Guidelines 1, 7, and 8 set out important structural presumptions about mergers, market structure, and market power. Since the passage of the Celler-Kefauver Act in 1950, amending Section 7 of the Clayton Act, industry structure has been key to understanding whether and how a merger may change the balance of market power in an industry and ultimately lead to the kind of anti-competitive harms Congress intended the law to prevent.¹ By setting firm presumptions of illegality, the agencies will be able to efficiently identify and block mergers that clearly threaten competition.
- *Including the Use of Direct Evidence and the Brown Shoe Indicia to Define Markets and Identify Problematic Mergers* — By including the Brown Shoe indicia in the Draft Merger Guidelines, the agencies adhere to Supreme Court precedent and recognize that this approach remains the best, most understandable method by which generalist judges can define markets in merger cases.
- *Providing Crucial Guidance for Mergers Involving Digital Platforms* — As the proposed guidelines correctly elaborate, tech platforms can use acquisitions to entrench or enhance their power in ways that do not fit conventional approaches to evaluating mergers. We commend the agencies for their close and careful delineation of the competition concerns that need to be considered.

II. The Agencies Should Make Several Revisions to Strengthen the Guidelines and Ensure They Align with the Intent and Letter of Our Anti-Merger Laws

We encourage the agencies to:

A. Lower the Structural Thresholds for All Types of Mergers

¹ The Supreme Court has made clear that requirement of a structural analysis of an industry under Celler-Kefauver in multiple cases; see, for example, *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962) and *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

We commend the agencies for establishing clear structural presumptions for horizontal and vertical mergers. However, the draft thresholds are too high to meet the directives of the Clayton Act. We urge the agencies to lower these thresholds in the final guidelines.

Congress made its intent clear in 1950, when it passed the Celler-Kefauver Antimerger Act. The act amended the 1914 Clayton Act's merger provisions "by broadening its scope so as to cover the entire range of corporate amalgamations" and "chang[ing] the test of illegality" so as to outlaw a much wider array of mergers.² To this end, Congress banned any acquisition when "the effect of such acquisition may be substantially to lessen competition... in any line of commerce."³ With this language, Congress chose to ban mergers that have a reasonable potential to reduce "the vigor of competition."⁴ As a Senate report explained: "The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."⁵ By outlawing a much broader range of mergers, Congress sought to both "limit future increases in the level of economic concentration."⁶

As part of a sweeping initiative to undermine antitrust law, the 1982 Merger Guidelines "substantially relaxed and narrowed the numerical standards for the levels of concentration and shares triggering competitive concerns," and defined concentration thresholds (under the newly introduced Herfindahl-Hirschman Index) at which the government would challenge mergers that were "well above the previous equivalent thresholds."⁷

Unfortunately, these same high HHI thresholds are mirrored in the agencies' draft guidelines today — despite what we've learned from four decades of impaired merger enforcement. We strongly encourage agencies to consider lowering the HHI concentration thresholds in the guidelines.

² *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

³ 15 U.S.C. § 18.

⁴ Senate Report No. 81-1775, at 6 (1950) ("A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints."); House Report No. 81-1191, at 8 (1949) (Stating that the bill is intended to stop mergers when there "may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize. Such an effect may arise in various ways: such as elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition, increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive, undue reduction in the number of competing enterprises, or establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete.")

⁵ Senate Report No. 81-1775, at 3 (1950).

⁶ Senate Report No. 81-1775, at 3 (1950) ("The purpose of the proposed bill ... is to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions.")

⁷ John Kwoka, "Reviving Merger Control - A Comprehensive Plan for Reforming Policy and Practice," Northeastern University (Oct. 9, 2018). Also see: Janusz A. Ordover and Robert D. Willig, "The 1982 Department of Justice Merger Guidelines: An Economic Assessment," *California Law Review*, (Mar. 1983) ("[the 1982 Merger Guidelines] increase the market share levels of the merging firms at which a merger will presumptively go unchallenged; significantly raise the benchmark levels for classifying markets as concentrated and highly concentrated; and markedly restrict the universe of vertical mergers that are likely to be challenged.").

Additionally, the draft guidelines indicate that a merger is presumptively illegal if it creates a firm with a market share greater than 30 percent for horizontal mergers and 50 percent for vertical mergers. While we applaud the inclusion of structural presumptions, these are remarkably high market share thresholds. As we've seen across many sectors, a market divided among three or four (or even five or six) major competitors is almost invariably too consolidated to deliver the benefits of competition that the antitrust laws were designed to promote.⁸ Yet, this is the level of concentration that a 30 percent threshold envisions.

Similarly, the 50 percent threshold for vertical deals asserts that a merger could foreclose 20, 30, or even 40 percent or more of supply or market access for rivals and not necessarily cause a meaningful reduction in competition. This does not track with practical realities. There is extensive evidence that vertical mergers foreclose upstream or downstream rivals, either by restricting key inputs they need to compete, or by raising their costs in ways that drive business to the merged firm.⁹ Vertical foreclosure is often particularly harmful to small, independent businesses, whose ability to compete on fair terms was a foremost concern of Congress in amending the Clayton Act in 1950.¹⁰ For these reasons, vertical mergers should be scrutinized as much as horizontal deals.

We urge the agencies to lower the presumptive threshold for both horizontal and vertical mergers to 20 percent. Further, there is considerable evidence the level of concentration at which competition concerns arise is substantially lower in buyer markets than in seller markets.¹¹ Yet the Draft Guidelines are tepid on this point. We urge the agencies to set a clear threshold for buyer power that is lower than for seller power.

Finally, we note that a preferred alternative to HHI would be to return to the four-firm concentration ratios as described in the 1968 merger guidelines,¹² or to adopt a structural

⁸ John Kwoka, presentation at Stigler Center conference, "Beyond the Consumer Welfare Standard," delivered April 21, 2023, video found here: <https://www.youtube.com/watch?v=qXGipgazA7c&t=1622s>.

⁹ Johannes Boehm and Jan Sonntag, "Vertical Integration and Foreclosure: Evidence from Production Data Network," CEPR Discussion Paper No. DP15463, (Using a novel relational dataset of vertically connected firms, the authors "interpret our results as supporting the view that vertical mergers have, on average in the population of firms and relationships that we study, anticompetitive effects," and that those effects include foreclosure, raising rivals' costs, and self-foreclosure.)

¹⁰ Stacy Mitchell and Ron Knox, "Rolling Back Corporate Concentration: How New Federal Antimerger Guidelines Can Restore Competition and Build Local Power," Institute for Local Self Reliance, June 2022.

¹¹ See for example, Robert H. Lande, "Beware Buyer Power," *Legal Times*, July 12, 2004 (Lande finds, among other things, that: "Buyer power can occur at much lower market share levels," and that "buyers sometimes have enough power to obtain lower prices or other discriminatory terms with much lower market shares."); Also, see *Toys R Us v. Federal Trade Commission*, Seventh Circuit, Aug. 1, 2000 (finding that Toys R Us' 20 percent share of the retail toy market was sufficient to extract concessions from its suppliers.)

¹² U.S. Department of Justice, 1968 Merger Guidelines (explaining the combined market shares at which the government will likely challenge mergers in which the four largest firms account for more than 75 percent share and less than 75 percent share, respectively - all of which were significantly below the Draft Merger Guidelines' proposed 30 percent).

presumption against mergers that leave five or fewer competitors in an industry, based on economist John Kwoka's retrospective finding that all such mergers have led to higher prices.¹³

B. Eliminate the Efficiencies Defenses

We urge the agencies to eliminate the efficiencies defenses from the final guidelines. As the Supreme Court has repeatedly recognized, Congress deliberately chose to protect and promote competition as the best means of achieving the broad aims of antitrust policy, including safeguarding the interests of consumers — rather than sacrifice competition in pursuit of potential efficiencies.¹⁴ Indeed, the draft guidelines themselves make clear that efficiencies are not an available defense under the law. As the draft notes: “The Supreme Court has held that ‘possible economies [from a merger] cannot be used as a defense to illegality.’ Competition usually spurs firms to achieve efficiencies internally, and Congress and the courts have indicated their preference for internal efficiencies and organic growth.”

However, the proposed guidelines then go on to discuss the circumstances in which efficiencies can be a defense to mergers that may lessen competition. We urge the agencies to eliminate this text from the final guidelines. Not only does it run counter to the law, but including efficiencies defenses opens the way for a continuation of the failed enforcement approach of recent decades. This approach has freighted merger cases with speculative, complex, and costly analysis of purported efficiencies. This embrace of a case-by-case, rule-of-reason analysis of mergers has significantly impaired the ability of the agencies and courts to discern and block mergers that lessen competition and give rise to the very harms that Congress intended the Clayton Act to prevent.¹⁵ (Indeed, there is considerable evidence that the vast majority of mergers did not even produce the efficiencies the merging parties claimed would materialize.¹⁶)

We recommend that the final merger guidelines remove efficiencies as a potential defense of an anticompetitive merger.

¹³ John Kwoka, presentation at Stigler Center conference, “Beyond the Consumer Welfare Standard,” delivered April 21, 2023, video found here: <https://www.youtube.com/watch?v=qXGipgazA7c&t=1622s>.

¹⁴ *Brown Shoe Co., Inc. v. United States* (The Court found that “Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.”)

¹⁵ John Kwoka, “Reviving Merger Control,” Oct. 9, 2018 (Citing scholar Sam Pelzman, Kwoka finds that “A careful study by Chicago School scholar Pelzman reported evidence that “concentration, which had been unchanged for all of the 20th century, began rising at the same time that merger policy changed,” namely, with the 1978 publication of [Robert] Bork’s treatise *The Antitrust Paradox* and the subsequent 1982 Merger Guidelines that reflected Bork’s view of mergers.”; Sam Pelzman, “Industrial Concentration and the Rule of Reason,” *Journal of Law and Economics*, August 2014 (Attributing increasing concentration in already-concentrated markets, Pelzman finds that “As soon as the ink was drying on the [1982] Merger Guidelines, concentration was increasing in U.S. manufacturing.”)

¹⁶ See, for example, Nancy Rose and Jonathan Sallet, “The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting It Right,” *University of Pennsylvania Law Review* 168, 2020 (finding that “Overall, the results from efforts to directly measure merger-induced efficiencies provide little support for the propositions that horizontal mergers are either motivated by or effective in producing significant economic efficiency gains.”) and Herbert Hovenkamp, “Appraising Merger Efficiencies,” *George Mason Law Review*, 2017 (noting that efficiencies claims “are often raised but almost never found to justify a merger that has been shown to be prima facie unlawful.”)

C. Provide Stronger Support for the Use of Practical Indicators in Defining Markets and Limit or Remove the Hypothetical Monopolist Test

Market definition is a critical aspect of any merger challenge. Yet, as former FTC Chairman Robert Pitofsky has pointed out: “No aspect of antitrust enforcement has been handled nearly as badly as market definition.”¹⁷

We commend the agencies for moving away from reliance on the hypothetical monopolist test and including in the draft guidelines a better set of tools for defining markets, including direct evidence and observable market characteristics. However, we encourage the agencies to strongly consider removing the hypothetical monopolist test altogether and strengthening their support for and guidance on using practical indicia.

The HMT’s inclusion in the 1982 guidelines undercut the government’s ability to enforce the antimerger law as intended. As Pitofsky notes, the HMT provided companies with new ways “to expand relevant markets and thus diminish apparent market power.”¹⁸ This was by design: “the Guidelines and some of the scholarship seek to change relevant market definition in order to diminish the role of antitrust enforcement.”¹⁹

Prior to 1982, markets were defined largely according to the Supreme Court’s guidance in *Brown Shoe*, in which the “reasonable Interchangeability of use or the cross-elasticity of demand,” was key to identifying the relevant market.²⁰ Meanwhile, the Court explained the practical indicia enforcers and courts should look to when defining more precise submarkets, including “industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.”²¹ Scholar Hillary Greene found that, in using the *Brown Shoe* indicia, “courts found submarkets to be a convenient concept with which to find liability.”²²

Market definition approaches that rely on direct evidence or observable market characteristics — such as real-world business documents, the expertise of market participants, and analysis of how the market functions in practice — often paint the most realistic picture of where and to what extent merging companies compete with one another or may do so in the future.

Rather than mirroring this kind of real-world clarity, the HMT is a theoretical model that has clouded court cases and led to unnecessary confusion in the courts or bad outcomes for the

¹⁷ Robert Pitofsky, “New Definitions of Relevant Market and the Assault on Antitrust,” *Columbia Law Review*, Nov. 1990.

¹⁸ *Ibid*

¹⁹ *Ibid*, footnote 11

²⁰ *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962).

²¹ *Ibid*

²² Hillary Greene, “Guideline Institutionalization: The Role of Guidelines in Antitrust Discourse,” *Faculty Articles and Papers*, 2006.

agencies.²³ As former DOJ economist Gregory Werden writes, merger definition guided by the HMT “lacks practicality in the sense that it is neither simple nor mechanical.” Another analysis suggests that elements of the HMT can be “misused” in order “to justify broad relevant markets” that cloud the picture of a merger’s potential competitive harm.²⁴

In light of this, we encourage the agencies to revise the draft guidelines by 1) removing or significantly circumscribing the use of the hypothetical monopolist test and 2) providing a stronger endorsement of and more guidance on the use of practical indicia.

In closing, we reiterate that this draft proposal provides a significant, important, and urgently needed revision to the current merger guidelines. Once finalized, these proposed guidelines will give the agencies better frameworks to evaluate and block harmful mergers, promote a decentralized economy, safeguard American liberty, and fulfill the aims of the antitrust laws enacted by Congress.

Thank you for the opportunity to share our views.

Sincerely,
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²³ See, perhaps most recently, *Federal Trade Commission et al v. Thomas Jefferson University et al*, U.S.C.C for the Eastern District of Pennsylvania, Dec 8, 2020.

²⁴ Michael L. Katz and Carl Shapiro, “Critical Loss: Let’s Tell the Whole Story,” *Antitrust Magazine*, Spring 2003.