The 2023 U.S. Merger Guidelines

A Review

Sean P. Sullivan (ed.)

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Antitrust Ideology and the 2023 U.S. Merger Guidelines

Diana L. Moss*
Progressive Policy Institute

* Vice President & Director of Competition Policy, Progressive Policy Institute.

I. Introduction

282. In late December 2023, the U.S. antitrust agencies jointly issued new merger guidelines.[1] The 2023 Merger Guidelines ("2023 Guidelines") are the seventh substantive version since they were first issued 55 years ago by the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC). Promoting competition in the U.S. economy is a priority for the Biden Administration, as reflected in a 2021 executive order that set forth an ambitious plan to harness a "whole of government" approach.[2] An uptick in resolving challenged mergers through injunctions, restructurings, and forced abandonments is visible evidence of this commitment. The same is true of a surge in monopolization cases, limited thus far to the digital sector, the outcomes of which will likely be determined by a future administration.

283. As part of the broader competition mandate under the current administration, the DOJ and FTC issued a draft of revised merger guidelines in mid-July 2023.[3] After collecting comments and holding public workshops, the Agencies turned a final version of the guidelines six months later, which will replace the 2010 Horizontal Merger Guidelines.[4] The changes to the draft guidelines, which presumably reflected public input, were far from cosmetic. Indeed, they reflect pressure to move the draft version away from the far left of the ideological spectrum and towards the center. This tells us a lot about the debate over antitrust ideology in the U.S. is today.

284. The Agencies received feedback on the draft guidelines from all sides. These include Chicago School advocates of laissez faire conservatism and Neo-Brandeisian advocates of "bright line" tests that are the foundation of a broader anti-monopoly approach. The Agencies also received comments from center-left, post-Chicago School, advocates focused on promoting more vigorous enforcement through strong presumptions, a broad interpretation of the consumer welfare standard, and a skeptical view of merger efficiencies. As the originators of the pro-enforcement movement 25 years ago, the center-left has held significant ground in promoting stronger merger enforcement. The influence of center-left commentary on final guidelines speaks to its appeal and durability.

285. Less ideologically polarized merger guidelines avoid operationalizing the goals of perspectives at the ends of the spectrum, which risks the pull-back of agency guidance by future administrations. It also avoids creating poor caselaw if the government does not prevail in blocking mergers on the

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1 Fed. Trade Comm'n and U.S. Dep't. of Justice, *Merger Guidelines* (2023) ("2023 Guidelines").

2 *Executive Order on Promoting Competition in the American Economy*, The White House (July 9, 2021), at § 1.

3 Fed. Trade Comm'n and U.S. Dep't. of Justice, *Draft Merger Guidelines* (2023) ("2023 Draft Guidelines").

4 Fed. Trade Comm'n and U.S. Dep't. of Justice, *Horizontal Merger Guidelines* (2010) ("2010 Guidelines").

basis of novel, or poorly supported, theories of competitive harm.[5] Both of these factors work against the goal of stronger enforcement. The final guidelines responded to a number of such concerns, especially as they relate to the transparency of the guidelines for the business community, practitioners, and the public; and their administrability in federal courts.[6] At the same time, material in the final guidelines that was the subject of center-left commentary, but remained unaltered from the draft, could potentially work against stronger enforcement moving forward.

286. The final version of the 2023 Guidelines clearly represents a compromise document that attempts to balance and resolve strong feedback. This article explains major themes that are apparent in the 2023 Guidelines. The first section provides a brief overview of the new structure of "frameworks" and "applications" guidelines. The second section turns to an analysis of changes that make the final guidelines a less ideologically polarized document than the draft version. The third section looks at features that could reduce the transparency and administrability of the guidelines and pose risks to more vigorous enforcement.

II. The "Frameworks" and "Applications" Approach to Guidelines

287. The revised guidelines come at a critical time. Concern over declining competition in the U.S. economy continues to rise in the pro-enforcement community. This is reflected in high levels of market concentration, growing gaps in wealth and income, high margins for the top firms, and a loss of worker bargaining power.[7] The "incipiency" standard embedded in U.S. merger law – or stopping harmful transactions before they happen – makes enforcement a first line of defense to the emergence of durable monopolies and oligopolies that inflict lasting damage on consumers, workers, and smaller businesses.[8]

288. The government and private antitrust plaintiffs face a high bar in bringing monopolization and collusion cases under the Sherman Act.[9] The incipiency standard thus draws attention back to the importance of merger control under Section 7 of the Clayton Act in promoting competition in

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5 *Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary*, Fed. Trade Comm'n. (Sept. 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary.

6 Unlike the 2010 Guidelines, the 2023 Guidelines do not explain their importance to the business community, practitioners, and the public. The 2010 Guidelines state "These Guidelines are intended to assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies' enforcement decisions. They may also assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws in the horizontal merger context." 2010 Guidelines, *supra* note 4, at § 1.

7 *See, e.g.*, Council of Economic Advisers, Benefits of Competition and Indicators of Market Power, The White House (Apr. 2016), at 4.

8 15 U.S.C. §§ 18.

9 15 U.S.C. §§ 1 and 2.

a market economy. As such, it elevates the importance of transparency and administrability in agency guidance and gives balance to the roles of legal doctrine and economic and business analysis that improves merger review.

289. The 2023 Guidelines support the incipiency standard with an expanded set of theories of harm for evaluating how a merger is likely to substantially lessen competition. These are referred to as "frameworks" guidelines. The 2010 Guidelines articulate four major theories of harm around mergers that are: (1) highly concentrative, (2) eliminate head-to-head competition, (3) enhance incentives to engage in anticompetitive coordination, and (4) eliminate a potential entrant. The 2023 Guidelines reiterate these four theories of harm and extend coverage to a fifth theory, vertical mergers, which supersede the guidance in the 2020 Vertical Merger Guidelines issued by the Trump administration and withdrawn by the FTC in 2021.[10]

290. The 2023 Guidelines add a sixth theory of harm – mergers that entrench or expand a dominant position. This is a needed response to expansion, for example, in business models that feature platforms, ecosystems, and that grow largely through acquisition, versus organically.[11] The 2023 Guidelines also introduce the "applications" guidelines, or settings in which the frameworks guidelines are applied. These five guidelines cover: (1) trends toward concentration, (2) serial acquisitions, and mergers involving (3) multi-sided platforms, (4) buyers of inputs, and (5) partial ownership acquisitions.[12]

291. As in the case of the frameworks guidelines, the applications guidelines are not all that novel. For example, mergers that raise concerns over powerful buyers and partial ownership shares are addressed in the 2010 Guidelines. This leaves three new settings covered in the applications guidelines in the 2023 revision: trends toward consolidation (revised from "concentration"), serial acquisitions, and multi-sided platforms.[13] A guideline on multi-sided platforms provides important clarity on complex market definition questions. In doing so, the Agencies helpfully cabin problematic market definition in *Ohio v. Amex* and *Sabre-Fare Logix*.[14]

292. The 2023 Guidelines also introduce the "trends" applications guideline, which recognizes three major dynamics: a trend toward higher concentration in horizontal mergers, a trend toward vertical integration, and "arms race" mergers motivated by incentives to gain bargaining power

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10 *Id.* Guideline 5.

11 2023 Guidelines, *supra* note 1, Guideline 6.

12 *Id.* Guidelines 7–11.

13 2010 Guidelines, *supra* note 4, at § 8 and § 13.

14 138 S. Ct. 2274 (2018); United States v. Sabre Corp., 452 F. Supp. 3d 97 (D. Del. 2020). *See also,* Randy Stutz, *We've Seen Enough: It Is Time to Abandon Amex and Start Over on Two-Sided Markets* (Apr. 21, 2020), https://www.antitrustinstitute.org/work-product/aai-says-its-time-to-cancel-amex-sabre-farelogix-opinion-makes-a-mockery-of-market-definition/. See also, Irving Scher, *The US Supreme Court rules that "anti-steering" clauses are not anticompetitive on the two-sided credit card market (American Express)*, e-Competitions June 2018, art. No. 96404.

over inputs suppliers or distributors. Finally, the applications guideline for serial acquisitions holds promise to address concerns involving business models that grow primarily through acquisition and acquisitions of smaller rivals that fly below the Hart-Scott-Rodino merger filing requirements thresholds.[15]

293. The 2023 Guidelines' larger universe of theories of harm and settings in which they can be applied is an intentional feature. It creates more combinations of potential anticompetitive scenarios and applications in horizontal and vertical mergers. Indeed, the guidelines are clear in stating that "…for any given transaction the Agencies may limit their analysis to any one guideline or subset of guidelines that most readily demonstrates the risks to competition from the transaction."[16] The reality, however, is that the Agencies have never limited themselves to alleging any single theory of harm. For example, mergers that eliminate head-to-head competition and leave a fringe of smaller rivals can also increase the risk of post-merger coordination. In these cases, the Agencies allege harm from unilateral and coordinated effects, such as in a number of pharmaceutical mergers.[17]

294. In sum, the 2023 Guidelines establish a new two-part structure of "frameworks" and "applications" guidelines. Many of these are not new, but some innovations are important in light of experience from past mergers, new business models and expansion strategies, and incentives for strategic competition. A major takeaway, however, is that the major thrust of the 2023 Guidelines is to provide the Agencies with more "options" to pursue potentially anticompetitive mergers.

III. Repositioning the 2023 Guidelines from the Far-Left Toward the Center-Left

295. The evolution of the 2023 Guidelines from draft to final form reveals a number of fundamental changes, some more obvious and others more nuanced. Together, they reflect a repositioning of the document from the far-left, toward the center-left of the ideological spectrum. The major issues that prompted reaction to the more polarized approach taken in the draft are most visible in Sections 1 and 2.[18] This section examines these features, including converting quasi-bright line tests to rebuttable presumptions and expanding citations from "binding" legal precedent to

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15 *See Premerger Notification and the Merger Review Process*, Fed. Trade Comm'n. https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review-process.

16 2023 Guidelines, *supra* note 1, at 3.

17 *See e.g.,* Diana L. Moss, *From Competition to Conspiracy: Assessing the Federal Trade Commission's Merger Policy in the Pharmaceutical Sector*, American Antitrust Institute (Sept. 3, 2020), at 13, https://www.antitrustinstitute.org/wp-content/uploads/2020/09/AAI_PharmaReport2020_9-11-20.pdf.

18 Section 1 of the 2023 Guidelines provides an overview of the document and section 2 explains the frameworks and applications guidelines in detail.

"applicable" legal precedent. Both of these changes improve the transparency and administrability of the 2023 Guidelines, which works to strengthen stronger enforcement.

1. Converting Quasi-Bright Line Tests to Rebuttable Presumptions

296. The draft guidelines presented what appeared to be quasi-bright line tests for determining whether a merger is illegal under Section 7. The standout feature of the original frameworks guidelines was the wording "a merger *should not*" result in an outcome likely to substantially lessen competition. This syntax lent a commandment-style flavor, fortified by little, if any, reference to "effects-based" analysis under the consumer welfare standard. Other features reinforced these concerns, including relocating economics and rebuttal evidence discussion away from the guidelines and to remote sections and appendices.[19]

297. Center-left commentators worried about the impact of the foregoing shift on enforcement. To be sure, the Agencies intended the guidelines to be rebuttable. But for non-experts, it was far from clear and fueled concern that the guidelines reflected polarized ideology and sacrificed transparency and administrability. For example, Section 1 of the draft guidelines did not include the important explanation of *how* a merger can substantially lessen competition. That is, how does eliminating a rival increase a firm's ability and/or incentive to exercise enhanced market power, for example, by controlling the terms of exchanges, or by frustrating the ability of rivals to compete?

298. Moreover, the draft guidelines did not discuss how the exercise of market power harms consumers, workers, and rival businesses. This analysis was clear in the 2010 Guidelines.[20] Absent an explicit departure from the consumer welfare standard in the 2023 Draft Guidelines, quasi-bright line tests appeared to depart from effects-based analysis under the consumer welfare standard, demoting the role of economic analysis and evidence and impeding stronger enforcement.

299. The final guidelines contain modifications that, to some extent, address the foregoing problems. Section 1 provides new context for what the guidelines are designed to do. For example, the final guidelines explain that competition is a process that "…incentivizes businesses to offer lower prices, improve wages and working conditions, enhance quality and resiliency, innovate, and expand choice..."[21] They also explain that a merger can "increase, extend, or entrench" market power that can harm

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19 *See, e.g.*, Comments of the Progressive Policy Institute on the Draft Merger Guidelines for Public Comment (Docket FTC-2023-0043), Progressive Policy Institute (Sept. 18, 2023), https://www.progressivepolicy.org/wp-content/uploads/2023/09/PPI_Merger-Guidelines_Comments_9.18.23.pdf.

20 2010 Horizontal Merger Guidelines, *supra* note 4, at § 1.

21 2023 Guidelines, *supra* note 1, at § 1, 1.

competition and market participants.[22] These explanations did not appear in the draft guidelines.

300. The final frameworks guidelines revise the controversial language "mergers should not" result in a substantially lessening of competition, to mergers that "raise the presumption" or "can violate the law."[23] The language backs away from a quasi-bright line test for illegality and makes clear that the presumptions embedded in the frameworks guidelines are rebuttable. For example, the text of the final guidelines states that "the agencies will also examine relevant evidence to determine if it disproves or rebuts the prima facie case..."[24]

301. In sum, the quasi-bright line tests and scant reference to effects-based analysis under the consumer welfare standard positioned the 2023 Draft Guidelines on the far-left end of the ideological spectrum. These optics were magnified by relegation of economic analysis and rebuttal evidence to distant sections and appendices. The practical implication of the draft guidelines was, therefore, to make them less transparent and administrable, and therefore potentially less effective in promoting stronger enforcement. In addressing commenters' concerns with the draft guidelines, the Agencies moved the final version of the guidelines toward the ideological center, which improves their transparency and administrability.

2. Converting "Binding" Legal Precedent to "Applicable" Legal Precedent

302. A second major feature of the draft guidelines is citation to legal precedent for a select body of caselaw.[25] The draft explained that the 50 unique citations to cases were "binding," 60% of which were decided earlier than 1980s.[26] To be sure, citation to strong legal precedent supports stronger enforcement but elevating the importance of certain cases highlights the dangers of "selective" citations in promoting stronger enforcement. For example, it is widely recognized that merger enforcement weakened dramatically after the 1980s as the Chicago School conservatism ascended.[27] However, there is post-1980 caselaw that supports stronger enforcement on a wider variety of important merger issues. A reluctance to give credit to more recent administrations for stronger merger enforcement telegraphed a more polarized ideology.

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22 *Id.* at § 1 and § 2.

23 *Id.*

24 *Id.*

25 2023 Draft Guidelines, *supra* note 3, at § 1, 5.

26 The unique citation count omits multiple references to a single case, including in different courts (*e.g.,* district vs. appellate).

27 *See, e.g.,* statement of former FTC Chair Robert Pitofsky, *Fair Fight in the Marketplace*, AMERICAN ANTITRUST INSTITUTE https://vimeo.com/151190144. ["…antitrust enforcement was almost asleep during the 1980s," at minute 6:07–6:20]. https://vimeo.com/151190144.

303. For example, merger enforcement under the Obama administration featured a historical shift toward a higher rate of merger abandonments, restructurings, and injunctions.[28] A number of these cases support the draft guidelines' citations to highly concentrative mergers or the elimination of head-to-head competitors. DOJ's success in forcing the abandonment of the 4–3 merger of wireless facilities-based carriers AT&T and T-Mobile in 2011 illustrates the importance of enforcement against highly concentrative mergers.[29] The FTC's successful block of the merger of broadline food distributors Sysco and U.S. Foods in 2015 is another leading example of how vigorous enforcement prevented the elimination of a head-to-head competitor.[30] The same is true of the DOJ's case against H&R Block and Tax Act, which would have led to a duopoly in tax preparation software.[31]

304. Other Obama-era cases not mentioned in the draft guidelines took up issues that were not present in pre-1980 cases. In 2015, for example, the DOJ also prevailed in blocking the merger of commercial health insurers Anthem and Cigna, setting pro-enforcement precedent on the treatment of merger efficiencies.[32] The final version of the guidelines makes a number of changes that responds to the foregoing concerns, moving them further to the center. Reference to "binding" legal precedent is replaced with "applicable legal precedent." There are fewer citations to pre-1980 caselaw and more citations to recent merger law. The final guidelines double the number of citations to cases during the Obama administration and include references to both anticompetitive effects and efficiencies defenses.[33]

305. These modifications in the final guidelines widen the aperture for recognizing, per center-left ideology, the importance of rebuttable presumptions while significantly raising the bar on efficiencies claims. In revising

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28 Rates are based on merger challenge outcomes as a percentage of clearances. Data collected from Fed. Trade Comm'n. and U.S. Dep't of Justice, Hart-Scott-Rodino Annual Reports, (fiscal years 1993–2021), https://www.ftc.gov/policy/reports/annual-competition-reports.

29 U.S. v. AT&T, Inc. and T-Mobile USA, Inc., et al, Complaint, Case No. 1:11-cv-01560 (D.D.C. Aug. 31, 2011), https://www.justice.gov/d9/atr/case-documents/attachments/2011/08/31/274613.pdf, see Jeffrey May, *The US DoJ joins seven States to block the proposed merger between two of the four largest national providers in the mobile wireless telecommunication services (AT&T / T-Mobile)*, e-Competitions September 2011, art. No. 38573.

30 Fed. Trade Comm'n. v. Sysco Corp., Memorandum Opinion, Case No. 1:15-cv-00256-APM (D.D.C. June 26, 2015), at 98, https://www.oag.state.va.us/consumer-protection/files/Lawsuits/Sysco-RedactedOpinion.pdf.

31 U.S. v. H&R Block Inc., et al, Memorandum Opinion, Case No. 1:11-cv-00948-BAH (D.D.C. Nov. 10, 2011), https://www.justice.gov/d9/atr/case-documents/attachments/2011/11/10/277287.pdf, see James A. Keyte, *The US District Court for the District of Columbia blocks a merger between two digital do-it-yourself tax preparation software providers giving insight on an S. 7 challenge of the Clayton Act (H&R Block / TaxAct)*, e-Competitions November 2011, art. No. 45926.

32 U.S. v. Anthem Inc. and Cigna Corp., Memorandum Opinion, Case No. 17-5024 (D.D.C. Apr. 28, 2017), https://www.justice.gov/atr/case-document/file/971316/dl?inline. The case sets legal precedent on the treatment of merger efficiencies, namely, that lower reimbursement rates to providers resulting from the larger insurer's enhanced buying power do not equate to cost savings for health plan subscribers. See Clifford H. Aronson et al., *The US District Court for the District of Columbia blocks two proposed mergers in the insurance sector brought and litigated under the Obama administration (Aetna / Humana and Anthem / Cigna)*, e-Competitions February 2017, art. No. 83761.

33 *Id.* at § 3.3, n.68, citing to U.S. v. Anthem.

"binding" to "applicable" legal precedent, the final guidelines reduce the costs of a narrower body of potentially incomplete caselaw and increase the benefits from a larger body of more inclusive and comprehensive merger caselaw.

IV. Ongoing Risks to Transparency and Administrability in the 2023 Merger Guidelines

306. Despite revisions to the 2023 Draft Guidelines, there are still features of the final guidelines that pose challenges to stronger enforcement. This section examines these features, including the inherent riskiness of the "applications" guidelines and questions raised by guidelines that assess dynamic scenarios, such as trends toward consolidation and serial acquisitions.

1. Inherent Riskiness of the "Applications" Guideline

307. The "applications" guidelines describe specific settings in which one or more of the frameworks guidelines can be applied. It is clear that the applications guidelines largely draw attention to successful cases brought by the Biden agencies. These include the merger of book publishers Penguin Random House and Simon & Shuster, where the DOJ's complaint alleged harm in a labor market for authors.[34] A serial acquisition is currently the subject of the FTC's case against private equity firm Anesthesia Partners.[35] Likewise, the vertical merger of UnitedHealthcare and Change Health involved a platform market where DOJ alleged that the anticompetitive exchange of sensitive information could stifle competition and innovation.[36]

308. The applications guidelines provide useful and important context to aid the agencies and courts in promoting stronger enforcement. But there are other applications that are equally important but *not* included in the guidelines. Other candidate settings for application guidelines come to mind. For example, some markets are dominated by only a few vertically integrated, multi-level "systems," such as in agricultural biotechnology and healthcare. In this setting, further horizontal or vertical consolidation exacerbates barriers to entry to smaller rivals[37] but merger reviews should also be concerned competitive paradigms, or the importance of competition *within* a system versus *between* systems.[38]

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34 U.S. v. Bertlesmann SE & Co. KGaA, Penguin Random House, LLC, Viacom CBS, Inc. and Simon & Shuster, Inc., Memorandum Opinion, Case No. 1:21-cv-02886-FYP (D.D.C. Nov. 7, 2022).

35 Fed. Trade Comm'n. v. Anesthesia Partners, Inc., et al., Complaint for Injunctive and Other Equitable Relief (S.D. Tex. Sept. 21, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2010031usapcomplaintpublic.pdf.

36 U.S., et al. v. UnitedHealth Group Inc. and Change Healthcare, Inc., Complaint, Case No. 1:22-cv-00481 (D.D.C. Feb. 24, 2022), https://www.justice.gov/atr/case-document/file/1476901/dl?inline.

37 The 2023 Guidelines discuss multi-level entry in the context of vertical mergers but do not reference markets dominated by just a few vertically integrated systems. *See,* 2023 Guidelines, *supra* note 1, at 14.

38 Letter from the American Antitrust Inst., Food & Water Watch, and National Farmers Union, to AAAG Andrew Finch Re: Proposed Merger of Monsanto and Bayer, (July 26, 2017), https://www.antitrustinstitute.org/wp-content/uploads/2018/08/White-Paper_Monsanto-Bayer_7.26.17_0.pdf.

309. Another candidate for an application guideline is the "ecosystem" merger, where acquisitions in a platform market, applications markets, or cloud computing market, could make it easier for the merged firm to leverage market power into another market.[39] For example, the DOJ noted in Google's 2011 acquisition of Admeld that the acquisition would enable Google to extend its market power in Internet search to the display advertising market.[40]

310. These examples highlight the concern that a selective list of applications could attract more attention to those particular settings, at the expense of others not explained in the guidelines. This stands in contrast to the frameworks guidelines, which given the present state of learning, present a more exhaustive list of theories of harm. This major difference between the frameworks and applications guidelines could cause confusion in the courts, potentially working against the goal of stronger enforcement. The risk inherent in providing only a selected list of applications guidelines is a good reason as to why they were better positioned as a narrative to support explanation of the frameworks guidelines, not as discrete guidelines.

2. Questions Raised by the "Trends" and "Serial Acquisitions" Guidelines

311. The draft guidelines introduce scenarios that are the focus of applications guidelines, under which a merger is integral to a strategy of amassing market power *over time*. These include firms that engage in successive, or serial acquisitions that may further a trend toward consolidation from horizontal concentration, vertical integration, or incentives to bulk up to gain bargaining power. There are notable examples of settings involving both trends toward consolidation and serial acquisitions.

312. For example, a rapid spate of mergers in agricultural biotechnology markets occurred in the last decade, against the backdrop of rising concentration and consolidation. In 2015, six firms competed in the global market for the sale of genetic crop traits, transgenic seed, and agro-chemicals. In a two-year period, three major mergers reduced those six firms to three.[41] Two major mergers of pharmacy benefit managers (PBMs) and commercial health insurers also occurred in quick succession. The merger of CVS and Aetna (2017) and Express Scripts

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39 Diana L. Moss et al., *Market Power and Digital Business Ecosystems: Assessing the Impact of Economic and Business Complexity on Competition Analysis and Remedies*, American Antitrust Institute (June 1, 2021), https://www.antitrustinstitute.org/work-product/aai-issues-report-market-power-and-digital-business-ecosystems-assessing-the-impact-of-economic-and-business-complexity-on-competition-analysis-and-remedies/.

40 *See, e.g.,* European Commission Press Release, Mergers: Commission Clears Acquisition of Fitbit by Google, Subject to Conditions, (Dec. 17, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484.

41 James M. MacDonald, *Mergers in Seeds and Agricultural Chemicals: What Happened?* U.S. Dep't. of Ag. Econ. Research SVC. (Feb. 15, 2019), https://www.ers.usda.gov/amber-waves/2019/february/mergers-in-seeds-and-agricultural-chemicals-what-happened/.

and Cigna (2018) created two large, vertically integrated PBM-insurer systems. Together with UnitedHealth Group's homegrown PBM Optum, three major PBM-insurer systems came to dominate the industry in a short period of time.

313. The serial acquisition application guideline examines a merger that is part of a series of multiple acquisitions. Under this guideline, the Agencies may examine a single merger against the backdrop of the entire series, "…looking for a pattern or strategy of multiple acquisitions and challenge it even if no single acquisition would risk a substantial lessening of competition or tend to create a monopoly."[42] A leading example is the FTC's case against Anesthesia Partners mentioned earlier. Other private equity-backed roll-ups of markets in physician practices, nursing homes, and home healthcare raise similar issues and are generating significant scrutiny.[43] The digital business ecosystems are also home to significant growth by serial acquisition, especially in regard to small acquisitions that fly under the Hart-Scott-Rodino reporting thresholds.[44]

314. The "trends" and "serial acquisitions" applications guidelines flag patterns of consolidation that are a major reason for vigilant and vigorous merger enforcement. However, the final 2023 Guidelines provide only brief discussion of how the Agencies will evaluate mergers in these settings. For example, how will the Agencies determine what constitutes a "trend" or a "serial acquisition?" What period of time, number or size of previous acquisitions, and merger characteristics define a trend toward consolidation or a pattern of serial behavior? Moreover, both the "trends" and "serial acquisitions" guidelines refer repeatedly to the "industry," not the "relevant market." where concerns might arise. But the guidelines do not provide any framework for distinguishing these two very different concepts. Th questions remain largely unanswered by the 2023 Guidelines.

315. Moreover, mergers that are likely to be evaluated under both the "trends" and "serial acquisition" guidelines may well occur at lower levels of concentration. In strengthening the structural presumption, however, the 2023 Guidelines eliminated discussion of when moderately concentrative mergers can pose competitive concerns which was an important element of the 2010 and prior guidelines.[45] Retaining this discussion would have likely aided the agencies and courts in evaluating cases under these applications guidelines.

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42 2023 Guidelines, *supra* note 1, at 24.

43 *See, e.g.,* Richard M. Scheffler et al., *Monetizing Medicine: Private Equity and Competition in Physician Practice Markets*, American Antitrust Inst, Petris Center, and Wash. Center for Equit. Growth (July 10, 2023), https://petris.org/monetizing-medicine-private-equity-and-competition-in-physician-and-practice-markets/.

44 Diana L. Moss & David Hummel, *Anticipating the Next Generation of Powerful Digital Players: Implications for Competition Policy*, American Antitrust Institute (Jan. 18, 2022), at 10, https://www.antitrustinstitute.org/work-product/new-aai-analysis-unpacks-acquisitive-growth-by-digital-firms-warns-of-next-wave-of-expansion-and-need-for-sector-wide-approach-to-competition-policy/.

45 2023 Merger Guidelines, *supra* note 1, at 6.

3. Overlooking Retrospective Analysis

316. A major feature of industrial organization and strategic management research over the last 15 years has been the development of merger retrospectives. Retrospectives assess whether completed mergers that were, and were not, the subject of *ex ante* merger reviews resulted in adverse effects or produced pro-competitive benefits claimed by merging parties. There is a valuable body of merger retrospectives that highlight merger outcomes that were contrary to *ex ante* predictions. Merger retrospectives analyze single mergers, but also multiple mergers, through the use of "meta-analysis."

317. Retrospective studies of post-merger effects have been performed for a wide variety of mergers, including for home appliances and food manufacturers, brewers, hospitals, and airlines.[46] There is also growing interest in retrospectives that evaluate whether the efficiencies claimed by parties to mergers actually materialized. Indeed, evidence from the strategic management literature indicates that mergers rarely produce benefits.[47] This evidence is particularly important in cases where the Agencies informally give credit to efficiencies claims in their investigations. But the probative value of such evidence is found in litigated merger proceedings. Namely, after the government has made the case for how a merger is likely to substantially lessen competition, the burden shifts to defendants to show pro-competitive efficiencies reduce their incentives to exercise their enhanced market power.

318. There are scant, if any, examples of litigated merger cases that were won on the basis of a defendant's successful rebuttal of the government's case. However, in reality, it is clear that the courts have given at least implicit deference to efficiencies claims. For example, in the vertical merger of AT&T and Time Warner, the court's decision formally relied on the failure of the government to make its case for why the merger was likely to substantially lessen competition. Nonetheless, the court noted that it was "…confident that defendants will achieve considerable efficiencies beyond those conceded by the Government,"[48] and that "…defendants have presented persuasive, probative evidence that the merger will produce even more efficiencies than those accounted for in this Opinion."[49]

319. In retrospect, rebuttal evidence offered by the defendants in AT&T–Time Warner was deeply flawed. For example, AT&T spun off Warner

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46 *See, e.g.*, Manesh S. Patel, *Merger Breakups*, 2020 Wis. L. Rev. 975 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3469984.

47 *See, e.g.*, Scott A. Christofferson et al., *Where Mergers Go Wrong*, McKinsey Q. (May 1, 2004), https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/where-mergers-go-wrong. ["…most buyers routinely overvalue the synergies to be had from acquisitions," finding that almost 70% of the mergers in the database studied failed to achieve expected synergies related to obtaining access to a target's customers, channels, and geographies."]

48 U.S. v. AT&T Inc., et al., Opinion, Civil Case No. 17-2511 (RJL) (D.D.C. June 12, 2018), at 36–39.

49 *Id.* at 54–55. *See also*, n.17.

Media less than three years post-consummation. Retrospective analysis of efficiencies shows that few cost savings were realized in that short period of time, much less the promise to increase the subscriber base for HBO.[50] Indeed, the AT&T–Time Warner merger was never going to create significant benefits. Time Warner, which experienced declining operating margins, accounted for under 20% of total revenues and costs and contributed less than 6% to the company's overall performance in the time period after the merger.[51]

320. In sum, the 2023 Guidelines missed an important opportunity to marshal evidence from past mergers to provide transparency and context that could significantly strengthen enforcement. This omission of important economic and business analysis seems oddly out of sync with the guidelines' priority of introducing citation to legal precedent. On the whole, however, it is consistent with the theme of relegating non-legal analysis and precedent to a secondary role in the 2023 Guidelines. This is likely to work against promoting stronger enforcement in the future.

V. Conclusion

321. The 2023 Guidelines reflect the challenges of finding an ideological compromise for important antitrust agency guidance in a critical area of the law. Viewed from a 10,000-foot level, the final version of the 2023 Guidelines corrects, in many ways discussed herein, an ideological "over-correction" that was apparent in the draft version. The net result highlights the importance and appeal of center-left pro-enforcement thinking, versus ideological extremes. As the guidelines are applied and interpreted by the agencies and courts and further caselaw is developed, it remains to be seen what questions will arise over their transparency and administrability.

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50 *See, e.g.,* Letter from the American Antitrust Institute and Public Knowledge to AAAG Richard Powers, Re: Strategic Consolidation, Market Power, and Efficiencies in the Media/Entertainment and Distribution Markets: Implications for Antitrust Reviews of Proposed Mergers, (Sept. 2, 2021), at § III, https://www.antitrustinstitute.org/wp-content/uploads/2021/09/AAI_PK-Ltr-on-Warner-Media-Disc_9.2.21.pdf.

51 *Id.*

The 2023 U.S. Merger Guidelines

A Review

Sean P. Sullivan (ed.)

| Foreword by Ilene K. Gotts

This multi-contributors guide invites you to explore the detailed landscape of antitrust law and economic policy through a comprehensive review of the 2023 U.S. Merger Guidelines. Written by a panel of esteemed scholars and practitioners, this volume offers a diverse array of perspectives on the pivotal changes reshaping U.S. merger control.

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Sean P. Sullivan *is Professor of Law at the University of Iowa, College of Law. His writing interests include topics in evidence law, antitrust law, and law and economics. He served as an antitrust attorney for the Federal Trade Commission, where his practice focused on the review and litigation of mergers in technology and commodity-chemical industries.*

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