Public Interest Comment[1] on FTC-DOJ

Draft Merger Guidelines

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REGULATORY STUDIES CENTER

The George Washington University Regulatory Studies Center improves regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the Federal Trade Commission / Department of Justice Draft Merger Guidelines does not represent the views of any particular affected party or special interest, but is designed to evaluate the effect of the agency's guidance on overall consumer welfare.

1 This comment reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at https://regulatorystudies.columbian.gwu.edu/about#integrity.

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Introduction

The Department of Justice and Federal Trade Commission (the Agencies) recently proposed revisions to the guidelines that the Agencies use to review mergers and acquisitions. The Merger Guidelines are revised from time to time to incorporate developments in business practices and advances in economics that help the Agencies better understand how proposed mergers may affect competition.

For many years, tracing back to the issuance of Merger Guidelines in 1982, there has been a broad and bipartisan consensus that the proper goal of merger enforcement policy was to identify and attempt to prevent only those mergers that seemed likely – after evaluating both the merger's potential for unlocking efficiencies and its potential for increasing market power (or facilitating coordination among remaining competitors) – to reduce the welfare of consumers or other "trading partners" (such as suppliers or laborers potentially subject to a post-merger exercise of monopsony power). These are inherently economic questions, and the Guidelines have historically rested on economic analysis as its primary tool for answering them. This historical consensus made the Merger Guidelines not only a true bipartisan achievement, but led courts to afford them considerable deference in litigation.

The purpose of issuing public Merger Guidelines is to inform firms, as well as the general public, the conditions under which the Agencies will determine whether a proposed merger is likely to be economically harmful. The guidelines do not themselves determine whether a merger can proceed – ultimately that needs to be decided by the courts. In the past, however, the courts – while not automatically agreeing with the government's position – have given great deference to the framework laid out in the Merger Guidelines – including how economics can be used to inform the likely effect of a merger.

The draft guidelines (dMGs) present a new vision of merger review that appears to depart in significant ways from some of the important principles underlying previous guidelines. To the extent that the dMGs are perceived as placing a thumb on the scale to achieve favored policy outcomes and not embracing a neutral application of economic theory and analysis (or worse yet, ignoring or discounting economic analysis), they risk losing the stability and longstanding support that the Merger Guidelines have enjoyed across administrations and with the courts.

To retain the integrity of the dMGs and ensure that they will continue to be respected by the courts, it is important that the Guidelines maintain the core mission of protecting consumer and trading partner welfare. I offer the following suggestions:

First, do not give precedence of formulaic rules over economics analysis in evaluating the likely effect of proposed mergers. Years of progress in economic theory and empirical research have refined our understanding of how competition works and how it depends on firm and market factors. As noted by Dennis Carlton, University of Chicago economist and former senior official in the Justice Department, "by starting with a structural presumption, the draft Guidelines emphasize the importance of market definition and formulaic decision making. This approach deviates from the approach in the 2010 Guidelines that says let's first look at hard evidence on past mergers or natural experiments where we can see what happens when the number of firms varies." Abandoning this knowledge would increase the costs to firms proposing mergers that are beneficial or neutral, as well as the Agencies' costs in attempting to block them.

Second, drop the citations to old case law written before economics became an integral part of antitrust. The Guidelines are not a legal brief, though this draft often reads as one. They should be a framework for economic analysis, which is itself a neutral and apolitical discipline. These citations give the impression that the Agencies are ignoring and defying the more recent case law and developments in economics.

Third, do not abandon "the focus on market power that has been fundamental to all merger guidelines for several decades." The concept of market power has provided a framework to identify mergers that would likely increase prices or otherwise adversely affect consumers. It has also been used to identify mergers that would likely be harmful to workers or other suppliers due to monopsony power (increased market power on the *buyer* side), and the Agencies have successfully brought cases in the past based on these concerns. Without the concept of market power as a guiding principle in directing merger investigations, there would be less clarity about the goal of merger investigations, how they would be conducted, and under what economic principles mergers would be permitted, or challenged.

Fourth, be clearer about how the Agencies should evaluate the effect of a proposed merger on labor interests. Is the concern limited to monopsony power that would allow the merged firm to lower wages by restricting the number of workers hired? Or do the dMGs also endorse preventing mergers that, by permitting the merged firm to operate more efficiently, reduce the need for as many employees (or would replace high-wage workers with low-wage workers)?

Fifth, retain the previous guidelines' treatment of efficiencies, or cost reductions resulting from a merger. According to the 2010 Horizontal Merger Guidelines, "the Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market." In other words, the Agencies would not challenge a merger if its cost reductions would negate any possible anticompetitive effects. The dMGs practically eliminate this possibility. According to the dMGs, for merger efficiencies to be cognizable, the merging firms must prove that "within a short period of time, the benefits will improve competition in the relevant market or prevent the threat that it may be lessened." Note that "improving competition" generally means lowering prices. At the same time, the dMGs state: "efficiencies are not cognizable if they will accelerate a trend toward concentration," which is likely if the merger makes the merged firm more efficient and benefits consumers as a result. The dMGs should also recognize the well-known efficiencies (including the elimination of double marginalization) from vertical mergers, which are most definitely *not* economically equivalent to horizontal ones. The dMGs's treatment of efficiencies gives the impression that one of its goals is to prevent even mergers that could increase social welfare, if at the same time they make the merged firm's rivals worse off. That would be unfortunate.

Sixth, the dMGs should explain at greater length which mergers the Agencies would not challenge, and how firms can effectively rebut claims of likely anticompetitive effects. Many mergers in our economy are benign or beneficial, and presumably this is because robust competition will remain, entry can prevent risk of harm, or there are efficiency justifications for the merger being proposed in the first place. The mere fact that a merger *may* be anticompetitive does not by itself imply that it will be. In his comments on the dMGs, Gregory Werden says: "Unlike prior Merger Guidelines, the dMGs do not promote the rule of law by articulating self-imposed limits to the exercise of discretion. As compared with prior Guidelines, the dMGs say less about which mergers the Agencies intend to challenge and especially about which mergers they intend not to challenge." In allowing more discretion, the dMGs would give the Agencies greater freedom to make decisions that favor their own preferences, whether justified by sound economic analysis and social welfare or not.

Conclusion

In conclusion, merger guidelines have earned bipartisan acceptance across several very different administrations, due to their consistent guiding principle of promoting social welfare with the use of objective economic analysis. This has been highly beneficial to firms, courts, and more importantly, to consumers and to the economy as a whole. Some of the proposed changes in the dMGs depart from widely accepted practices and principles, and could be perceived as favoring particular policy preferences. If that is the case, a future administration with a different set of policy preferences would likely replace the dMGs with new guidelines designed to support its preferred policies, leading to wide swings in merger policy.

Revisions to the merger guidelines are appropriate and needed to account for new business practices and advances in economics. However, the Merger Guidelines should have bipartisan support and not be subject to revision with each incoming administration.