

Comments on the Draft Merger Guidelines
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The modern merger guidelines have been a striking success. It was a brilliant move by Bill Baxter in 1982 to set out, in a low-key way, how the Division under his leadership analyzed mergers—only to have the Guidelines, as they evolved, acquire extraordinary importance in litigation and, indeed, around the world. HHIs became the standard measure of concentration, and even a concept as American as “maverick” could be found in guidelines as far away as Indonesia. It is really quite remarkable that a prosecutor’s guide to the agency’s thinking came to be accepted as more important and persuasive than a good number of court opinions.

Consider, as just one example, the (rare) recent government litigated merger win, *United States v. Bertelsmann SE & Co.*, 2022 WL 16949715 (D.D.C. 2022). The opinion cites the 2010 Horizontal Merger Guidelines 31 times and declares that “[a]lthough the Merger Guidelines are not binding, courts have consistently looked to them for guidance in merger cases.” *Id.* at n.16 (citation omitted). The Justice Department invited the Court’s reliance by citing the Guidelines 23 times in its Pre-Trial Brief and explaining: “The D.C. Circuit considers the *Merger Guidelines*, while not binding, ‘a helpful tool, in view of the many years of thoughtful analysis they represent, for analyzing proposed mergers.’” United States’ Pre-Trial Brief at 3 n.4 (July 15, 2022).

The critical question at this point is whether that unique status of the Merger Guidelines will be preserved after this revision. Nothing guarantees that this will happen. Indeed, if an agency litigates a merger and relies on revised guidelines, defense lawyers will extend considerable ingenuity to try to persuade the court that it should give no more weight to these guidelines than to an agency amicus brief.

So how can the agencies maximize the chances that courts will continue to accord Merger Guidelines unique status? By, among other things, preserving the format that has been followed since 1982. In particular: (1) focus the Guidelines on how the agencies analyze mergers; (2) delete the “overview’s” setting out guidelines in summary form; (3) have one set of Merger Guidelines, not 13 Guidelines; (4) remove citations; and (5) integrate the appendices into the main document.

1. Focus the Guidelines on how the agencies analyze mergers.

The 1982 Guidelines introduced dramatic changes in how the antitrust community analyzed mergers. See, e.g. 71 Calif. L. Rev. No. 2 (1983) (symposium issue). To note just one example, the Guidelines relied heavily on HHIs, which were totally unused by courts, meaning that if litigants relied on HHI’s they would have to accept the thresholds

set out in the Guidelines. Stephen Calkins, *The New Merger Guidelines and the Herfindahl-Hirschman Index*, 71 Calif. L. Rev. 402 (1983). Litigants *did* use HHIs, and courts did look to the Guidelines' thresholds. Really quite amazing.

The Antitrust Division accomplished this by proceeding with somewhat understated modesty. Notably absent were claims about dramatically changing merger law. The Guidelines were not issued to change the law, but merely "to describe the general principles and specific standards normally used by the Department [i]n analyzing mergers." See 1982 [and 1984] Merger guidelines at 1 ("By stating its policy as simply and clearly as possible, the Department hopes to reduce the uncertainty associated with enforcement of the antitrust laws in this area."). The 1992 Guidelines proceeded with comparable modesty: "These Guidelines outline the present enforcement policy of the [agencies] They describe the analytical framework and specific standards normally used by the Agency in analyzing mergers. By stating its policy as simply and clearly as possible, the Agency hopes to reduce the uncertainty associated with enforcement of the antitrust laws in this area." 1992 Guidelines at 1. (The 2010 Guidelines are very similar although adding that they "may also assist the courts.")

The antitrust community accepted the guidelines in this spirit. In the California Law Review Guidelines symposium, Phil Areeda wrote that "these Guidelines' main function, and a useful one, is to present the current administration's mode of merger analysis." Areeda, *Justice's Merger Guidelines: The General Theory*, 71 Calif. L. Rev. 303, 304 (1983). If, in the process of letting us know how the agencies analyzed mergers, our own thinking and that of the courts was influenced, so much the better.

The Biden antitrust agencies have made no secret of their unhappiness with current merger law and recent enforcement, so any thoughtful observer would assume that the agencies hope to use new guidelines to change the law. Indeed, I assume they want to do this. But the way to do it is to follow as closely as possible the guidelines' traditional format.

The draft guidelines depart from the traditional approach and unnecessarily weaken their position in a number of ways. As explained below it is a mistake to set out Guidelines in summary form and support them with citations. But the agencies also should review the tone of the Guidelines and various supporting statements and keep attention squarely on outlining "the present enforcement policy" and describing the agencies' "analytical framework."

The draft Guidelines say they "explain how [the agencies] identify potentially illegal mergers," but they omit the language about the purpose of the Guidelines that has long been there. Instead, the draft Guidelines' second sentence declares that "[t]hey are designed to help the public, business community, practitioners, and courts understand the factors and frameworks the Agencies consider when investigating mergers." Draft Guidelines at 1. Government officials also have occasionally departed from the traditional "this is how we analyze mergers" approach. Attorney General Garland introduced the draft by declaring, "Unchecked consolidation threatens the free and fair

markets upon which our economy is based.” (Agency press releases July 19, 2023.) The Statement of Chair Khan joined by Commissioners Slaughter and Bedoya that was issued with the draft states that it sets out “how the FTC and the DOJ *will* [not do] analyze transactions” (emphasis added).

Although much of the rollout of the draft has been professionally done, the Agencies would be best served by consistently following the traditional, modest approach of explaining how the Agencies analyze mergers.

2. Delete the “overview’s” setting out guidelines in summary form.

Two pages of “summary” guidelines, with a dozen footnotes, is a mistake.

What is someone wanting to understand the Guidelines supposed to read? Consider a new lawyer in an antitrust agency who needs to understand the Agency approach. Should they skip the summary because, after all, they need to read the real document? But what if there is tension between the summary and the real document? So they need to read both. These days, most antitrust casebooks include significant excerpts from the Guidelines. Should they skip the summary, or skip the real document, or include both? What about a judicial law clerk wanting to understand the area of law? For those who need to understand these issues, it just increases work to make them read the same material twice.

What if the summary and the real document are in tension? Any plaintiff would quote the more enforcement-strong wording, while any defendant would quote the wording more favorable to it. Saying things twice just gives lawyers more fodder for argument while increasing confusion.

The summaries are not only harmful to agency staff, who have to read additional and possibly inconsistent wording, but also show that these Guidelines are not only about setting out agency principles—they are about preaching to the press, to advocacy groups, to the general public, and to the courts. Who needs a two-page summary? Only people who are going to read only a summary. Including a summary shows that these Guidelines are significantly about changing the law and thus reduces the chances that they will succeed in changing the law.

If the agencies want to reach the general public, there are lots of opportunities. Give a speech. Make a video. Publish a layperson’s guide to the law. The FTC already publishes scores of guidance documents for consumers and business, and nothing would prevent it from publishing a document commenting on the new Merger Guidelines. But the Guidelines should be a stand-alone document that sets out material once, not twice.

3. Have one set of Merger Guidelines, not 13 Guidelines

We have always had one set of merger guidelines (or two, when there was a separate

guideline for vertical mergers). The document had to be read as a whole. Consider market definition, and increases in concentration, and unilateral effects, and coordinated effects, and ease of entry, and efficiencies, etc.

The draft Guidelines are very different because unless changed there will be not one document—the Merger Guidelines—but 14 separate numbered guidelines. This kind of change increases the chance that courts will treat the document as an amicus brief. It also invites mischief. Guidelines 1-8 and Guideline 13 declare that mergers should not be allowed to do various things, full stop, each time without analysis of ease of entry, or efficiencies, or failing firms, etc. Since defenses are allowed the Guidelines don't really mean what they say—but they should not say what they don't really mean.

Have a single set of Guidelines, not 13 Guidelines. (For that matter, what would the term “merger guidelines” mean if the draft remains unchanged? Today, the 2010 Merger Guidelines are a single document. Tomorrow, if one refers to the “merger guidelines” would one be referring to the whole document? Or to the 13 numbered “guidelines”? Or to both?)

4. Remove citations

Amicus briefs need citations since they are designed to persuade by marshaling authorities. The purpose of such briefs is to persuade the decision-maker (usually a court) or the public or both.

The Merger Guidelines were different. Even the 1968 Guidelines, whose drafters paid close attention to court opinions, refrained from citing statutes or cases. For over 50 years Merger Guidelines have described how government agencies analyze mergers by doing just that. Citations are harmful and unnecessary.

Citations are harmful because they send a loud message: this is an amicus brief and is designed to change the law. The document thus appears to be less about how the agencies analyze mergers and more about how they want courts and the public to analyze them.

Citations are also harmful because they are a source of potential ambiguity. If an agency staffer reads a guideline statement to which a case citation is appended, should the staffer read the case to learn its true holding? And what if the guidelines arguably fail to follow the case, then what controls? Or what if the case has been reversed or undermined by subsequent cases?

These are not hypothetical issues. Draft Guideline 1 invokes *Philadelphia National Bank* to set out a presumption of illegality when a merger creates a firm with over a 30% market share and “significantly increases concentration.” The Guideline operationalizes “significant increase” as a 100 point change in the HHI. But *Philadelphia Bank*, although giving us the 30% number, points to a 33% increase in the market share of the top two firms (from 44% to 59%) to show a significant increase in concentration. 374

U.S. at 364. So which is it, *Philadelphia National Bank's* 33% increase, or 100 points? Or perhaps it is the HHI increase at issue in *Philadelphia National Bank*. The two banks had assets of \$1,000,000,000 and \$750,000,000, which together resulted in a 36% share. 374 U.S. at 331. That means the merger would have combined shares of 20.6% and 15.4% (yielding 36%), with a corresponding increase in the HHI of 634. *Id.* at 364. If the agencies are relying on *Philadelphia National Bank*, perhaps that means that a presumption should require a 634 point HHI increase? My guess is that the agencies prefer tighter thresholds than were found in *Philadelphia National Bank*, but by relying so explicitly, in the document itself, on *Philadelphia National Bank* they guarantee that any defendant would litigate by interpreting the Guidelines to mean what *Philadelphia National Bank* actually held.

Citations also are unnecessary. An agency can set out government policy by simply setting it out. If an agency head wants the antitrust community to understand that a 30% market share was used because it is in *Philadelphia Bank*, give a speech. Similarly, footnote 29 about the source of the 1800/100 HHI numbers is interesting but could more effectively go in a speech. The agencies could issue a commentary about how they made various decisions, and that would be fine. But that sort of background is not needed in the Guidelines.

5. Integrate the appendices into the main document

We instinctively know that appendices are not important. Consider various definitions of "appendix," collected online Sept. 16, 2023:

American Heritage Dictionary: "A collection of supplementary material, usually at the end of a book."

Cambridge Dictionary: "a separate part at the end of a book or magazine that gives extra information."

Collins Dictionary: "An appendix to a book is extra information that is placed after the end of the main text."

Dictionary.com: "supplementary material at the end of a book, article, document, or other text, usually of an explanatory, statistical, or bibliographic a nature."

Merriam-Webster: "supplementary material usually attached at the end of a piece of writing"

Oxford Reference: "Supplement to a volume containing material that supports content in the main text. Appendices may comprise tables, lists of entities or events, charts, questionnaires, texts or translations of documents."

Wiktionary: "A text added to the end of a book or an article, containing additional information."

Again and again we are told that an appendix has “supplementary” information and gives “extra information.” Nowhere are we told that what is in an appendix is important, let alone essential. (Indeed, until recently most people assumed that the human body’s appendix was completely unnecessary.)

We know that the agencies view the Draft Guidelines’ appendices as important because in public discussion sessions agency speakers make that point again and again. With respect, thou dost protest too much. The very fact that agency speakers repeatedly insist that the appendices are important proves that they are not, or at least will not be regarded as very important by courts, commentators, and other agencies here and abroad. If something is important it belongs in the main document, not in a supplement.

(Another disadvantage of extensive appendices is that this would be a substantial departure from the traditional format and thus emphasize the differences between these guidelines and predecessor guidelines.)

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Although much about the Merger Guidelines project has been impressive, there is a substantial risk that courts will treat any new Guidelines as an amicus brief, not something special. Every potential litigant is gearing up to make this happen. It is a small miracle that the Merger Guidelines have enjoyed an incredible run with a special status, and perhaps there is no way for this run to continue. But the agencies should view the continuation of that run as of critical importance and do everything possible to make it happen. Doing so includes focusing the Guidelines on how the agencies analyze mergers, deleting the summary guidelines, having one set of Merger Guidelines rather than 13 guidelines, removing citations, and integrating the appendices into the main document.