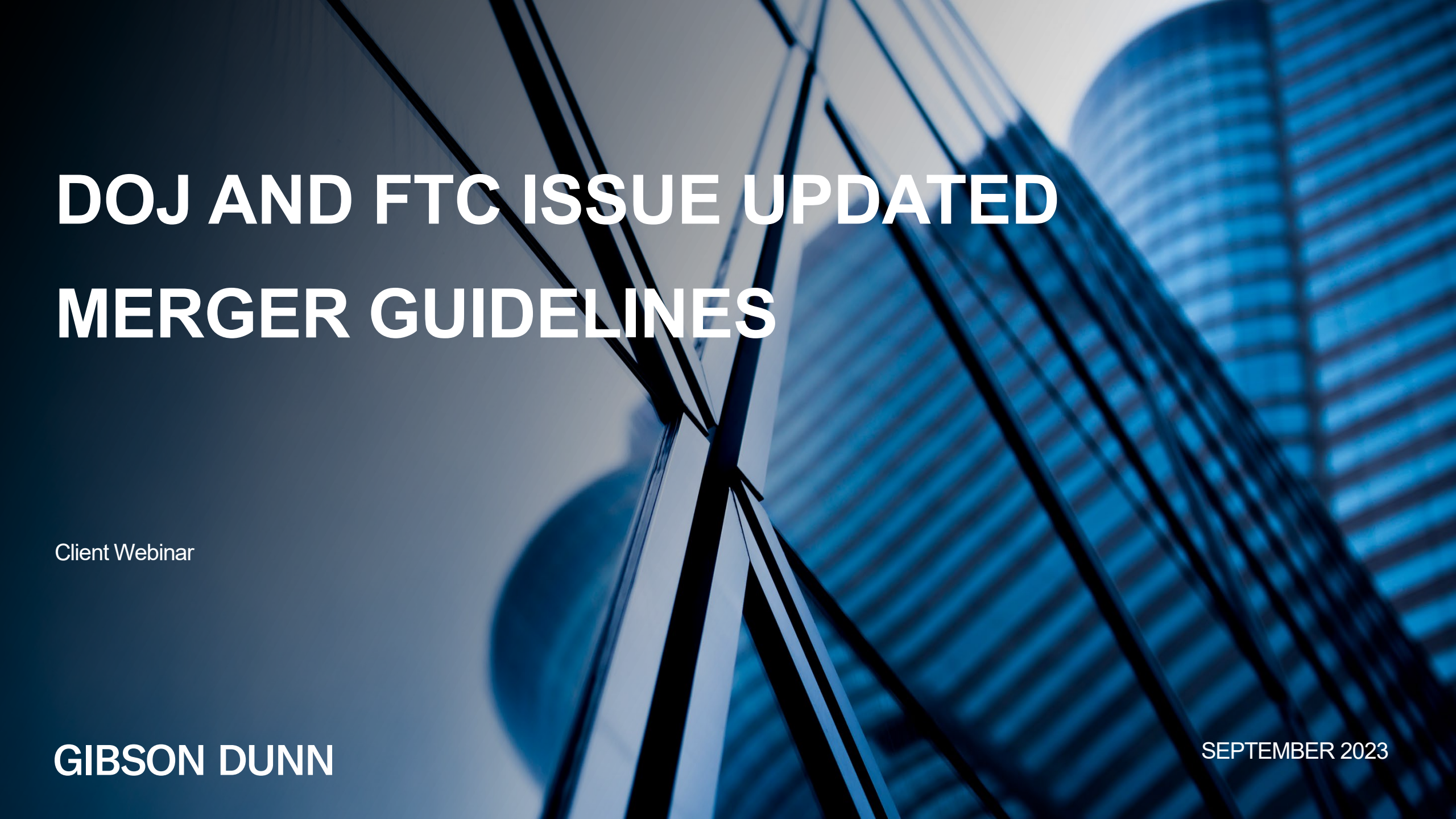

DOJ AND FTC ISSUE UPDATED MERGER GUIDELINES

Client Webinar

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Revised Merger Guidelines: Overview

On July 19, DOJ and FTC jointly released updated draft Merger Guidelines for public comment

- The Merger Guidelines describe how Agencies analyze the competitive impact of proposed transactions
- DOJ and FTC withdrew prior merger guidance in September 2021
- The revisions will not be formally effective for several months but reflect current antitrust enforcement policy and agency thinking
- The Guidelines are not binding on courts—expect courts to diverge from the Guidelines, especially when they contradict precedent

HSR Form Change: HSR Process In Brief

Hart-Scott-Rodino Act requires notification of certain transactions above a certain size ($111.4 million as of 2023)

- Notification requires completion of HSR form
- Parties must wait for the 30-day statutory waiting period to expire before closing (15 days for cash tender offers and certain bankruptcy-related transactions).
- Agencies use this period to investigate whether transactions raise competition issues
- The Merger Guidelines are the lens through which the Agencies analyze whether a transaction may harm competition

HSR Form Change: HSR Process In Brief (cont'd)

At the end of waiting period, agencies can either:

- Close their investigation
- Ask for more time through a "pull and refile" request, or
- Issue a Second Request (a very broad subpoena for documents and data)

In matters with little or no competitive overlap, DOJ and FTC may not reach out to parties during 30-day period

- Parties may then close the transaction after the 30-day period
- DOJ and FTC retain the right to investigate post-closing, though this is rare

Revised Merger Guidelines: Summary of Changes

The revisions reflect significant departure from prior agency thinking on merger analysis:

- Lower market share and concentration thresholds necessary to trigger the structural presumption that a transaction is anticompetitive
- Movement away from market definition as starting point to an effects-based approach
- Close scrutiny of transactions that may eliminate potential competition
- New framework for analyzing transactions involving platforms (companies that bring together two or more groups who benefit from each others' participation)

Revised Merger Guidelines: Summary of Changes (cont'd)

- Analyzing combinations that may potentially harm rivals of the merging parties in non-horizontal or non-vertical contexts
- Attention to serial "roll-up" or "bolt-on" acquisitions
- Increased scrutiny of the effect of transactions on competition for workers or labor markets
- Framework for analyzing whether transactions create or ehance monopsony effects (i.e. buyer power)

Key Change: Lower market share and concentration thresholds

- The draft Guidelines adopted substantially lower HHI thresholds, a tool the Agencies use to calculate industry concentration
  - **Prior Guidance**: 1500-2500 = "concentrated" and >2500 is "highly concentrated"
  - **New Guidance**: 1000-1800 = "concentrated" and >1800 is "highly concentrated"
- Under established precedent, mergers that increase concentration in "highly concentrated" markets are presumptively illegal
- New HHI thresholds would trigger this presumption at a substantially lower level of concentration than challenges in the past 20 years
  - No modern court has blocked a merger with an HHI less than 2739
  - Agencies rarely challenge mergers with HHIs less than 3000

Recent Merger Challenges with HHIs <3000	Post-HHI	HHI-Delta
Evanston (2004)	2739	384
Hackensack (2020)	2835	841
UPM-Kemmene (2003)	2990	190
Anthem (2016)	3000	537

Key Change: Movement away from market definition as starting point to an effects-based approach

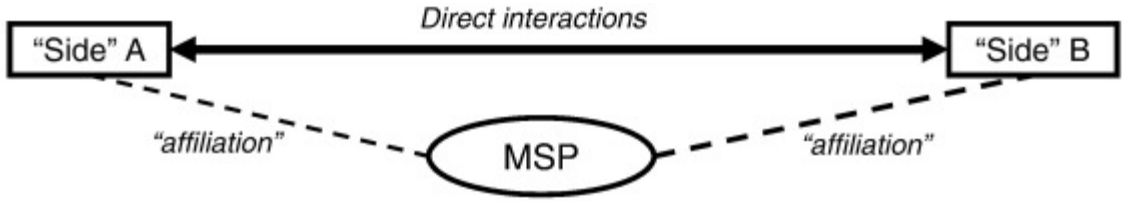
- The draft Guidelines prioritize identifying broader potential market effects of the transaction over defining relevant markets as the starting point for then analyzing effects to consumers.
  - **Prior Guidelines:** Identifying effects on consumers through economic analysis
  - **New Guidelines:** Identifying effects on consumers, competitors, and workers through economic or subjective evidence from market participants
- Market definition has historically been the critical starting point
  - In practice, market definition is often decisive because effects that fall outside of the relevant market are attenuated and difficult to compute
- Evidence the agencies may consider at more weight include:
  - Subjective beliefs from competitors about the post-transaction landscape
  - Prior industry coordination and prior transactions

Key Change: Close scrutiny of transactions that may eliminate potential competition

- The draft Guidelines endorse an expansive view of potential competition, signaling broader possible enforcement
  - Agencies adopt both actual potential competition and perceived potential competition theories as grounds for challenge.
  - Circuits have adopted divergent frameworks for analyzing potential competition; the draft Guidelines incorporate the most plaintiff-friendly standard
  - Agencies now discount pro-competitive efficiencies such that the merger will enhance product offerings by empowering the nascent firm with superior resources
- The Agencies see potential competition challenges as a tool for preventing large firms from acquiring nascent competitors, especially in tech, healthcare, and transactions by private equity buyers.
- Courts recognize both potential competition theories of harm, but historically, potential competition challenges have been rare and mostly unsuccessful

Key Change: Platform Competition

- The agencies have articulated a new framework for analyzing competitive effects in markets involving platforms in the Guidelines
  - **Platforms:** Businesses that provide different products or services to two or more "sides" who may benefit from each other's presence
  - **Examples**: payment processors, operating systems, social media, marketplaces



- The Agencies will investigate whether mergers involving platforms reduce competition by:
  - Eliminating head-to-head competition between rival platforms
  - Reducing users' ability to switch to rival platforms
  - Limiting rival platforms' access to one or more sides
  - Foreclosing rivals' access to a key input for platform services
  - Allowing a provider to self-preference when competing on its own platform

Key Change: Non-Horizontal Mergers

- The Revised Guidelines return to frameworks for analyzing vertical and conglomerate mergers last used in the 1970s
  - **Prior Guidelines:** Absent foreclosure or anticompetitive information sharing, vertical and conglomerate mergers rarely harm (and often help) consumers
  - **New Guidelines:** Non-horizontal mergers harm competition by creating large firms and concentrated markets in which smaller firms cannot compete
- Under the Revised Guidelines, Agencies will shift greater focus to industry concentration and harm to competitors instead of consumers
  - Mergers that increase a post-merger firms' ability or incentive to foreclose its rival's access to a key input are illegal, regardless of the effect on consumers
  - Vertical mergers involving firms with >50% of an related market are presumed illegal, especially in concentrated and vertically integrated markets
  - Acquisition of a leading product is unlawful if the acquisition preserves or increases the acquired product's position
  - Any merger that would increase or accelerate concentration in a market already "trend[ing] towards concentration" is unlawful under the Guidelines

Key Change: Greater scrutiny of serial "roll-up" and "bolt-on" acquisitions

- The draft Guidelines adopt a new approach for analyzing multiple acquisitions by the same company
  - **Prior Guidelines:** Mergers are analyzed independent of prior acquisitions, with analysis focusing on the instant transaction's effect on future competition
  - **New Guidelines:** If the acquirer has a "pattern or strategy of multiple small acquisitions," the Agencies will evaluate the acquisitions' cumulative effect
- This scrutiny is part of the Agencies' broader focus on preventing "trends towards concentration" and "entrenchment", looking at deals that may:
  - Increase barriers to entry
  - Increase switching costs
  - Foreclose inputs to rivals
  - Deprive rivals of scale
  - Deprive rivals of network effects
  - Eliminate nascent competitors
- It remains unclear what thresholds the agencies may use to trigger investigations or challenge in the courts under this category

Key Change: Focus on competition for workers and labor markets

- The draft Guidelines expand the Agencies' focus on mergers' competitive effects in labor markets
  - **Prior Guidelines:** Agencies focused on agreements that explicitly increase "buyer power" of labor (ex. no-poach agreements alongside JVs)
  - **New Guidelines:** All mergers between firms that hire from the same pool of employees may be evaluated for harm to workers
- Under the revisions, harm to labor market competition is sufficient to block a merger even with a lack of competitive harm in the underlying product market where there is overlap.
- Expect the Agencies to:
  - Define narrow or ends-driven labor markets
  - Evaluate competition in labor markets based on employee characteristics, not the firms' products
  - Treat labor markets as independent markets not subject to balancing test against pro-competitive efficiencies elsewhere

Key Change: Revival of Standalone FTC Act Section 5 Enforcement

- The draft Guidelines continue the current administration's vision of expanded authority following recision of the 2015 Statement of Enforcement Principles:
  - **Prior Guidelines:** FTC will use Section 5 primarily to evaluate incipient harms under Sherman or Clayton Act, not as standalone basis for challenge
  - **New Guidelines:** The FTC may now evaluate expanded and undefined potential harms not covered by the Sherman and Clayton Acts
- Expect the Agencies to:
  - Use Section 5 as a catch-all statutory authority to trigger investigations into more areas, such as non-competes, pricing discrimination
  - Craft new theories of harm that seek to evade Sherman Act/Clayton Act case precedent by relying on Section 5 alternatively

Revised Merger Guidelines: Potential Implications

- **Broader Agency Power:** Guidelines support trend of broader and more flexible enforcement powers, with fewer clear guidelines on what will actually result in enforcement actions.
- **Increased Procedural Barriers:** By increasing uncertainty in the process, the Guidelines further Agencies' stated objective to drive down filings and promote deal abandonment
- **Burdensome Investigations:** Guidelines signal deeper and broader investigations than before, such as labor and prior transactions
- **Less Judicial Deference:** Guidelines' overreach may result in less favorable treatment by courts long-term.

Net effect: Less deal certainty and increased procedural delay

Revised Merger Guidelines: Responses

- **Prepare for antitrust review early**:
  - Involve counsel to ensure transaction and strategy documents are not ambiguous or subject to misinterpretation
  - Build investigation time in to termination outside dates
  - Consider enforcement environment when apportioning risk in agreements
- **Include antitrust team early to get head-start on process**
  - Develop strong advocacy and potential remedies to "litigate the fix" or discourage lawsuits
- **Prepare to litigate in challenging cases**

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