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NOTE

Antitrust's North Star: The Continued and Nameless Judicial Deference Toward the Merger Guidelines

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Abstract. In December 2023, the Department of Justice and the Federal Trade Commission issued the eighth iteration of the Merger Guidelines—guidance documents that outline the antitrust agencies' priorities when reviewing a merger or acquisition. These documents are not legally binding. And yet over the past fifty years, courts have heavily relied upon the Guidelines to decide antitrust cases, citing them in equal breath with statutes and case law. This is a deference that has unfolded quietly. Courts piling on citations to the Guidelines have not articulated exactly what kind of deference these guidance documents are receiving. Nor have they explained why this deference is happening at all.

This Note seeks to shine a light on how and why the Merger Guidelines climbed to such an incredibly prominent position in modern antitrust jurisprudence. First, it charts the history of the Guidelines' birth and development from 1968 to 2023, highlighting how the Guidelines and the case law gradually came into conversation with one another. It then explores how the antitrust agencies came to voluntarily adopt notice-and-comment procedures that mimic the Administrative Procedure Act's requirements, despite having no obligation to do so. This Note argues that the agencies have sought to cloak the Guidelines in greater procedure in order to bolster their popular legitimacy and temper judicial skepticism. After categorizing the specific language judges have used to refer to the Guidelines in merger decisions from December 2000 to February 2025, this Note concludes that courts have generally failed to label their deference. From this silence, the Note predicts courts will continue to rely on the Guidelines and argues they should apply *Skidmore* deference when doing so. This Note closes with an exploration of whether the Supreme Court's doctrinal tidal waves in deference and finality might uproot the thus far nameless deference. The first year of cases issued under the 2023 Guidelines reveals that

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the Guidelines have largely remained persuasive to the courts. Antitrust's north star continues to light the way.

Table of Contents

Introduction 1192

I. Overview of the Merger Guidelines from 1968 to 2023 1194

II. Public Participation, Procedures, and the Guidelines 1205
- A. The Early Years: Closed Doors Are Pressured to Open 1205
- B. The 1990s to 2000s: The Agencies Voluntarily Solicit Comments 1207
- C. 2023 Guidelines: Participation Skyrockets 1210
- D. Explaining the Rise of Public Participation in the Guidelines 1214

III. Judicial Deference and the Guidelines 1218
- A. Categorizing the "Deference" 1222
  - 1. "Persuasive" 1225
  - 2. "Helpful"/"useful" 1226
  - 3. "Looked to"/"relied on"/"guidance" 1227
  - 4. No label 1228
- B. Explaining the "Deference" 1229
- C. Explaining the Silence 1232

IV. End of Deference? 1233
- A. A Brave New Anti-Agency World 1234
- B. The Early Cases and Their Prognosis for the 2023 Guidelines 1238

Conclusion 1243

Appendix: Merger Challenges, December 2000 to February 2025 1245

Introduction

In December 2020, the Federal Trade Commission (FTC) filed a lawsuit in the District of New Jersey seeking to enjoin an impending merger.[1] The merging parties were Englewood Healthcare Foundation, a local hospital, and Hackensack Meridian Health, New Jersey's largest healthcare system. The district court granted the preliminary injunction, and the Third Circuit ultimately affirmed.[2] But before reviewing any case law, statute, or canon of statutory interpretation, the Third Circuit opened with a simple, matter-of-fact statement: "We begin our analysis with the Merger Guidelines."[3] And indeed, the Merger Guidelines were mentioned twenty times throughout the opinion. A common judicial refrain goes, "We begin, as always, with the text."[4] Only here, the text happens to be a *nonlegislative* rule.

The Merger Guidelines are guidance documents that are periodically reissued by the Department of Justice (DOJ) and the FTC (together, "the Agencies"). According to the Agencies, these documents are intended to inform the public about current enforcement practices and shed light on the Agencies' procedures for investigating whether a certain merger or acquisition violates the antitrust laws.[5] Each version has superseded the last.

As with the Third Circuit above, courts have heavily relied upon the Guidelines[6] to decide merger cases for over fifty years. But despite the Guidelines' pivotal role in shaping merger law, courts have not articulated exactly how much deference these guidance documents are receiving—or why they receive any deference at all. This lack of clarity has become even more salient in light of two recent developments. First, in December 2023, the Agencies issued the latest, highly anticipated version of the Guidelines. While the 2023 Guidelines have received immense acclaim, they have also been subject to great criticism, with many scholars and regulated entities suggesting

1. Complaint for Temporary Restraining Order & Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act, FTC v. Hackensack Meridian Health, Inc., No. 20-cv-18140, 2021 WL 4145062 (D.N.J. Aug. 4, 2021), ECF No. 14.

2. FTC v. Hackensack Meridian Health, Inc., 30 F.4th 160, 164 (3d Cir. 2022).

3. *Id.* at 167. This was the preamble to the court's discussion of whether a showing of price discrimination is required in determining a patient-specific geographic market.

4. *See, e.g.*, Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193, 197 (2007); *see also* Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 205 (3d Cir. 1992) (stating, in a monopolization case, "we begin with the text of the Sherman Act").

5. *See, e.g.*, DOJ, MERGER GUIDELINES (1968) [hereinafter 1968 GUIDELINES], https://perma.cc/YMZ8-Y784.

6. Throughout this Note, when I refer to "the Guidelines" or "the Merger Guidelines," I am referring to the Guidelines generally as opposed to a particular version. A particular version will be prefaced by its year; for example, "the 2023 Guidelines."

that they will lose any persuasive value to courts. Underlying these concerns is the second development: the Supreme Court's newfound scorn toward agency action.

This Note sets out to explore how the Guidelines came to occupy such a revered role in merger decisions and whether this reverence will continue. Part I outlines the general history of the Guidelines, from their inception in the 1960s to their latest iteration in 2023. It describes substantive changes to the Guidelines and situates each iteration within its political context to explain why certain versions were perceived as more relaxed or more stringent. Several observations about the interplay between courts and the Agencies emerge from this comparative approach. Part II explores how the Agencies' procedures for drafting new iterations of the Guidelines have evolved to both encourage greater public participation and to incorporate the public's feedback in the final product. After tracking this phenomenon, Part II suggests that the Agencies gradually adopted notice-and-comment procedures that mimic the Administrative Procedure Act's (APA) requirements for rulemaking[7] in order to dial back congressional (and later, judicial) pressure on the Guidelines.

Drawing on this background, Part III surveys merger cases from December 2000 to February 2025 and observes that, with one recent exception, courts have deferred to the Guidelines for decades without articulating a clear level of deference. To that end, this Note provides a first-of-its-kind analysis of the specific language judges have used over the years to refer to the Guidelines. It groups courts' characterizations of the Guidelines into four buckets: (1) "persuasive," (2) "useful"/"helpful," (3) "looked to"/"relied on"/"guidance," and (4) no label at all. The analysis suggests that courts' reliance on the Guidelines is the product of a deficit of case law, judges' unfamiliarity with the complexities of antitrust, and the uniquely symbiotic relationship between the Guidelines and case law.

Finally, Part IV contemplates whether courts will continue to rely on the new 2023 Guidelines. Much ink has been spilled on what recent shifts in administrative law on finality, the death of *Chevron* deference, and the birth of the major questions doctrine might spell for the future of agency action.[8] And over the years, many antitrust scholars have dissected the substantive merit of

7. 5 U.S.C. § 553.

8. *See generally, e.g.*, William Funk, *Final Agency Action After* Hawkes, 11 N.Y.U. J.L. & LIBERTY 285 (2017) (discussing finality); Gary Lawson, *"Then What?": A Framework for Life Without* Chevron, 60 WAKE FOREST L. REV. 57 (2025) (discussing deference); Lisa Schultz Bressman, *Lower Courts After* Loper Bright, 31 GEO. MASON L. REV. 499 (2024) (same); Austin Piatt & Damonta D. Morgan, Essay, *The Three Major Questions Doctrines*, 2024 WIS. L. REV. FORWARD 19 (discussing the major questions doctrine).

some iteration of the Guidelines,[9] often to the end of arguing that a particular version will or will not be adopted by courts.[10] But to date, no scholarship has meaningfully explored the intersection of these two questions.[11] That is, no scholarship has specifically considered what effect these recent shifts in administrative law may have on the persuasive weight of the Guidelines—some of the most economically significant guidance documents of the modern era.[12] This Note bridges that gap, ultimately concluding that, despite concern from antitrust commentators, courts are unlikely to—and *should* not—turn away from the Guidelines.

I. Overview of the Merger Guidelines from 1968 to 2023

The DOJ issued the first Guidelines in 1968 during the Johnson Administration.[13] The express purpose of the document was "to acquaint the business community, the legal profession, and other interested groups and individuals with the standards currently being applied by the [DOJ] in determining whether to challenge" horizontal, vertical, and conglomerate mergers.[14] These first Guidelines, overseen by Assistant Attorney General (AAG) Donald F. Turner, were broadly consistent with existing Supreme Court jurisprudence.[15] From the seminal case *Brown Shoe Co. v. United States* they adopted the concept that a market has both product and geographic

9. *See generally, e.g.*, Lawrence A. Sullivan, *The New Merger Guidelines: An Afterword*, 71 CALIF. L. REV. 632 (1983) (criticizing and summarizing scholarly commentary about the 1982 Guidelines); Dennis W. Carlton, *The 2023 Merger Guidelines: A Critical Assessment*, 65 REV. INDUS. ORG. 129 (2024) (criticizing the 2023 Guidelines).

10. *See generally, e.g.*, Judd E. Stone & Joshua D. Wright, *The Sound of One Hand Clapping: The 2010 Merger Guidelines and the Challenge of Judicial Adoption*, 39 REV. INDUS. ORG. 145 (2011) (arguing the 2010 Guidelines will not be relied upon by courts).

11. Richard J. Pierce, Jr.'s working paper *Modern Merger Law: Dante's Inferno Revisited* observes in passing that the Supreme Court's newfound willingness to view guidance documents as final documents reviewable for substance suggests that the 2023 Merger Guidelines might be subject to immediate, preapplication review, but it does not explore this thesis in depth. *See* Richard J. Pierce, Jr., *Modern Merger Law: Dante's Inferno Revisited* (Geo. Wash. L. Fac. Publ'ns & Other Works, Working Paper No. 1660, 2023), https://perma.cc/BF37-HTHP.

12. *See infra* notes 180-85 and accompanying text (indicating that the Guidelines qualify as "significant" guidance given their annual economic effect exceeds $100 million). Consider that the Merger Guidelines are not industry specific; that is, they apply to any merger or acquisition in a given year that meets the general criteria. *See infra* Part I (discussing the substantive framework of the Guidelines).

13. 1968 GUIDELINES, *supra* note 5.

14. *Id.* § 1.

15. *See* Donald I. Baker, *Donald Turner's Merger Guidelines as an Antitrust Watershed*, 53 REV. INDUS. ORG. 435, 438-39 (2018).

dimensions.[16] From *United States v. Philadelphia National Bank* they adopted the idea of a strong market share presumption: Where a market is already highly concentrated—that is, where relatively few firms dominate sales in a market—mergers that significantly increase that already high concentration are presumptively illegal.[17]

But the DOJ radically departed from the courts in actually quantifying what level of concentration would be challenged. The 1968 Guidelines defined a "highly concentrated" market as one in which the combined market share of the top four firms, also known as the CR4 combination, amounts to at least 75%.[18] Mergers would be blocked, for example, if the CR4 were above 75% and the two merging firms each had a market share above 4%—in other words, a combined share of 8% or more.[19] Notably, in a prior case, *United States v. Von's Grocery Co.*, the Supreme Court enjoined a merger between two retailers with a combined market share of just 7.5%.[20] And before that, in *Brown Shoe*, the Court stopped a merger that yielded an even lower market share of 7.2%.[21] The upshot is that the Guidelines adopted a slightly more relaxed standard than the case law.

AAG Turner's willingness to give up enforcement ground laid by the Court reportedly "did not sit well" with career staff.[22] In fact, many opposed issuing guidelines at all, fearing they "gave away too much and unduly tied the hands of the division in enforcing the law."[23] One scholar has attributed the Guidelines' concessions to AAG Turner's (more industry-friendly) view that conglomerate mergers were not illegal.[24] Others have pointed to the political context that brought AAG Turner to Washington: He was appointed because Attorney General Robert Kennedy had grown frustrated at being "bombarded" with complaints from the business community about the unpredictability of

16. *Compare* Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962), *with* 1968 GUIDELINES, *supra* note 5, § 3. As the 1968 Guidelines defined it, "product dimension" is the idea that the scope of a market can be defined by whether or not a specific product is reasonably interchangeable with other products. "Geographic dimension" is the idea that the scope of a market can be defined by the section of the country where a product has significant sales. 1968 GUIDELINES, *supra* note 5, § 3.

17. *Compare* United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963), *with* 1968 GUIDELINES, *supra* note 5, § I.4.

18. 1968 GUIDELINES, *supra* note 5, § I.5.

19. *Id.*

20. 384 U.S. 270, 272, 279 (1966).

21. 370 U.S. at 345-46.

22. DAVID M. WELBORN, REGULATION IN THE WHITE HOUSE: THE JOHNSON PRESIDENCY 169 (1993).

23. *Id.*

24. *See id.* at 168-69.

merger enforcement.[25] In fact, an earlier draft of the Guidelines, written by AAG Turner and then-Special Economic Assistant Stephen Breyer prior to the *Von's Grocery* victory, had proposed even higher (i.e., more merger-friendly) market share thresholds.[26] The FTC, for its part, did not join the 1968 Guidelines.[27]

The DOJ reissued the Guidelines in 1982, under the Reagan Administration, with extensive revisions.[28] Compared to its predecessor, the second version departed substantially from existing law. Most notably, it introduced a new market concentration measurement for horizontal mergers: the Herfindahl-Hirschman Index (HHI).[29] Markets with an HHI below 1,000 would be considered "unconcentrated," while markets with an HHI from 1,000 to 1,800 and above 1,800 would be considered "moderately concentrated" and "highly concentrated," respectively.[30] To determine whether to challenge a

25. Baker, *supra* note 15, at 436. In his 1967 concurrence in *FTC v. Procter & Gamble Co.*, Justice Harlan criticized the majority for its failure to "formulat[e] . . . standards for the application of § 7 [of the Clayton Act] to mergers" that would "allow the responsible agencies to give proper consideration to such mergers and allow businessmen to plan their actions with a fair degree of certainty." 386 U.S. 568, 583, 592 (1967) (Harlan, J., concurring). Given the first Guidelines were issued just one year later, it's certainly possible that the Johnson Administration heard Justice Harlan's cry. *See supra* text accompanying notes 13-14.

26. Baker, *supra* note 15, at 440-41. Breyer has suggested that the DOJ ultimately landed on 8% because of pressure from Attorney General Ramsey Clark not to concede too much ground post-*Von's Grocery*. *Id.*

27. The DOJ Antitrust Division and the FTC both have broad jurisdiction over antitrust matters, but over time each agency has developed expertise in particular industries and markets. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105790, ANTITRUST: DOJ AND FTC JURISDICTIONS OVERLAP, BUT CONFLICTS ARE INFREQUENT 6-7 (2023). Notwithstanding this overlap, conflicts over which agency will investigate a transaction are rare and resolved through an established clearance process. *Id.* at 7-12. One explanation for why the FTC did not initially join the Guidelines is that the FTC had already issued its own industry-specific guidance statements in 1967 (for the cement, food distribution, grocery, and textile-mill-products industries) and did not see a need to join the DOJ's broader, less-applicable statements. *See* Thomas M. Kerr, *A Quest for Some Certainty: Guideline (1968) and Task Force (1969) Approaches to Merger Law*, 8 DUQ. L. REV. 95, 109-10 (1969) (describing the FTC's 1960s guidance documents). Indeed, two years before the FTC issued its statements, Commissioner Elman posited that "[t]o be most useful and meaningful, merger enforcement guidelines must be specific, concrete, and related to particular markets and industries. If they merely indicate in a general way areas of concern to the prosecuting agency, individual businessmen will still be in the dark." Philip Elman, *The Need for Certainty and Predictability in the Application of the Merger Law*, 40 N.Y.U. L. REV. 613, 620 (1965).

28. DOJ, MERGER GUIDELINES (1982) [hereinafter 1982 GUIDELINES], https://perma.cc/5B3F-CG76.

29. *See id.* § III.A.

30. *Id.* HHI is calculated by identifying all the firms included in a given market, squaring each of their individual market shares, and summing the values. For instance, a market

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merger, the DOJ would compare the pre- and post-merger HHIs.[31] The 1982 version also introduced the hypothetical monopolist test for defining the scope of a relevant market.[32] Under this test, the DOJ would hypothesize a "small but significant and non-transitory increase in price" (SSNIP) and ask how many buyers would be likely to shift to other products within one year, in light of the price increase.[33] At "first approximation," the DOJ would hypothesize a 5% increase.[34] The FTC did not join the 1982 Guidelines either, but issued a similar policy document on the same day, the *Statement of Federal Trade Commission Concerning Horizontal Mergers*, which noted that the FTC would give "considerable weight" to the Guidelines.[35]

Overall, the 1982 version is seen to have greatly relaxed enforcement standards.[36] This was in large part due to the Reagan Administration's view that "government was the problem and not the solution," and that mergers were largely beneficial.[37] Former AAG Turner commended the revisions upon reflection that the 1968 version had been "too severe" when it came to horizontal mergers.[38] Many, however, objected that the 1982 version retreated too much. As one commentator described it, "practically every merger found illegal by the Supreme Court since 1960 would not even be challenged [under the new Guidelines] . . . . The result has been to unleash a new 'merger mania.'"[39] Indeed, very few investigations were opened or mergers challenged

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of four firms, each with a 25% share, would have an HHI of $25^2 + 25^2 + 25^2 + 25^2 = 2500$. If two of these firms merged, the post-merger HHI would be $50^2 + 25^2 + 25^2 = 3750$. *See id.*

31. *Id.* § III.A.1.

32. *Id.* § II.A.

33. *Id.*

34. *Id.*

35. FTC, STATEMENT OF FEDERAL TRADE COMMISSION CONCERNING HORIZONTAL MERGERS § I (1982), https://perma.cc/RTG8-59LB.

36. *See, e.g.*, DOJ, Statement Accompanying Release of Revised Merger Guidelines (June 14, 1984) [hereinafter Statement Accompanying 1984 Guidelines] ("The 1982 Guidelines recognized that most mergers do not threaten competition and that many are in fact procompetitive and benefit consumers."), *reprinted in* 49 Fed. Reg. 26824 (June 29, 1984).

37. *See* Robert Pitofsky, *Introduction: Setting the Stage*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 3, 5 (Robert Pitofsky ed., 2008).

38. Donald F. Turner, *Observations on the New Merger Guidelines and the 1968 Merger Guidelines*, 51 ANTITRUST L.J. 307, 307 (1982); *cf. supra* text accompanying note 24 (explaining how Turner's merger-friendly views affected the 1968 Guidelines).

39. Willard F. Mueller, *Antitrust in the Reagan Administration*, 9 REVUE FRANÇAISE D'ÉTUDES AMERICAINES 427, 429 (1984). Others shared this view. *See, e.g.*, Joseph P. Bauer, *Government Enforcement Policy of Section 7 of the Clayton Act: Carte Blanche for Conglomerate Mergers?*, 71 CALIF. L. REV. 348, 362-63 (1983); Walter Adams & James W.

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during the Reagan years.[40] With all these changes, the 1982 Guidelines were thirty-one pages long—fourteen pages longer than their predecessor.[41] While the 1982 version dropped the introductory language about acquainting the business community, it still noted, "the Department hopes to reduce the uncertainty associated with enforcement of the antitrust laws in [mergers and acquisitions]" by stating enforcement priorities "as simply and clearly as possible."[42]

Just two short years later, the DOJ issued the 1984 Guidelines.[43] The 1984 version did not substantially depart from the previous one; it maintained the same HHI levels and the hypothetical monopolist test, for instance.[44] But it did add some clarifications,[45] on account of the DOJ's experience that some of the 1982 Guidelines' provisions "either [were] ambiguous or ha[d] been interpreted by observers in ways that [were] not fully consistent with the Department's actual policy."[46] In line with the dominant Chicago School of Economics, the 1984 version included a more robust discussion on the role of efficiencies,

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Brock, *Reaganomics and the Transmogrification of the Merger Policy*, 33 ANTITRUST BULL. 309, 309-10 (1988).

40. *See* F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 191 (3d ed. 1990) (describing a 50% drop in the average number of annual merger challenges from the period between 1960-1980 as compared to 1981-1984); Jonathan B. Baker & Robert Pitofsky, *A Turning Point in Merger Enforcement*: Federal Trade Commission v. Staples, *in* ANTITRUST STORIES 311, 315 & n.10 (Eleanor M. Fox & Daniel A. Crane eds., 2007) (observing that "merger enforcement came close to disappearing" in the Reagan years). The Reagan Administration also voluntarily dismissed many major monopoly cases (such as the case against IBM) and settled others on highly favorable terms to the firm (such as the case against AT&T) that had carried over from prior administrations. Marc Allen Eisner & Kenneth J. Meier, *Presidential Control Versus Bureaucratic Power: Explaining the Reagan Revolution in Antitrust*, 34 AM. J. POL. SCI. 269, 274 (1990).

41. *Compare* 1968 GUIDELINES, *supra* note 5, *with* 1982 GUIDELINES, *supra* note 28.

42. 1982 GUIDELINES, *supra* note 28, § I.

43. DOJ, MERGER GUIDELINES (1984) [hereinafter 1984 GUIDELINES], https://perma.cc/J7RK-4PK4.

44. *Id.* §§ 2.11, 3.1.

45. Some commentators have observed that the 1984 Guidelines went beyond merely clarifying the 1982 Guidelines to introduce an even more relaxed approach to mergers. *See, e.g.*, Richard A. Miller, *Notes on the 1984 Merger Guidelines: Clarification of the Policy or Repeal of the Celler-Kefauver Act?*, 29 ANTITRUST BULL. 653, 661 (1984); John Cirace, *The Horizontal Merger Guidelines of the Department of Justice and the National Association of Attorneys General Compared in the Context of Recent Cases and Consent Decrees*, 33 VILL. L. REV. 281, 284 n.16 (1988). For example, while the 1982 Guidelines said the DOJ would be "unlikely" to challenge a merger with a post-merger HHI below 1,000, the 1984 version took a firmer line and declared that "the Department *will not* challenge" such mergers. Cirace, *supra*, at 284 n.16 (emphasis added) (first quoting 1982 GUIDELINES, *supra* note 28, § III.A.1.a; and then quoting 1984 GUIDELINES, *supra* note 43, § 3.11.a).

46. Statement Accompanying 1984 Guidelines, *supra* note 36.

noting that the DOJ would consider cognizable efficiencies such as economies of scale, better integration of production facilities, plant specialization, and lower transportation costs in deciding whether to challenge a merger.[47] Just two decades earlier, the Supreme Court had flatly stated that "[p]ossible efficiencies cannot be used as a defense to illegality."[48] The DOJ's consideration of efficiencies in the 1984 Guidelines thus marked a great departure from then-existing case law.

Minor tweaks were made as well. The DOJ clarified, for example, that the hypothetical monopolist test may at times employ a SSNIP higher or lower than 5%, depending on the industry,[49] and listed several "other factors" that could affect the likelihood that a merger will increase market power.[50] At bottom, the 1984 Guidelines stepped back from the "rigid mathematical formulas" of their predecessor, but they did not "indicate any fundamental change in policy."[51]

In 1985, the Reagan DOJ issued the Vertical Restraints Guidelines, which addressed nonprice vertical restraints.[52] These Guidelines took a very permissive view of vertical restraints which made them highly controversial.[53] The National Association of Attorneys General (NAAG) introduced its own

47. *See* 1984 GUIDELINES, *supra* note 43, § 3.5.

48. FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967). After the 1984 Guidelines were issued, many lower courts started to discuss efficiencies more seriously. *See* FTC v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001) ("Although the Supreme Court has not sanctioned the use of the efficiencies defense in a section 7 case, the trend among lower courts is to recognize the defense." (footnote omitted) (citation omitted)).

49. 1984 GUIDELINES, *supra* note 43, § 2.11.

50. *Id.* § 3.4 (including factors such as the homogeneity or heterogeneity of the relevant product, the degree of difference between the products and locations in the market and next-best substitutes, and the ability of small sellers to increase sales).

51. Statement Accompanying 1984 Guidelines, *supra* note 36; *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1986, Hearing Before the Subcomm. on the Dep'ts of Com., Just., and State, the Judiciary, and Related Agencies of the H. Comm. on Appropriations*, 99th Cong., pt. 7, at 429 (1985) (statement of J. Paul McGrath, Assistant Att'y Gen., Antitrust Div., DOJ).

52. DOJ, VERTICAL RESTRAINTS GUIDELINES (1985), *reprinted in* 50 Fed. Reg. 6263 (Feb. 14, 1985). Vertical nonprice restraints are arrangements between firms at different levels of the distribution chain that restrict the conditions under which the firms can purchase or sell. They include territorial and customer restrictions (which restrict where and to whom firms can sell) and exclusive dealing arrangements (which require a buyer deal only with a specific seller, and vice versa). *Id.* at 6264. These Guidelines are not about mergers per se, but I have included them for their impact on the Agencies' change in public-participation procedures for the merger guidelines. *See infra* Part II.A.

53. The 1985 Guidelines were seen as lenient compared to both the predecessor Guidelines and judicial precedent. *See* Scherer & Ross, *supra* note 40, at 569.

alternative vertical restraints guidelines in defiance.[54] Meanwhile, Congress called on the DOJ to repeal the guidance: Whereas previous guidelines had been based on "existing jurisprudence and congressional intent" and therefore "given considerable weight," Congress declared, the Vertical Restraints Guidelines were "not an accurate expression of the Federal antitrust laws or of congressional intent."[55] This marked the first time Congress inserted itself into the Guidelines promulgation process. Nevertheless, the Vertical Restraints Guidelines remained in place for the remainder of the Reagan Administration and the next two Republican administrations. They would be withdrawn in 1993 under the Clinton Administration as one of AAG Anne Bingaman's first acts in office.[56]

In 1992, at the tail end of the George H.W. Bush Administration, the DOJ and FTC issued the first joint Merger Guidelines.[57] In choosing to issue the Guidelines together, the Agencies hoped to "minimize uncertainty in structuring merger transactions" and ensure that "the standards to be applied [do] not depend on which agency is analyzing a particular merger."[58]

While retaining many prior features on market definition, the 1992 Guidelines proposed dramatic changes. Most notable was the introduction of a framework for analyzing entry.[59] The Agencies stated that where the possibility of entry of new firms in a market was "timely, likely, and sufficient in its magnitude," entry would be considered "easy."[60] And where entry was easy, a merger would not be "likely to create or enhance market power."[61] The Guidelines described a three-step process for how the Agencies would define "timely," "likely," and "sufficient."[62] This version also specified circumstances under which a merger might lead to the unilateral exercise of market power

54. NAT'L ASS'N OF ATT'YS GEN., VERTICAL RESTRAINTS GUIDELINES (1985), *reprinted in* 49 ANTITRUST & TRADE REGUL. REP. 996 (1985).

55. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1986, Pub. L. No. 99-180, § 605, 99 Stat. 1136, 1170 (1985) (calling upon the DOJ to abandon the 1985 Guidelines); *see also* H.R. REP. NO. 99-399 (1985) (criticizing the 1985 Guidelines).

56. *See* Anne K. Bingaman, Assistant Att'y Gen., Antitrust Div., DOJ, Some Initial Thoughts and Actions, Address Before the Antitrust Section of the American Bar Association (Aug. 10, 1993) (announcing the recission of the 1985 Guidelines), https://perma.cc/YCK3-GPDD.

57. DOJ & FTC, MERGER GUIDELINES (1992) [hereinafter 1992 GUIDELINES], https://perma.cc/D8R2-BAJB.

58. Press Release, DOJ, Justice Department and Federal Trade Commission Issue Horizontal Merger Guidelines (Apr. 2, 1992), https://perma.cc/629M-XQZ3.

59. 1992 GUIDELINES, *supra* note 57, § 3.

60. *Id.*

61. *Id.*

62. *Id.*

(i.e., unilateral effects)[63] and articulated a five-step analytical process for determining whether to challenge a merger at the outset.[64]

The impetus for the new language on entry was likely the D.C. Circuit's 1990 decision in *United States v. Baker Hughes Inc.*[65] Writing for the panel, then-Judge Clarence Thomas criticized the government's proposed standard for entry as being "devoid of support" even in "the government's own Merger Guidelines."[66] The severe judicial pushback on the 1980s Guidelines' entry language is likely why the Agencies' released the 1992 Guidelines at all. After all, the Bush Administration waited until its final year (two years after *Baker Hughes*) to issue a new version, and not much else in substance differed from the previous one, also issued by a Republican administration. The 1992 Guidelines addressed only horizontal mergers.[67] Consequently, the 1984 Guidelines continued to govern vertical mergers (and would do so until the Agencies issued the 2020 Vertical Merger Guidelines[68]).

In 1997, under the Clinton Administration, the Agencies revised just section 4 of the Guidelines, on efficiencies.[69] As Acting AAG Joel Klein stated, while past versions touched on the potential role of efficiencies, "[t]he revisions explain more thoroughly how [the Agencies] take efficiencies into account and what information we need from the merging parties to evaluate their claims."[70] The Agencies clarified that they would only consider "merger-specific efficiencies," that is, efficiencies that are unlikely to be accomplished in the absence of either the merger or an alternative means with comparable anticompetitive effects.[71]

63. *Id.* §§ 0.1, 2.2; *see infra* note 76 (explaining unilateral effects).

64. The steps include: (1) market definition and concentration; (2) the potential adverse competitive effects of the merger; (3) entry; (4) efficiencies; and (5) likelihood of failure. 1992 GUIDELINES, *supra* note 57, § 0.2.

65. 908 F.2d 981 (D.C. Cir. 1990).

66. *Id.* at 983.

67. 1992 GUIDELINES, *supra* note 57.

68. *See infra* notes 79-82 and accompanying text.

69. *See* DOJ & FTC, MERGER GUIDELINES § 4 (1997) [hereinafter 1997 GUIDELINES], https://perma.cc/LRD4-HCFP. The economic argument for merger efficiencies is that the newly merged firm will better utilize existing resources and thereby produce a higher quality and quantity of goods at lower costs than each firm could achieve on its own. *See id.*

70. Press Release, DOJ, Justice Department and Federal Trade Commission Announce Revisions to Merger Guidelines (Apr. 8, 1997) [hereinafter April 8, 1997, Press Release], https://perma.cc/CJ3S-YQ5U.

71. 1997 GUIDELINES, *supra* note 69, § 4.

Thirteen years later, under the Obama Administration, the Agencies released the 2010 Horizontal Merger Guidelines.[72] These Guidelines retained the hypothetical monopolist test as the primary method for defining relevant markets and the use of HHI to measure market concentration.[73] Otherwise, the changes were substantial. The 2010 Guidelines stepped back from the rigid five-step approach put forth in 1992, disclaiming that the policy statement "should be read with the awareness that merger analysis does not consist of uniform application of a single methodology."[74] In other words, the 2010 Guidelines contemplated the Agencies relying in large part, or even solely, on other evidence besides the traditional market shares and concentration when analyzing a merger for harm to competition.[75] The 2010 Guidelines also introduced a robust framework for assessing "unilateral effects"[76] and expressed much greater concern about mergers that may constrain innovation.[77] Finally, they raised the thresholds for triggering a presumption under HHI for the first time since the index had been introduced.[78]

In June 2020, six months before the end of the first Trump Administration, the Agencies released an updated version of the Vertical Merger Guidelines.[79] These Guidelines took a much friendlier view of vertical mergers, recognizing that such vertical mergers often benefit consumers through the elimination of double marginalization,[80] even if they are not "invariably

72. U.S. DEP'T OF JUSTICE & FTC, HORIZONTAL MERGER GUIDELINES (2010) [hereinafter 2010 GUIDELINES], https://perma.cc/JD9N-5VCQ.

73. *Id.* §§ 4, 5.3.

74. *Id.* § 1.

75. *See id.* § 4. The Agencies suggest, for example, relying more heavily on evidence of competitive effects, such as higher prices. *Id.* ("[E]vidence that a reduction in the number of significant rivals offering a group of products causes prices for those products to rise significantly . . . . may more directly predict the competitive effects of a merger, reducing the role of inferences from market definition and market shares.").

76. Unilateral effects refer to the ability of a merged firm to raise prices on its own, without coordination with others. This contrasts with coordinated effects, the traditional focus of the merger analysis, which refers to the increased possibility of collusion among firms in the more concentrated market post-merger. *Compare id.* § 6, *with id.* § 7.

77. *Id.* § 6.4.

78. The old thresholds for "unconcentrated," moderately concentrated, and highly concentrated were below 1,000, between 1,000 and 1,800, and above 1,800, respectively. The new thresholds were below 1,500, between 1,500 and 2,500, and above 2,500. *Compare supra* notes 29-31 and accompanying text, *with* 2010 GUIDELINES, *supra* note 72, § 5.3.

79. DOJ & FTC, VERTICAL MERGER GUIDELINES (2020) [hereinafter 2020 GUIDELINES], https://perma.cc/N456-SFKB.

80. Double marginalization is what happens when multiple firms with market power in a supply chain issue markups on the same product, distorting the final price. When a downstream and an upstream firm merge, however, the merged firm supplies itself

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innocuous."[81] The 2020 Vertical Merger Guidelines emphasized that they should be read in conjunction with the 2010 Horizontal Guidelines, but offered no bright-line rule on what would constitute an anticompetitive vertical merger.[82] The Agencies instead listed several types of harms that they consider in their enforcement decisions: foreclosure and raising rivals' costs, giving the combined firm access to competitively sensitive information, and increased risk of post-merger coordinated interaction.[83] The FTC voted to withdraw the Vertical Merger Guidelines in September 2021, under the Biden Administration.[84]

Finally, on December 18, 2023, the Agencies released the Biden Administration's version of the Guidelines, which encompasses both horizontal and vertical mergers.[85] These Guidelines are a substantial departure from the 2010 and 2020 versions. They are the longest Guidelines yet, at fifty pages. They are also the first to cite to case law. In terms of substance, the 2023 Guidelines significantly lower the HHI and market share thresholds for triggering a presumption of anticompetitiveness.[86] They also introduce several novel legal theories. The Agencies assert that mergers may violate the law by (1) substantially lessening competition in labor markets, even if not in the product market;[87] (2) enabling a "dominant" firm in one market to extend its position to another, unexplored market;[88] (3) eliminating a potential entrant in a concentrated market;[89] (4) engaging in an "anticompetitive pattern" of serial

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with its own related product and will therefore have access to that input at cost, sans markup. The ultimate price is lower; this is the elimination of double marginalization. *See id.* § 6. For a more sophisticated economic discussion, see 3B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 758 (4th ed. 2024).

81. 2020 GUIDELINES, *supra* note 79, § 1.

82. *See id.* § 1.

83. *Id.* §§ 4-5.

84. Press Release, DOJ, Justice Department Issues Statement on the Vertical Merger Guidelines (Sept. 15, 2021), https://perma.cc/K3K6-7RNP. The DOJ did not explicitly withdraw from the Vertical Merger Guidelines, but issued a statement shortly after the FTC's vote noting that it was "conducting a careful review" of both the 2010 and 2010 Guidelines and had "already identified several aspects . . . that deserve close scrutiny." *Id.*

85. DOJ & FTC, MERGER GUIDELINES (2023) [hereinafter 2023 GUIDELINES], https://perma.cc/W6K3-8Z5E.

86. Markets with an HHI above 1,800 are now deemed highly concentrated; a post-merger change of more than 100 points is a significant increase. Where the merged firm's market share is greater than 30% and there is a significant increase in HHI, the merger will also be presumed to substantially lessen competition. *Id.* § 2.1.

87. *Id.* § 2.10.

88. *Id.* § 2.6.

89. *Id.* § 2.4.

acquisitions in the same line of business;[90] (5) partially acquiring a firm in a way that does not result in control;[91] or (6) acquiring another multisided platform.[92]

Looking at this fifty-year cycle of issuing, repealing, and reissuing guidance statements, several patterns emerge. One is a symbiotic relationship between the Guidelines and the case law.[93] It can be argued that the Guidelines emerged, in part, to answer a call from the courts for clearer rules in merger enforcement.[94] Even if the Guidelines did not explicitly invoke case law until 2023, the footprints left by the Supreme Court's early merger cases are still visible across iterations of the Guidelines.[95] This influence does not mean the Guidelines are mechanically adopting standards from the courts. The 1992 Guidelines' pushback on the D.C. Circuit's position on entry in *Baker Hughes* is a testament to the occasional conflict that occurs between the courts and the Agencies.[96] And as the new labor competition section in the 2023 Guidelines shows,[97] the Agencies have occasionally used the Guidelines to test new theories and "to boldly go where no [court] has gone before."[98] The underlying point is that the Guidelines and the case law seem to be in conversation with one another, although arguably with the Agencies taking the lead in recent years given the dearth of modern merger case law.[99]

Another takeaway is the sheer number of times the Agencies have revised the Guidelines: Eight versions have been promulgated by seven administrations, with substantive changes made to the merger analysis by each

90. *Id.* § 2.8.

91. *Id.* § 2.11.

92. *Id.* § 2.9.

93. For an exploration of what this relationship might mean for the Guidelines, see Part IV below.

94. *See supra* note 25.

95. The basic ideas of a market share presumption (from *Philadelphia National Bank*) and the dimensions of a market (from *Brown Shoe*) have carried through the Guidelines over the years, though many of the details have changed. *See, e.g.*, 2010 GUIDELINES, *supra* note 72, §§ 4, 5.3; 1992 GUIDELINES, *supra* note 57, § 1.1-.2, .5; *see also supra* notes 16-17 and accompanying text.

96. *See supra* notes 65-67 and accompanying text. The 1992 Guidelines are not the only example of divergence. Antitrust scholar Phillip Areeda lauded the original 1968 Guidelines for getting it "right" on the efficiency defense, "unlike some insensitive and unduly categorical Supreme Court *dicta*." Richard W. McLaren et al., *Panel Discussion: The Merger Guidelines*, 37 ANTITRUST L.J. 872, 877-78 (1968).

97. 2023 GUIDELINES, *supra* note 85, § 2.10. For a discussion of a case applying this labor theory for the first time, see Part IV below.

98. *Star Trek: The City on the Edge of Forever* (Paramount Television Apr. 6, 1967).

99. For an exploration of this deficit, see Part III.B below.

one.[100] As later Parts suggest, this partisan pendulum swing could be one explanation for why courts have failed to articulate a clear level of deference for the Guidelines.[101] But first, Part II takes up another theme in the development of the Guidelines: the rise of public participation.

II. Public Participation, Procedures, and the Guidelines

As nonlegislative rules, the Guidelines are not required to go through the APA's notice-and-comment procedures. Consequently, for a long time, the Agencies did not solicit any public participation at all. But over the past thirty years, the Agencies have offered more and more opportunities for public comment, resulting in a longer, and thus more resource-intensive, guidance promulgation process.[102] The upshot is that today's process is a near copy-and-paste of the APA's requirements, all despite the lack of a legal obligation to follow the APA.[103] This Part explores how and why this happened. The impetus to engage the public can be traced back to one congressman's efforts in the 1980s to impose greater guardrails on the Guidelines.[104] Today, executive and judicial pressure to justify the Guidelines' persuasiveness is likely what motivates the Agencies to hew to the APA.[105]

A. The Early Years: Closed Doors Are Pressured to Open

The 1968 Guidelines were published and made effective on the same day, without any prepublication notice, engagement with the White House, or comment period.[106] The same was true for the 1982, 1984, and 1992

100. *Compare* 2023 GUIDELINES, *supra* note 85 (Biden), *with* 2020 GUIDELINES, *supra* note 79 (Trump), 2010 GUIDELINES, *supra* note 72 (Obama), 1997 GUIDELINES, *supra* note 69 (Clinton), 1992 GUIDELINES, *supra* note 57 (Bush), 1984 GUIDELINES, *supra* note 43 (Reagan), 1982 GUIDELINES, *supra* note 28 (Reagan), *and* 1968 GUIDELINES, *supra* note 5 (Johnson).

101. *See infra* Parts II-III.

102. *See infra* Parts II.A-.C; *see also* Douglas H. Ginsburg, Assistant Att'y Gen., Antitrust Div., DOJ, Antitrust Enforcement in the Second Term: Remarks Before the 19th New England Antitrust Conference (Nov. 8, 1985), https://perma.cc/772X-NEC8 (announcing that the DOJ would begin soliciting public comments on guidance statements from 1985 onward).

103. *See infra* notes 229-31 (discussing the Agencies' enforcement authority); *infra* notes 166-77 (discussing how today's Guidelines promulgation process mirrors the APA).

104. *See infra* Part II.A.

105. *See infra* Part II.D.

106. *See* Baker, *supra* note 15, at 438-42 (discussing internal staff's creation of the 1968 Guidelines without mention of any external participation).

Guidelines.[107] This sudden-release format was subject to some criticism. In 1985, Representative Hamilton Fish, Jr., a Republican from upstate New York, introduced the Antitrust Procedural Fairness Act,[108] which would have required the Agencies "to follow certain procedural due process requirements" analogous to "the public notice and comment requirements contained in the [APA]," including public notice of the proposed guidelines through publication in the Federal Register and a minimum public comment period of 60 days.[109]

Officially, Representative Fish had raised concerns about how, despite being issued as nonbinding policy statements, the Guidelines were "frequently given great weight by the courts" and had a "major impact on the development and application of antitrust laws."[110] Unofficially, however, the call for greater procedure was likely an outgrowth of congressional dissatisfaction with the substance of the 1985 Vertical Restraints Guidelines.[111] In a floor statement about House Resolution 303, a resolution criticizing the 1985 Guidelines,[112] Representative Fish remarked that concerns about public participation would be "squarely addressed" by the Antitrust Procedural Fairness Act.[113]

Both Agencies vehemently opposed the legislation.[114] When asked about the DOJ's views in an oversight hearing, AAG Sanford Litvack cautioned that requiring stringent public-participation procedures would "transform[] [the DOJ] into a regulatory rulemaking agency," weighed down by the many demands of the APA while trying to swiftly bring enforcement actions, "and

107. *See* Ginsburg, *supra* note 102 (observing, in 1985, that the DOJ's existing practice was to circulate drafts of the Guidelines only among select "members of the antitrust community for informal comment" rather than the public more broadly); Press Release, DOJ, Justice Department and Federal Trade Commission Issue Horizontal Merger Guidelines (Apr. 2, 1992), https://perma.cc/NT3P-C4TF (acknowledging the "useful input" received from the NAAG but noting no one else).

108. Antitrust Procedural Fairness Act of 1985, H.R. 1467, 99th Cong. (1985). Representative Fish reintroduced the bill eight years later. Antitrust Procedural Fairness Act of 1993, H.R. 489, 103d Cong. (1993).

109. 131 CONG. REC. 5103 (1985) (statement of Rep. Hamilton Fish, Jr.).

110. *Id.*

111. *See supra* notes 52-56 and accompanying text. One month after introducing the Antitrust Procedural Fairness Act, Representative Fish introduced a concurrent resolution expressing disapproval of the 1985 Guidelines, declaring that they did not have the "force of law" and should not be reissued "before providing fair procedures to allow public participation . . . including public notice and hearings." H.R. Con. Res. 128, 99th Cong. §§ 1(C)-2(A) (1985). He introduced two other similar House resolutions later that year. *See* H.R. Res. 278, 99th Cong. (1985); H.R. Res. 303, 99th Cong. (1985).

112. H.R. Res. 303, 99th Cong. (1985).

113. 131 CONG. REC. 29680 (1985) (statement of Rep. Hamilton Fish, Jr.).

114. *See* Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 842 (2006).

that ought not to happen."[115] AAG Litvack instead recommended that if members of Congress wished to see a draft of the Guidelines before publication, they should simply cultivate an "ongoing good relationship with the [Antitrust] Division" and request one.[116]

But just eight months after AAG Litvack spurned public participation, his successor Douglas Ginsburg announced a change in policy for Reagan's second term:

> Henceforth . . . absent extraordinary circumstances, we will release law enforcement guidelines to the public in draft form and solicit comment from all interested persons before promulgating a final version. The Attorney General and I firmly believe that whatever delay and resource expenditure are caused by this procedure will be justified by broader participation in the policy process and a better final product.[117]

Representative Fish's bill was referred to the Subcommittee on Monopolies and Commercial Law just one day after AAG Litvack testified.[118] Though the bill ultimately died in committee, this timeline suggests that the Agencies' increased receptiveness to public participation was driven by a desire to get ahead of more restrictive legislation.

B. The 1990s to 2000s: The Agencies Voluntarily Solicit Comments

The Agencies lived up to their word. Beginning with the 1997 efficiencies update, they increasingly solicited public participation when issuing new Guidelines.[119] The public has increasingly participated in turn.[120] An interagency task force developed the 1997 Guidelines, for example, following

115. *Authorization for the Antitrust Division of the DOJ: Oversight Hearings Before the Subcomm. on Monopolies & Com. L. of the H. Comm. on the Judiciary*, 99th Cong. 147 (1985) [hereinafter *1985 Antitrust Oversight Hearings*] (statement of Sanford M. Litvak).

116. *Id.*

117. Ginsburg, *supra* note 102.

118. *Compare 1985 Antitrust Oversight Hearings*, *supra* note 115, *with* Antitrust Procedural Fairness Act, H.R. 1467, 99th Cong. (1985) (as referred to the H. Comm. on the Judiciary, Subcomm. on Monopolies & Com. L., Mar. 14, 1985).

119. *See* April 8, 1997, Press Release, *supra* note 70. The Reagan Administration did not issue another version of the Merger Guidelines but did issue Enforcement Guidelines for International Operations in 1988 that, as promised, solicited public participation. Antitrust Guidelines for International Operations, 53 Fed. Reg. 21584 (June 8, 1988) (draft for public comment). The 1995 International Guidelines revision and the 1995 Intellectual Property Guidelines, released during the Clinton Administration, also solicited public comment. Press Release, DOJ, Department of Justice, Federal Trade Commission Release New International Antitrust Guidelines (Apr. 5, 1995), https://perma.cc/NG3B-8BFC; Press Release, DOJ, Department of Justice and Federal Trade Commission Issue Joint Antitrust Guidelines for the Licensing of Intellectual Property (Apr. 6. 1995), https://perma.cc/9MRX-SKT8.

120. *See infra* Parts II.B-.C (describing increased participation from 1997 to 2023).

"extensive FTC hearings during the fall of 1995, and the release of a comprehensive report on the hearings prepared by the FTC staff."[121]

The process leading up to the 2010 Guidelines was noticeably more elaborate. The Agencies first announced in a September 2009 press release that they would be soliciting public comment and holding joint workshops to "explore the possibility" of updating the Guidelines.[122] The Agencies then issued a set of questions about the 1997 Guidelines and potential revisions.[123] They held five workshops from December 2009 to January 2010 across Washington, D.C., Chicago, New York City, and San Francisco, and issued a draft for public comment on April 20, 2010.[124] The Agencies posted the thirty-two public comments received on the FTC's website.[125] These comments came largely from antitrust advocacy groups and other nonprofits,[126] industry players,[127] law and consulting firms,[128] and scholars.[129] The fact that most individual comments came from insiders mirrors a similar trend in individual rulemaking petitions, which are largely submitted by former staffers, lawyers, and law professors.[130] The Agencies issued the final Guidelines on August 19, 2010.[131]

121. April 8, 1997, Press Release, *supra* note 70.

122. Press Release, FTC, Federal Trade Commission and Department of Justice to Hold Workshops Concerning Horizontal Merger Guidelines (Sept. 22, 2009) [hereinafter September 22, 2009, Press Release], https://perma.cc/833A-W4KV.

123. FTC & DOJ, Horizontal Merger Guidelines: Questions for Public Comment (2009), https://perma.cc/RKP6-YYMG.

124. September 22, 2009, Press Release, *supra* note 122 (listing workshops); Press Release, DOJ, Department of Justice and Federal Trade Commission Issue Revised Horizontal Merger Guidelines (Aug. 19, 2010) [hereinafter August 19, 2010, Press Release], https://perma.cc/9WM4-8ADT.

125. *# 340: FTC File No. P092900; Federal Trade Commission Seeks Views on Proposed Update of the Horizontal Merger Guidelines; Revisions Undertaken Jointly by the FTC and the Department of Justice After a Series of Public Workshops*, FTC, https://perma.cc/33EC-WYXC (last updated July 19, 2010).

126. *Id.* (American Antitrust Institute, American Medical Association, and Consumer Federation of America).

127. *Id.* (Microsoft, General Electric, and Verizon).

128. *Id.* (Hogan Lovells, Keller and Heckman, Paul, Weiss, and Charles River Associates).

129. *Id.* (economists Elizabeth Bailey and Lawrence Wu, and professors Joshua Wright, John Kwoka, and Robert Willig).

130. JASON A. SCHWARTZ & RICHARD L. REVESZ, PETITIONS FOR RULEMAKING: FINAL REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 46-47 (2014), https://perma.cc/2M85-M9QT; *see also* Cynthia R. Farina, Dmitry Epstein, Josiah Heidt & Mary J. Newhart, Essay, *Knowledge in the People: Rethinking "Value" in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 1185, 1191 (2012) (discussing the "sophisticated stakeholders" who regularly "engage in formal and informal discussions" with the agencies during notice-and-comment periods).

131. August 19, 2010, Press Release, *supra* note 124.

The process behind the 2020 Vertical Merger Guidelines was similarly involved. In June and October 2018, the FTC sought comment on whether new vertical merger Guidelines should be issued.[132] In November 2018, the FTC held a public hearing to discuss the proper scope of the new Guidelines.[133] AAG Makan Delrahim announced a new draft of the Guidelines was "underway" in March 2019.[134] On January 10, 2020, the Agencies released a draft and sought public comment.[135] The FTC received comments over email for thirty days.[136] Following the comment period, the Agencies hosted two workshops on the draft and extended the comment period until the end of February.[137] In total, the Agencies received seventy-four substantive comments.[138] Though most of the comments again came from regulated entities, firms, and other repeat players, many new nonprofits, scholars, and state and federal government entities joined the discussion.[139] These new nonindustry voices meant that antitrust was no longer the insiders' game that Representative Fish had criticized.[140] The broader public was beginning to join the conversation. The Agencies published the final Vertical Merger Guidelines on June 30, 2020.[141] On September 14, 2020, for the first time in their history, the Guidelines were transmitted to the House of Representatives pursuant to the Congressional Review Act.[142] In total, the process took about two years from start to finish.

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132. Press Release, DOJ, Department of Justice and Federal Trade Commission Issue New Vertical Merger Guidelines (June 30, 2020) [hereinafter June 30, 2020, Press Release], https://perma.cc/HVL2-5CZD.

133. *FTC Hearing #5: Vertical Merger Analysis and the Role of the Consumer Welfare Standard in U.S. Antitrust Law*, FTC, https://perma.cc/7T7S-FG5P (archived Apr. 2, 2025).

134. June 30, 2020, Press Release, *supra* note 132.

135. *Id.*

136. Press Release, DOJ, DOJ and FTC Announce Draft Vertical Merger Guidelines for Public Comment (Jan. 10, 2020), https://perma.cc/X3Z6-FSL5.

137. Press Release, DOJ, Justice Department and FTC Announce Workshops on Draft Vertical Merger Guidelines, Extend Comment Period (Feb. 3, 2020), https://perma.cc/EMC2-M8AS.

138. *#798: Draft Vertical Merger Guidelines*, FTC, https://perma.cc/L3N2-TXGE (archived Apr. 2, 2025).

139. *Id.* Public Knowledge and Open Technology Institute, Electronic Frontier Foundation, North Dakota Farmers Union, AIDS Healthcare Foundation, and Writers Guild of America West all submitted comments for the first time. A group of state attorneys general, the State of Colorado, and the Federal Communications Commission were also first-time commenters.

140. *See supra* notes 108-13 and accompanying text; *cf.* 131 CONG. REC. 5103 (1985) (statement of Rep. Hamilton Fish, Jr.) ("[T]he public—interested persons affected by the content of these policy statements—never was afforded an opportunity to comment . . . .").

141. June 30, 2020, Press Release, *supra* note 132.

142. *See* 166 CONG. REC. H5637 (daily ed. Oct. 1, 2020); 5 U.S.C. § 801(a)(1)(A).

C. 2023 Guidelines: Participation Skyrockets

The self-described "robust process" behind the new 2023 Guidelines has involved the most public participation thus far.[143] In January 2022, the Agencies announced an initiative to revise the 2010 and 2020 Guidelines and published a Request for Information (RFI) on Merger Enforcement that sought public comment.[144] The RFI was posted on Regulations.gov and received over 5,000 comments, roughly 1,900 of which were published.[145]

What's remarkable about this RFI is the sheer number of individual Americans who participated for the first time.[146] Many comments came from physicians lamenting that private-equity acquisitions had led to a decline in the quality of care.[147] Others had complaints about specific companies like LiveNation/Ticketmaster, Amazon, and Google.[148] To be sure, such a steep spike in comment submissions was likely the product of mass comment campaigns—a tactic that has been increasingly employed by advocacy groups to get agency attention.[149] But even those comments that appeared to be part of such a campaign still supplemented the provided text with personal experiences.[150] This level of engagement is a long way from the mere

143. Press Release, DOJ, Justice Department and Federal Trade Commission Release 2023 Merger Guidelines (Dec. 18, 2023) [hereinafter December 18, 2023, Press Release], https://perma.cc/FH5A-RJL9.

144. DOJ & FTC, Request for Information on Merger Enforcement (Jan. 18, 2022), https://perma.cc/AN3X-6S97.

145. *Request for Information on Merger Enforcement*, REGULATIONS.GOV, https://perma.cc/PJ4T-6LJ3 (archived Apr. 2, 2025); December 18, 2023, Press Release, *supra* note 143.

146. *See Request for Information on Merger Enforcement*, *supra* note 145 (displaying a docket of 1,906 comments that were largely submitted by individuals rather than organizations).

147. *See, e.g.*, Anonymous, Comment Letter on Request for Information on Merger Enforcement (Apr. 3, 2022), https://perma.cc/FL2J-2ZSQ; Brendan O'Gorman, Comment Letter on Request for Information on Merger Enforcement (Apr. 21, 2022), https://perma.cc/24FE-7RZX.

148. *See, e.g.*, Heidi Johnston, Comment Letter on Request for Information on Merger Enforcement (Apr. 8, 2022), https://perma.cc/C3JK-8ZA5 (LiveNation/Ticketmaster); Joseph DeSalvo, Comment Letter on Request for Information on Merger Enforcement (Apr. 8, 2022), https://perma.cc/EU5H-CXAC (Amazon); Anthony Sterbenc, Comment Letter on Request for Information on Merger Enforcement (Apr. 10, 2022), https://perma.cc/PQE3-J6D9 (Microsoft, Amazon, and Google).

149. For literature on mass comment campaigns, see, for example, Steven J. Balla et al., *Responding to Mass, Computer-Generated, and Malattributed Comments*, 74 ADMIN. L. REV. 95, 105-06 (2022).

150. *See, e.g.*, Concerned Citizen, Comment Letter on Request for Information on Merger Enforcement (Apr. 9, 2022), https://perma.cc/6SXQ-6VLK (noting that the commenter works at an aerospace contractor); Rebecca Du, Comment Letter on Request for Information on Merger Enforcement (Apr. 10, 2022), https://perma.cc/N79U-VD93 (adding personal criticism of Disney); Eric Foos, Comment Letter on Request for

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thirty-two comments from antitrust insiders submitted for the 2010 Guidelines.[151]

The Agencies then held four "listening sessions" from March to May 2022, in which invited speakers and members of the public convened to share their views on how mergers and acquisitions had impacted their lives.[152] In July 2023, the Agencies published a draft of the Guidelines on Regulations.gov and sought public comment for two months.[153] The Agencies received over 3,000 comments, 1,600 of which were posted on Regulations.gov.[154] Here, again, the number of comments submitted by ordinary Americans was higher compared to past Guidelines. Individuals expressed their concerns about personal job loss following mergers, depreciating quality of services, and higher prices.[155] The Agencies held another three workshops to discuss the draft from September to November 2023,[156] before publishing the final Guidelines in December.[157]

Information on Merger Enforcement (Apr. 10, 2022), https://perma.cc/XJ44-WEYB (describing a personal struggle to see a urologist because of healthcare mergers).

151. *See supra* notes 125-30 and accompanying text.

152. *FTC and Justice Department Listening Forum on Firsthand Effects of Mergers and Acquisitions: Health Care*, FTC, https://perma.cc/2GT3-38C6 (archived Apr. 3, 2025). Each of the forums focused on a different industry that the Agencies deemed "commonly impacted" by mergers. *Id.* (advertising forums on "Food and Agriculture," "Health Care," "Media and Entertainment," and "Technology"). Invited speakers included the likes of a registered nurse and union member in North Carolina, a pig farmer in Indiana, and a CEO of an audience-research software startup. *Id.*; *FTC and Justice Department Listening Forum on Firsthand Effects of Mergers and Acquisitions: Food and Agriculture*, FED TRADE COMM'N, https://perma.cc/WX9U-SL4R (archived Apr. 3, 2025); *FTC and Justice Department Listening Forum on Firsthand Effects of Mergers and Acquisitions: Technology*, FTC, https://perma.cc/9WLY-ECAB (archived Apr. 3, 2025).

153. *Draft Merger Guidelines for Public Comment*, REGULATIONS.GOV, https://perma.cc/T7NS-T5U5 (archived Apr. 2, 2025) (opening for comment on July 19, 2023, with a September 18, 2023, deadline).

154. *Id.* All in all, the Agencies reported receiving 30,000 total comments prior to the release of the 2023 Guidelines. December 18, 2023, Press Release, *supra* note 143. Presumably, many of the unpublished submissions were duplicative mass comments.

155. *See, e.g.*, Anonymous, Comment Letter on 2023 Draft Merger Guidelines for Public Comment (July 22, 2023), https://perma.cc/AY2S-N6HD ("I was a creative producer for Disney Plus—Eastham Studios. Disney bought out the production house when it was Maker Studios. They just shut down the entire studio and laid everyone off last month."); Anonymous, Comment Letter on 2023 Draft Merger Guidelines for Public Comment (July 22, 2023), https://perma.cc/ZDH5-9DUN ("I lost my job, along with many of my colleagues, when Warner Brothers and Discovery merged."); Anonymous, Comment Letter on 2023 Draft Merger Guidelines for Public Comment (Aug. 21, 2023), https://perma.cc/9PV3-ZAFK ("I'm disabled, and I worry frequently about the availability of medical care where I live. My doctor's office has been rolled up in [a] series of mergers including most of the offices near me.").

156. *Public Workshops on the 2023 Draft Merger Guidelines*, DOJ (updated Dec. 13, 2023), https://perma.cc/HG3Y-CP3X.

157. 2023 GUIDELINES, *supra* note 85.

While much of the substance of the Guidelines remained the same between the draft and final version, the Agencies made several notable changes that seemingly responded to criticism in the draft comments. For example, many commenters had pointed out that much of the case law that the Agencies cited in the draft was Supreme Court precedent from over fifty years ago and had become outdated.[158] In the final version, the Agencies added several more recent lower court decisions,[159] including the Fifth Circuit's decision in *Illumina, Inc. v. FTC* earlier that year.[160] The Agencies also added multiple assurances that structural presumptions and evidence establishing the prima facie case that a merger could lessen competition were rebuttable—assurances that were less prominent in the draft[161] and subject to criticism by commenters, as well.[162]

158. *See, e.g.*, Herbert Hovenkamp, Comment Letter on 2023 Draft Merger Guidelines for Public Comment (Sept. 8, 2023), https://perma.cc/B85V-CHAT ("The current draft relies heavily on Supreme Court case law from the 1960s and 1970s at the expense of more recent cases in the Circuit Courts of Appeal . . . ."); Business Roundtable, Comment Letter on 2023 Draft Merger Guidelines for Public Comment (Sept. 18, 2023), https://perma.cc/BG92-XGMV ("[M]ost of the supporting material consists of outdated case citations . . . ."); Tech. Councils of N. Am., Comment Letter on 2023 Draft Merger Guidelines for Public Comment (Sept. 12, 2023), https://perma.cc/PR5V-Y96Y ("The Agencies are citing decades old case law . . . .").

159. *Compare* DOJ & FTC, DRAFT FTC-DOJ MERGER GUIDELINES FOR PUBLIC COMMENT (2023) [hereinafter DRAFT 2023 GUIDELINES], https://perma.cc/AXE9-F5X4, *with* 2023 GUIDELINES, *supra* note 85, §§ 1 n.5, 2.1 n.9, 3.3 n.68, 4.3 n.78 (citing Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775 (9th Cir. 2015); FTC v. Hackensack Meridian Health, Inc., 30 F.4th 160 (3d Cir. 2022); United States v. Anthem, Inc., 855 F.3d 345 (D.C. Cir. 2017); and FTC v. Advoc. Health Care Network, 841 F.3d 460 (7th Cir. 2016)).

160. 2023 GUIDELINES, *supra* note 85, §§ 2.5 nn.28-29, 4.3 n.91 (citing Illumina, Inc. v. FTC, 88 F.4th 1036 (5th Cir. 2023)).

161. *Compare* DRAFT 2023 GUIDELINES, *supra* note 159, §§ II.5.A, II.6.A, IV (confining the discussion of rebuttal evidence largely to section IV), *with* 2023 GUIDELINES, *supra* note 85, §§ 1, 2.1, 2.3-.6, 2.11, 3 (including more detail on rebuttal evidence throughout, starting with the new "How to Use These Guidelines" section). The final version softened the language of "mergers should not" from the draft to "mergers can violate the law when," a change further suggesting greater amenability to rebuttal evidence. *Compare* DRAFT 2023 GUIDELINES, *supra* note 159, § I (capitalization altered), *with* 2023 GUIDELINES, *supra* note 85, § 1 (capitalization altered).

162. *See, e.g.*, TechFreedom, Comment Letter on 2023 Draft Merger Guidelines for Public Comment (Sept. 18, 2023), https://perma.cc/R7YS-CEZP ("The Agencies should recognize additional rebuttal arguments as part of the competitive effects analysis of a merger . . . ."); Economists & Laws., Comment Letter on 2023 Draft Merger Guidelines for Public Comment (Sept. 15, 2023), https://perma.cc/E8SD-F6YJ ("A policy that makes presumptions based on market structure irrebuttable . . . would tend to reduce growth and exacerbate inequality relative to what could be achieved by making them rebuttable.").

These changes suggest that the notice-and-comment procedures are not merely a box-checking exercise to the Agencies. To be sure, given that much of the substance of the Guidelines remained the same,[163] one could posit that the Agencies are just cherry picking a small pool of tweaks to create the illusion of public impact. But such an illusion could have been created with just one round of comment, and shortening the engagement period would have surely saved the Agencies considerable resources. The Agencies' choice to voluntarily undertake an RFI, listening sessions, and draft comments over two years instead suggests that the public's comments are, to some extent, taken seriously.

The 2023 Guidelines were submitted to each House of Congress, again pursuant to the Congressional Review Act.[164] In its transmission to the Senate, the DOJ caveated:

> These Merger Guidelines are not a "rule" within the meaning of 5 U.S.C. 804(3) and thus do not require submission pursuant to 5 U.S.C. 801(a)(1). Nevertheless, the Antitrust Division is submitting the Merger Guidelines to each House of the Congress and to the Comptroller General for the sake of consistency because this jointly promulgated document was already submitted by the FTC.[165]

With the 2023 version, the Agencies essentially adopted the APA's requirements in full. The Agencies published an RFI[166] (read: ANPRM[167]), published a draft[168] (read: NPRM[169]), solicited multiple rounds of comments[170] (read: following the duty to give interested parties an opportunity to

163. From the draft, the final version carried over the same HHI thresholds as well as the Agencies' new theories of enforcement for mergers by "already dominant" firms, mergers related to industry "consolidation," an overall pattern or strategy of "serial acquisitions," and mergers that threaten to eliminate a "nascent competitive threat." *Compare* DRAFT 2023 GUIDELINES, *supra* note 159, § II.1, .7-.9, *with* 2023 GUIDELINES, *supra* note 85, § 2.1, .6-.8.

164. 170 CONG. REC. S308 (daily ed. Jan. 31, 2024); 170 CONG. REC. H636 (daily ed. Feb. 14, 2024); 5 U.S.C. § 801(a)(1)(A).

165. 170 CONG. REC. S308 (daily ed. Jan. 31, 2024). The FTC's submission does not appear in the Congressional Record.

166. *See supra* notes 144-45 and accompanying text.

167. In the preliminary stages of rulemaking, federal agencies will often submit an "Advanced Notice of Proposed Rulemaking" (ANPRM) to solicit the public's initial thoughts on whether or not the rulemaking should be initiated. For an example of an ANPRM by a federal agency, see Controlled Substance Destruction Alternatives to Incineration, 88 Fed. Reg. 74379 (proposed Oct. 31, 2023) (to be codified at 21 C.F.R. pt. 1301).

168. DRAFT 2023 GUIDELINES, *supra* note 159.

169. Once an agency decides it wants to promulgate a new rule, it must issue a "Notice of Proposed Rulemaking" (NPRM) alongside the proposed rule. *See* 5 U.S.C. § 553(b).

170. *See supra* notes 144, 153 and accompanying text.

comment[171]), published final guidelines[172] (read: final rule[173]) that incorporated suggestions from the comments[174] (read: following the duty to respond to materially cogent comments[175]), and even submitted the Guidelines to Congress for review[176] (read: adherence to the Congressional Review Act[177]), all despite repeated assurances that the Guidelines are not, in fact, a legislative rule.

D. Explaining the Rise of Public Participation in the Guidelines

What could explain this phenomenon of increasing solicitation and receipt of public participation—one that is increasingly occurring within other agencies as well?[178] Certainly the initial shift in the 1980s can be explained by the lingering threat of Representative Fish's bills.[179] But for more recent editions of the Guidelines, the push must be coming from elsewhere.

One source of pressure could be the Executive Branch. In 2007, under the George W. Bush Administration, the Office of Management and Budget published a "Final Bulletin on Agency Good Guidance Practices."[180] The

171. Once an agency issues a proposed rule, it must "give interested persons an opportunity to participate in the rule making" through the submission of comments. *See* 5 U.S.C. § 553.

172. 2023 GUIDELINES, *supra* note 85.

173. After the completion of the comment period, the agency may then issue a final rule. For an example of a final rule, see Non-Compete Clauses, 16 C.F.R. pt. 910 (2024).

174. *See supra* notes 158-62 and accompanying text.

175. As first articulated in *United States v. Nova Scotia Food Products Corp.*, agencies have a duty to respond to materially cogent comments received during rulemaking. 568 F.2d 240, 252 (2d Cir. 1977); *see also* Biden v. Missouri, 142 S. Ct. 647, 659 (2022) (Alito, J., dissenting) ("If the agency issues the rule, it must address concerns raised during the notice-and-comment process.").

176. *See supra* notes 164-65 and accompanying text.

177. Under the Congressional Review Act, "major" rules—that is, rules with over $100 million in annual effect—must be laid before Congress for sixty legislative days, during which members may introduce a joint resolution of disapproval. 5 U.S.C. §§ 801(a)(3)(A), 802(a), 804(2)(A).

178. The FDA, for example, has sought public comment on guidance since the 1990s in accordance with its "Good Guidance Practices." The Food and Drug Administration's Development, Use, and Issuance of Guidance Documents, 62 Fed. Reg. 8961 (Feb. 27, 1997). During the Obama Administration, U.S. Citizenship and Immigration Services also began soliciting public comment on certain draft policy memoranda. Jill E. Family, *Easing the Guidance Document Dilemma Agency by Agency: Immigration Law and* Not Really *Binding Rules*, 47 U. MICH. J.L. REFORM. 1, 15-16 (2013).

179. *See supra* Part II.A.

180. Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007). Although President Biden revoked this 2019 Executive Order (EO), President Trump reinstated it on January 20, 2025. *Compare* Exec. Order No. 13992, 86 Fed. Reg. 7049 (Jan. 25, 2021), *with* Exec. Order No. 14148, 90 Fed. Reg. 8237 (Jan. 25, 2025). The EO

footnote continued on next page

Bulletin, which is formally still in effect, requires agencies to use notice-and-comment procedures when they issue "economically significant guidance documents."[181] More recent pressure to engage came during the first Trump Administration. In October 2019, President Trump issued EO 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents.[182] For "significant" guidance, this EO required agencies to (1) honor a 30-day public notice-and-comment period before issuing a final guidance document, (2) provide a "public" response to "major concerns" raised in comments, (3) submit the guidance to the Office of Information and Regulatory Affairs (OIRA) for review before issuance, and (4) explicitly label the document as nonbinding.[183] "Significant" guidance was defined, in part, as guidance that was "reasonably" anticipated to have over $100 million of annual effect on the economy[184]—a standard that one could imagine a document regulating mergers and acquisitions across all industries easily satisfying.[185]

President Biden did not issue an EO requiring specific procedures for guidance, but his Administration generally encouraged public participation in agency actions,[186] most recently in an August 2024 OIRA report outlining best practices for agencies when engaging with the public.[187] The Agencies may have thus bolstered guidance procedures in response to executive pressure to engage the public more.

Agencies may also have internal good-governance motivations to solicit greater participation. A common rationale given by officials for engaging in these time-consuming procedures is a desire for better policy. Nobody is "smart" enough to do it on their own, so said a former senior Federal Reserve

previously received great acclaim from administrative law scholars. *See, e.g.*, Cass R. Sunstein, Opinion, *Trump's New Executive Orders Deserve Praise*, TWIN CITIES (Oct. 18, 2019, 10:53 AM CDT), https://perma.cc/TX46-47RG.

181. Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. at 3425.

182. Exec. Order No. 13891, 84 Fed. Reg. 55235 (Oct. 15, 2019).

183. *Id.* § 4(a).

184. *Id.* § 2(c). Guidance that (1) created a "serious inconsistency" with other agency action, (2) "materially alter[ed] the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof," or (3) raised "novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles of [EO 12866]" was also deemed "significant." *Id.* § 2(c)(ii)-(iv).

185. The 2023 Guidelines, for example, begin with the broad statement that the document provides the practices that the Agencies "use to investigate whether mergers violate the antitrust laws." 2023 GUIDELINES, *supra* note 85, § 1.

186. *See* Exec. Order No. 14094, § 2(a), 88 Fed. Reg. 21879 (Apr. 11, 2023) ("To the extent practicable and consistent with applicable law, regulatory actions should be informed by input from interested or affected communities.").

187. OIRA, WITH THE PEOPLE, FOR THE PEOPLE: STRENGTHENING PUBLIC PARTICIPATION IN THE REGULATORY PROCESS (2024), https://perma.cc/W5NF-EVBW.

official, and public comment helps make "better policy."[188] Former General Counsel of the Department of Transportation Kathryn Thompson made similar remarks: Public comment makes an agency's approach "smarter" and "better informed."[189]

While logically appealing, the sincerity of this justification is questionable. Even before the Agencies started releasing drafts of the Merger Guidelines to the larger public in the late 1980s, they circulated copies to select stakeholders.[190] One might question whether shifting from closed-door conversations to notice-and-comment procedures actually creates better guidance. To some observers, "[n]otice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues."[191] Indeed, ex parte communications with industry are still a regular part of agency rulemaking today,[192] albeit subject to certain constitutional[193] and agency-imposed[194] limitations.

There is also a more cynical motivation: judicial self-preservation. In 1987, the ABA issued a report, later withdrawn, recommending that the DOJ adopt notice-and-comment procedures for the Guidelines.[195] One justification the ABA gave was that notice-and-comment procedures "infuse into this process elements of openness, accountability and legitimacy" that "may result in greater acceptance of the guidelines."[196] Given the Supreme Court's loss of

188. Nicholas R. Parrillo, *Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study*, 71 ADMIN. L. REV. 57, 86 (quoting unnamed former official).

189. *Id.* at 87.

190. H.R. REP. NO. 99-399, at 5 n.8 (1985).

191. E. Donald Elliott, Comment, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992).

192. *See* ESA L. SFERRA-BONISTALLI, EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING 14-16 (2014), https://perma.cc/5N9U-6FT3 ("[T]he fact that [ex parte communications] occur is undisputed."); *cf.* Sierra Club v. Costle, 657 F.2d 298, 401 (D.C. Cir. 1981) ("Furthermore, the importance of effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated.").

193. *See* Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959) (finding ex parte communications raised due process concerns because there were competing claims to a valuable privilege).

194. The Department of Labor, for example, has a written policy that discourages ex parte communications after an NPRM has been published and requires disclosure of any oral communications. *See* SFERRA-BONISTALLI, *supra* note 192, at 53-54. The EPA, by contrast, encourages ex parte communications, even after a comment period has closed. Memorandum from Andrew R. Wheeler, Acting Adm'r, U.S. EPA (Aug. 2, 2018), https://perma.cc/LTN7-AP39.

195. *See Report No. 2 of the Section of Administrative Law*, 112 ANN. REP. A.B.A. 265, 272-76 (1987).

196. *Id.* at 273.

appetite for *Chevron* and other forms of deference toward agency action, the Agencies' newfound insistence on public-participation procedures may simply be an effort to establish firmer ground for the Guidelines' future existence. If courts see robust public engagement, then the Guidelines may continue to have the power to persuade.[197]

Ultimately, the true explanation for this pursuit of public participation is likely some combination of the three reasons above. Some agency staff may sincerely believe that public participation improves the substance of the Guidelines—if only because they believe that *publicly* soliciting the input of industry groups and other antitrust watchers and then *publicly* implementing it could turn a heavily criticized draft into a respected (or at least tolerated) final product that lasts across changes in administration.[198] At the same time, the Executive Branch, publicly in executive orders and bulletins[199] and privately behind closed doors,[200] is likely pressing the Agencies to engage the public—if only to ensure the lifeblood of the guidance document by increasing public buy-in or, at the very least, showing courts that the Agencies took feedback seriously.

Lurking behind good-governance motivations and executive pressure is judicial pressure to seek out every tool at the Agencies' disposal to justify the Guidelines. Some of those tools are substantive, such as gesturing to case law for the first time. This one is procedural: using public engagement in creating the final product as a justification for its persuasiveness. As the following Part will explore in greater depth, the only articulable level of deference that could apply to a guidance document is *Skidmore* deference.[201] One of the pillars of *Skidmore* asks whether an agency's action reflects "thoroughness evident in its

197. For an exploration of these shifts and how likely it is that courts will stop relying on the Guidelines, see Parts III-IV below.

198. *See* Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 574 (1977) ("[T]he public may be more likely to accept and less likely to sabotage a rule if it has been allowed to participate in its formulation."); Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 735 (2007) ("[I]ncreased public participation in agency decisionmaking is more democratic and increases the legitimacy of agency decisions and public trust in the agencies." (footnote omitted)). Recall how the 2023 Guidelines did, in fact, walk back some of their more aggressive language in response to input on the draft. *See supra* Part II.C. The Agencies surely could have gotten that feedback through ex parte communications, but they chose instead to go through notice-and-comment procedures and speak with industry groups out in the open.

199. *See supra* notes 180-85 and accompanying text.

200. *Cf.* Sierra Club v. Costle, 657 F.2d 298, 404-10 (D.C. Cir. 1981) (holding that political communications between the Executive Branch and agencies need not be disclosed on the record).

201. *See infra* Part III.A; Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2259, 2273 (2024); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

consideration."[202] Though this criterion has not been fully defined by the Supreme Court, at least one lower court has suggested that an agency's voluntary pursuit of notice-and-comment procedures when issuing a nonlegislative rule demonstrates thoroughness in its consideration under *Skidmore*.[203] By soliciting multiple rounds of public comment and meaningfully engaging with criticism in the final product, the Agencies have amassed sizable evidence to make a case for "thoroughness" in the "consideration" of the Guidelines.[204] The next Part will explore in more depth what deference has looked like in practice.

III. Judicial Deference and the Guidelines

Though the Merger Guidelines were expressly intended to be a statement of enforcement priorities, courts have heavily cited to them for their own analysis of mergers. As former FTC Chair Lina Khan and CFPB Director Rohit Chopra previously described this phenomenon, "[w]hile they were not promulgated as agency rules, certain elements of the merger guidelines eventually came to *serve as rules* once courts adopted them."[205] Other scholars have made similar observations about the considerable weight courts (and companies) give the Guidelines.[206] And the power of the Guidelines becomes even more palpable when one considers that most merger cases are never

202. *Skidmore*, 323 U.S. at 140.

203. *Compare* Miller v. Herman, 600 F.3d 726, 734 (7th Cir. 2010) ("The FTC promulgated the interpretations using notice-and-comment procedures even though it was not required to do so . . . . These considerations lead us to give the interpretations a reasonably high degree of deference [under *Skidmore*]."), *with* Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 159 (2012) (concluding that the Department of Labor's interpretation of its regulations "lack[ed] the hallmarks of thorough consideration" in part because "there was no opportunity for public comment"), *and* Navarro v. Pfizer Corp., 261 F.3d 90, 100 (1st Cir. 2001) (finding "no thoroughness evident in the consideration" of the EEOC's interpretive guidance in part because it was "not the product of notice-and-comment rulemaking").

204. *See Skidmore*, 323 U.S. at 140; *supra* Parts II.A-.C (describing increasing solicitation of comments). This is not to say that the Agencies' specific intent is to satisfy the thoroughness prong of *Skidmore*. The point is that the Agencies are seeking to ensure the document's persuasiveness to courts *overall*, and this specific tactic can be slotted under the "thoroughness" prong.

205. Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 367 (2020) (emphasis added).

206. *See, e.g.*, Ashutosh Bhagwat, *Modes of Regulatory Enforcement and the Problem of Administrative Discretion*, 50 HASTINGS L.J. 1275, 1305-06 (1999) ("In practice, however, the 1992 Guidelines constitute what is in effect the 'law' of horizontal merger since they state rules which for all practical purposes *must* be complied with by merging firms . . . .").

litigated to a decision.[207] When mergers are abandoned following an agency complaint or proceeding that relies on the Guidelines, these guidance documents effectively *do* become the law on mergers. That is not even counting those mergers that are never pursued in the first instance because parties believe, based on the current version of the Guidelines, that the Agencies will challenge them.[208]

From December 2000 to February 2025, there were forty-nine total merger enforcement actions brought by the Agencies that resulted in a judicial decision.[209] Within this universe of cases, only three do not mention the Guidelines at all.[210] Eleven cases discuss the Guidelines in some minimal form, such as in quoting or citing parentheticals,[211] in "see also" or string citations,[212] in a singular quote or reference,[213] or buried in a

207. For an exploration of this legal deficit, see Part III.B below.

208. Some law firms, for example, have published blog posts advising regulated entities that "fewer mergers" will pass muster under the 2023 Guidelines. *See, e.g.*, Alison M. Agnew, Daniel J. Delaney, Jonathan H. Todt, Kenneth M. Vorrasi & John S. Yi, *Final Merger Guidelines Will Result in Increased Scrutiny for M&A Deals*, FAEGRE DRINKER (Jan. 16, 2024), https://perma.cc/AS52-H4YJ. One could easily imagine, then, regulated entities choosing not to pursue mergers on the basis of these predictions in order to save time and money. For an exploration of regulated entities' incentive to settle or abandon deals, see Part III.B below.

209. *See infra* Appendix.

210. Illumina, Inc. v. FTC, 88 F.4th 1036 (5th Cir. 2023); FTC v. Steris Corp., 133 F. Supp. 3d 962 (N.D. Ohio 2015); Polypore Int'l., Inc. v. FTC, 686 F.3d 1208 (11th Cir. 2012).

211. FTC v. Tempur Sealy Int'l, Inc., No. 24-cv-02508, 2025 WL 617735, at *24 (S.D. Tex. Feb. 26, 2025) (vertical merger challenge); United States v. JetBlue Airways Corp., 712 F. Supp. 3d 109, 151, 153, 155-57 (2024), *appeal dismissed per stipulation*, No. 24-1092, 2024 WL 3491184 (1st Cir. Mar. 5, 2024); United States v. Booz Allen Hamilton Inc., No. 22-1603, 2022 WL 9976035, at *13 (D. Md. Oct. 17, 2022). The court in *JetBlue* recognized that the Agencies had issued the new 2023 Guidelines mid-trial but did not consider them further. 712 F. Supp. 3d at 151 n.51.

212. FTC v. Lab'y Corp. of Am., No. SACV 10-1873, 2011 WL 3100372, at *14, *18-20 (C.D. Cal. Mar. 11, 2011); FTC v. Lundbeck, Inc., 650 F.3d 1236, 1240 (8th Cir. 2011). Notably, the FTC did not cite to the Guidelines in its complaint at the district court in *Lundbeck*, and the district court did not cite to it either. *See* Amended Complaint for Permanent Injunction and Other Equitable Relief, Including Disgorgement of Unlawful Monopoly Profits, FTC v. Lundbeck, Inc., Nos. 08-6379 & 08-6381, 2010 WL 3810015 (D. Minn. Aug. 31, 2010), *aff'd*, 650 F.3d 1236 (8th Cir. 2011), ECF No. 68; *Lundbeck*, 2010 WL 3810015.

213. United States v. Energy Sols., Inc., 265 F. Supp. 3d 415, 446 (D. Del. 2017) ("[U]nder the horizontal merger guidelines, a reasonable alternative offer is '[a]ny offer to purchase the assets of the failing firm for a price above the liquidation value of those assets.'" (second alteration in original) (quoting 2010 GUIDELINES, *supra* note 72, § 11 n.16)); United States v. UPM-Kymmene Oyj, No. 03 C 2528, 2003 WL 21781902, at *8 (N.D. Ill. July 25, 2003) ("I think the product-market methodology [SSNIP] set out in the Horizontal Merger Guidelines is legally sound."); United States v. U.S. Sugar Corp.,
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footnote.[214] But the vast majority of these cases (thirty-five) rely on the Guidelines in some meaningful way in their analysis.[215] That is, they discuss the Guidelines in some detail beyond citing or quoting parentheticals, string citations, a singular quote or reference, or a footnote. Notably, even in the uncommon circumstance where courts do not appear to cite to the Guidelines and instead rely on other cases, this is just a form of indirect reliance because the majority of that precedent has relied on the Guidelines in some way. In recent years, for example, courts have relied on *Anthem*,[216] even when they don't cite the Guidelines.[217] But *Anthem* itself relied extensively on the Guidelines.[218] Whichever way you slice it, the presence of the Guidelines looms in the courts.[219]

In fact, even when the government loses, courts still regularly cite to the Guidelines—often to criticize the Agencies for failing to meet their own standards.[220] This form of accountability is reminiscent of the *Accardi*

No. 21-1644, 2022 WL 4544025, at *23 (D. Del. Sept. 28, 2022), *aff'd*, 73 F.4th 197 (3d Cir. 2023).

214. FTC v. Microsoft Corp., 681 F. Supp. 3d 1069, 1086 n.5 (N.D. Cal. 2023) (discussing the hypothetical monopolist test in section 4 of the 2010 Guidelines); FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 52 n.33 (D.D.C. 2002) (naming the 1997 Guidelines in a citing parenthetical buried in a footnote); United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 131 n.3 (D.D.C. 2022) (relying on the Vertical Merger Guidelines to define related products in vertical mergers).

215. *See infra* Appendix.

216. United States v. Anthem, Inc., 236 F. Supp. 3d 171 (D.D.C.), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017).

217. *See generally, e.g.*, United States v. JetBlue Airways Corp., 712 F. Supp. 3d 109 (D. Mass.) (citing *Anthem* eleven times), *appeal dismissed per stipulation*, No. 24-1092, 2024 WL 3491184 (1st Cir. Mar. 5, 2024).

218. *See* 855 F.3d at 349, 351, 353, 355-59. Judge Millett and then-Judge Kavanaugh also relied on the Guidelines in their concurrence and dissent, respectively. *See id.* at 369-71 (Millett, J., concurring); *id.* at 371-81 (Kavanaugh, J., dissenting).

219. As this Note focuses on merger enforcement by the Agencies, it does not contemplate the role of the Guidelines in antitrust actions brought by states or private parties. I observe here that at least some lower courts have afforded weight to the Guidelines even when the Agencies are not party to a case, but leave a fuller analysis to another paper. *See generally, e.g.*, California v. Sutter Health Sys., 130 F. Supp. 2d 1109, 1120 (N.D. Cal. 2001) (citing the 1992 and 1997 Guidelines over a dozen times and noting "courts have often adopted the standards set forth in the Merger Guidelines in analyzing antitrust issues").

220. *See, e.g.*, United States v. Sabre Corp., 452 F. Supp. 3d 97, 144 (D. Del. 2020) (recognizing HHI as a common measure of market concentration but rejecting the government's own calculations as flawed), *vacated as moot*, No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020); United States v. Sungard Data Sys., Inc., 172 F. Supp. 2d 172, 187 (D.D.C. 2001) (finding the government's analysis of internal hotsites "misconstrue[d] the Merger Guidelines"); FTC v. Cmty. Health Sys., Inc., 736 F. Supp. 3d 335, 367-70 (W.D.N.C.) (citing to HHI and SSNIP but rejecting the government's own calculations as flawed), *granting motion for injunction pending appeal sub nom.* FTC v. Novant Health,

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principle: Agencies must follow their own internally set procedures and regulations.[221] It also suggests that Turner's critics were right in 1968 when they warned of the Guidelines' potential to haunt the Agencies.[222] Decades ago, the Second Circuit laid out the most extreme form of this accountability when it refused to entertain an argument from the government because it conflicted with the Guidelines.[223] In *Waste Management*, the government tried to argue that ease of entry was irrelevant to the court's analysis; the court responded by quoting the 1984 Guidelines' language to the contrary and chastising the government for its departure from its own guidance document: "If the Department of Justice routinely considers ease of entry as relevant to determining the competitive impact of a merger, *it may not* argue to a court addressing the same issue that ease of entry is irrelevant."[224]

Looking at government losses from the past twenty years, courts have often chastised the government for errors under its own tests.[225] In *FTC v. Foster*, for example, the court quoted language from the Guidelines about entry but ultimately found that the FTC failed to show the market was isolated.[226] The court then referenced the hypothetical monopolist test but found the FTC's geographic market inadequate.[227] Also from the Guidelines, the court referenced HHI (finding the FTC only had a weak prima facie case), unilateral effects (finding the FTC failed to show the merger falls within the triggering thresholds), and mavericks (finding the FTC had not "presented evidence of past competitor coordination").[228]

Inc., No. 24-1526, 2024 WL 3042896 (4th Cir.), *and vacated, appeal dismissed as moot*, No. 24-1526, 2024 WL 3561941 (4th Cir. July 24, 2024).

221. United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 266-68 (1954); *see also* Vitarelli v. Seaton, 359 U.S. 535, 546-47 (1959) (Frankfurter, J., concurring in part and dissenting in part).

222. *See supra* text accompanying note 23.

223. *See* United States v. Waste Mgmt., Inc., 743 F.2d 976, 982-83 (2d Cir. 1984).

224. *Id.* (emphasis added).

225. *See, e.g.*, *Sabre Corp.*, 452 F. Supp. 3d at 144-45; *Cmty. Health Sys.*, 736 F. Supp. 3d at 367-70.

226. FTC v. Foster, No. CIV 07-352, 2007 WL 1793441, at *24 (D.N.M. May 29, 2007).

227. *Id.* at *17 (endorsing the Merger Guidelines' hypothetical monopolist SSNIP test but finding the "FTC's geographic market is inadequate" because "[n]one of the firms that the FTC identifies as market participants operate refineries within northern New Mexico").

228. *Id.* at *27-30, *49. For other government losses that refer, at least in part, to the Guidelines, see FTC v. Thomas Jefferson Univ., 505 F. Supp. 3d 522, 539, 542-44, 547 (E.D. Pa. 2020) (citing the hypothetical monopolist test and other guidance); FTC v. Lab'y Corp of Am., No. SACV 10-1873, 2011 WL 3100372, at *20 (C.D. Cal. Mar. 11, 2011) (citing language from the Guidelines about unilateral effects and the benefits of mergers); FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 120, 123-24, 128, 130-31, 146 (D.D.C. 2004) (citing the Guidelines for the SSNIP test, HHI, the likelihood of coordinated interaction, and mavericks).

A. Categorizing the "Deference"

As noted above, the Merger Guidelines are guidance documents that reflect the Agencies' prosecutorial priorities. They are, therefore, not legislative rules promulgated under notice-and-comment rulemaking.[229] Nor could they be—the DOJ enjoys no express or implied grant of rulemaking authority.[230] The agency is simply charged with enforcement of the federal antitrust laws.[231]

Theoretically, when courts review merger enforcement decisions, any weight afforded to the Merger Guidelines should be no more than that which a nonlegislative guidance document receives. As the Supreme Court laid out in *Christensen v. Harris County*, that weight is *Skidmore* deference.[232] Under *Skidmore*, the weight afforded to an agency's interpretations of law depends on the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[233]

Similarities to *Mead*[234] also confirm that *Skidmore* is the right reference point. In *Mead*, the Court added a layer to *Chevron* deference by requiring lower courts to first interrogate whether Congress delegated to the agency authority to act with the force of law—and, if so, whether the agency acted with that authority—before analyzing whether the statute at issue was ambiguous.[235] Under *Mead*, interpretative rules, guidance documents, and policy statements are not entitled to *Chevron* deference, but might still merit some weight under *Skidmore* deference.[236] The Merger Guidelines, like the tariff-classification letters at issue in *Mead*, fall into the category of "interpretations contained in

229. *See* 5 U.S.C. § 553(b)(A); *see also* Greene, *supra* note 114, at 841-42.

230. *See* 15 U.S.C. §§ 1-2, 4-5. Whether the FTC possesses rulemaking authority under section 5 of the FTC Act is a matter of current dispute and beyond the scope of this Note. For an argument that it does not, see generally Thomas W. Merrill, *Antitrust Rulemaking: The FTC's Delegation Deficit*, 75 ADMIN. L. REV. 277 (2023). But whether the FTC has rulemaking authority is ultimately irrelevant for our purposes post-*Loper Bright*, as the maximum amount of deference that can be afforded to *any* agency action is now *Skidmore* deference. *See infra* note 307.

231. The federal antitrust laws include sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2, section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and sections 3, 7, and 8 of the Clayton Act, 15 U.S.C. §§ 14, 18-19. *See also* 28 C.F.R. § 0.40 (2025) (assigning enforcement powers to the Assistant Attorney General of the DOJ Antitrust Division).

232. 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.").

233. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

234. United States v. Mead Corp., 533 U.S. 218 (2001).

235. *See id.* at 226-27.

236. *Id.* at 234.

policy statements, agency manuals, and enforcement guidelines."[237] The antitrust statutes give no clear indication that Congress intended to delegate authority to the Agencies to issue the Guidelines with the force of law, and therefore the Guidelines are "beyond the *Chevron* pale."[238] But the Guidelines still reflect the Agencies' specialized expertise from decades of merger enforcement, as well as "the thoroughness evident"[239] from a lengthy public-comment process,[240] and therefore they ought to receive "a respect proportional to [their] 'power to persuade.'"[241]

Since 1968, courts have regularly cited to the Merger Guidelines. Former AAG Turner predicted this development himself: He hypothesized as early as the 1980s that broadening the scope of factors considered by the Agencies with each iteration of the Guidelines would "lead courts to incorporate those factors in the legal standards applied by them."[242] But courts have not clarified exactly what level of deference these guidance documents are receiving. Indeed, a survey of merger decisions over the past fifty years reveals that, with one recent exception, courts have not invoked *Skidmore* or *Chevron* deference when referencing the Guidelines.[243]

The earliest cases were of no help in articulating a standard. In *Allis-Chalmers Manufacturing Company v. White Consolidated Industries*, decided just one year after the first Guidelines were promulgated, the Third Circuit simply stated that "because the [DOJ] is obviously one of the principal government agencies charged with the duty of enforcing the antitrust laws," the Guidelines were due "*some* consideration, particularly when elements of the Guidelines find support in the developing case law."[244] Pointing to the DOJ's expertise and ties to case law could be another way of saying these factors give the Guidelines the power to persuade, à la *Skidmore*. But the Third Circuit did not actually invoke *Skidmore*.[245]

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237. *Id.* (quoting *Christensen*, 529 U.S. at 587).

238. *Id.* The only notable difference with *Mead* is that the (defunct) U.S. Customs Service generally did not engage in notice and comment, while the Agencies have come to adopt a quasi-notice-and-comment process over the years. *See supra* Part II.

239. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

240. *See supra* Part II (discussing the rise in public participation).

241. *Mead*, 533 U.S. at 235 (quoting *Skidmore*, 323 U.S. at 140).

242. Turner, *supra* note 38, at 308-09.

243. *See* Greene, *supra* note 114, at 819 n.178 (analyzing decisions from 1968 to 2000 and finding no ruling mentions *Skidmore* or its progeny). My own analysis of cases from December 2000 to February 2025 revealed just one instance: FTC v. Tapestry, Inc., 755 F. Supp. 3d 386, 412 n.3 (S.D.N.Y. 2024) (citing *Skidmore*, 323 U.S. at 140).

244. 414 F.2d 506, 524 (3d Cir. 1969) (emphasis added).

245. *See id.*

Judge Leval's 1995 dissent in *United States v. Kinder*[246] came closer to clarifying the standard. Criticizing the majority for rejecting the persuasive value of the United States Sentencing Guidelines, Judge Leval drew a parallel to the Merger Guidelines to note that "[c]ourts frequently borrow agency interpretations in other contexts as well, where *Chevron* deference is *not required*."[247] But Judge Leval did not specify what was required in the absence of *Chevron*. He simply observed that courts treated the Merger Guidelines as a "benchmark of legality."[248]

In October 2024, Judge Rochon of the Southern District of New York issued the first decision to suggest analyzing the Guidelines under the *Skidmore* framework. In a decision enjoining a proposed merger between Tapestry, Inc. and Capri Holdings, Judge Rochon dropped the following footnote after her first mention of the Guidelines:

> In this opinion, the Court considers statements in the 2023 Merger Guidelines to the extent that the Court finds them persuasive—recognizing, of course, that the guidelines are nonbinding. . . . The persuasiveness of a statement in the Guidelines, as with any agency pronouncement, "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[249]

Judge Rochon did not state outright that the 2023 Guidelines were worthy of deference. Nor did she specifically interrogate whether the Guidelines had "thoroughness evident in [their] consideration" and "all those factors which give [them] power to persuade."[250] But the opinion proceeded to cite the 2023 Guidelines dozens of times after mentioning *Skidmore*—a frequency that suggests some persuasiveness was found and some judicial deference had occurred.[251]

It is possible that Judge Rochon's gesturing toward *Skidmore* marks the beginning of a sea change in how judges deal with the Guidelines (and guidance documents more broadly) in the post-*Loper Bright* era.[252] But as of December 2024, her decision remains a noteworthy outlier in a chorus of silence. Indeed, an analysis of recent merger decisions, from December 2000 to February 2025,

246. 64 F.3d 757 (2d Cir. 1995).

247. *Id.* at 771 (Leval, J., dissenting) (emphasis added).

248. *Id.*

249. FTC v. Tapestry, Inc., 755 F. Supp. 3d 386, 412 n.3 (S.D.N.Y. 2024) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

250. *Skidmore*, 323 U.S. at 140.

251. *See generally Tapestry*, 755 F. Supp. 3d 386.

252. For an exploration of what shifts in administrative law might mean for the Guidelines, see Part IV below.

shows no other application of *Chevron* or *Skidmore*.[253] Instead, courts' characterizations of the Guidelines have tended to fall into three buckets, from most to least concrete: (1) "persuasive," (2) "helpful"/"useful," and (3) "looked to"/"relied on"/"guidance."[254] As explored below, while these buckets are useful for logical sorting, no strong correlation exists between what label courts give and case outcomes.

1. "Persuasive"

The most common characterization used by courts for the Guidelines is that they are "persuasive."[255] In *FTC v. Hackensack Meridian Health, Inc.*, previewed in the Introduction of this Note, the Third Circuit considered whether a merger between two hospital systems would substantially lessen competition for certain health services in Bergen County, New Jersey.[256] The court briefly stated in a footnote that the "Merger Guidelines are not binding on the courts. However, 'they are often used as *persuasive authority.*'"[257] The FTC ultimately won: The court affirmed the preliminary injunction, finding that the FTC properly applied the hypothetical monopolist test and HHI (as articulated in the Guidelines) to establish its prima facie case.[258] In its analysis, the district court below engaged in quasi-statutory interpretation of the Guidelines, also acknowledging them as "persuasive authority."[259] When the defendant cited to the Guidelines to argue that a showing of price discrimination was required, the court disagreed: "Section 4.2 of the *Guidelines*

253. *See infra* Appendix.

254. I selected these buckets after reading each of the forty-nine decisions and pulling out the adjectives used to describe the Guidelines. The "persuasive" cases all expressly referred to the Guidelines as "persuasive." I grouped together "helpful"/"useful" cases because of the proximity in meaning of these adjectives. The third category of "looked to"/"relied on"/"guidance" is a catch-all category of cases that did not use more concrete descriptors (like persuasive, helpful, or useful) but nonetheless used some adjective suggesting reliance. The Appendix describes how I classified each case. For pinpoint citations to cases I categorized as "persuasive," see Part III.A.1 below. For pinpoint citations to cases I categorized as "helpful"/"useful," see Part III.A.2 below. For pinpoint citations to cases I categorized as "looked to"/"relied on"/"guidance," see Part III.A.3 below. Some cases fit no bucket at all. *See infra* Part III.A.4.

255. *See infra* Appendix.

256. 30 F.4th 160, 164 (3d Cir. 2022).

257. *Id.* at 167 n.3 (emphasis added) (quoting FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 338 n.2 (3d Cir. 2016)); *see also* FTC v. Hackensack Meridian Health, Inc., No. 20-cv-18140, 2021 WL 4145062, at *15 n.20 (D.N.J. Aug. 4, 2021) ("Although the *Guidelines* are not binding on this Court, 'they are often used as persuasive authority.'" (quoting *Hershey*, 838 F.3d at 338 n.2)).

258. *Hackensack*, 30 F.4th at 169-73, 179.

259. *Hackensack*, 2021 WL 4145062, at *17.

does not use mandatory language," and therefore the FTC could succeed without such a showing.[260]

As in *Hackensack*, in many cases where the court characterizes the Guidelines as "persuasive," the government wins.[261] But this pattern has not held across the board. There are also examples where the court has used the persuasive moniker but ultimately refused to enjoin the merger; my research uncovered two cases since 2000, both brought by the FTC.[262]

2. "Helpful"/"useful"

Other courts merely refer to the Guidelines as being a "helpful" or "useful" tool in the analysis. This conclusion has been based, in part, in the Agencies' expertise. In *United States v. Anthem, Inc.*, the D.C. Circuit explained that while it "owe[d] no particular deference to[] the Guidelines," they are a "helpful tool, in view of the many years of thoughtful analysis they represent, for analyzing

260. *Id.*

261. *See, e.g.*, FTC v. Kroger Co., No. 24-cv-00347, 2024 WL 5053016, at *1, *16, *20 (D. Or. Dec. 10, 2024) ("Although the Merger Guidelines are 'not binding on the courts,' . . . they 'are often used as persuasive authority.'" (quoting Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 784 n.9 (9th Cir. 2015))); *Hershey*, 838 F.3d at 334, 338 n.2 ("Although the Merger Guidelines are not binding on the courts, they are often used as persuasive authority." (quoting *Saint Alphonsus*, 778 F.3d at 784 n.9)); United States v. H&R Block, Inc. 833 F. Supp. 2d 36, 45, 52 n.10 (D.D.C. 2011) ("The Merger Guidelines are not binding upon this Court, but courts in antitrust cases often look to them as persuasive authority."); Chi. Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410, 420, 431 n.11 (5th Cir. 2008) ("Merger Guidelines are often used as persuasive authority when deciding if a particular acquisition violates anti-trust laws."); United States v. Bazaarvoice, Inc., No. 13-cv-00133, 2014 WL 203966, at *2, *70 n.18 (N.D. Cal. Jan. 8, 2014) (recognizing the Guidelines as "persuasive" when it comes to "deciding if a particular acquisition violates anti-trust laws" (quoting *Chicago Bridge*, 534 F.3d at 431 n.11)). *FTC v. Tapestry, Inc.*, a government win which openly discusses *Skidmore*, also refers to the Guidelines as "persuasive." 755 F. Supp. 3d at 404, 412 n.3 (S.D.N.Y. 2024) ("[T]he Court considers statements in the 2023 Merger Guidelines to the extent that the Court finds them persuasive . . . ."). The Ninth Circuit in *Saint Alphonsus* called the Guidelines "persuasive," affirming a lower court decision that had not used a label. *Compare* 778 F.3d at 781, 784 n.9 (9th Cir. 2015) ("Although the Merger Guidelines are 'not binding on the courts,' they 'are often used as persuasive authority.'" (citations omitted) (first quoting Olin Corp. v. FTC, 986 F.2d 1295, 1300 (9th Cir. 1993); and then quoting *Chicago Bridge*, 534 F.3d at 431 n.11)), *with* Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., Nos. 12-cv-00560 & 13-cv-00116, 2014 WL 407446 (D. Idaho Jan. 24, 2014), *aff'd*, 778 F.3d 775.

262. *See* FTC v. Thomas Jefferson Univ., 505 F. Supp. 3d 522, 539 n.7, 557-58 (E.D. Pa. 2020) (recognizing the Guidelines as "persuasive" but rejecting the FTC's market); FTC v. Rag-Stiftung, 436 F. Supp. 3d 278, 293 n.2, 299 (D.D.C. 2020) (recognizing the Guidelines as "persuasive" when it comes to "examining competitive effects" but rejecting the FTC's novel supply-side market definition).

proposed mergers."[263] Other courts have remarked on the particular usefulness of the Guidelines for calculating HHI.[264] Again, here, the government often wins when a court describes the Guidelines as helpful,[265] but the court in *AT&T* used the moniker and ultimately found for the defendant.[266]

3. "Looked to"/"relied on"/"guidance"

The most nebulous label courts affix to the Guidelines is to simply say that they are "looked to" or "relied on" for "guidance."[267] In *United States v.*

263. United States v. Anthem, Inc., 855 F.3d 345, 349 (D.C. Cir. 2017). The decision below in *Anthem* had observed that the "D.C. Circuit Court of Appeals, and other courts, have approved the use of the Horizontal Merger Guidelines as *guidance* in merger cases." United States v. Anthem, Inc., 236 F. Supp. 3d 171, 194 n.5 (D.D.C. 2017) (emphasis added), *aff'd*, 885 F.3d 345. For other examples of courts describing the Guidelines as useful because of their thoroughness, see United States v. AT&T Inc., 310 F. Supp. 3d 161, 192 n.18 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019); and FTC v. IQVIA Holdings, 710 F. Supp. 3d 329, 368 n.19 (S.D.N.Y. 2024). *See also* ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559, 565 (6th Cir. 2014) (finding the Guidelines to be "useful but not binding upon us here"). A prior decision in *ProMedica* granting a preliminary injunction had stated that the Guidelines "*guide* federal courts for merger analysis." FTC v. ProMedica Health Sys., Inc., No. 11-cv-47, 2011 WL 1219281, at *12 (N.D. Ohio Mar. 29, 2011) (emphasis added).

264. *See, e.g.*, FTC v. Swedish Match, 131 F. Supp. 2d 151, 167 n.12 (D.D.C. 2000) ("The Merger Guidelines are not binding on the Court, but as this Circuit has stated, they do provide 'a useful illustration of the application of the HHI.'" (quoting FTC v. PPG Indus., Inc., 798 F.2d 1500, 1503 n.4 (D.C. Cir. 1986))); FTC v. CCC Holdings, 605 F. Supp. 2d 26, 37 (D.D.C. 2009) ("Although the Merger Guidelines are not binding on the Court, they provide a 'useful illustration of the application of the HHI.'" (quoting *PPG Indus.*, 798 F.2d at 1503 n.4)); FTC v. H.J. Heinz Co., 246 F.3d 708, 716 n.9 (D.C. Cir. 2001) ("Although the Merger Guidelines are not binding on the court, they provide 'a useful illustration of the application of the HHI.'" (quoting *PPG Indus.*, 798 F.2d at 1503 n.4)). The now-reversed district court decision in *Heinz* had not used any label when discussing the Guidelines. *See* FTC v. H.J. Heinz Co., 116 F. Supp. 2d 190 (D.D.C. 2000), *rev'd*, 246 F.3d 708. In *FTC v. Advocate Health Care*, the original district court decision denying a preliminary injunction and the Seventh Circuit decision reversing and remanding discussed the Guidelines without a label, but district court on remand referred to the Guidelines' HHI as a "useful" tool. *Compare* FTC v. Advoc. Health Care, No. 15 C 11473, 2016 WL 3387163 (N.D. Ill. June 20, 2016), *rev'd and remanded sub nom.* FTC v. Advoc. Health Care Network, 841 F.3d 460 (7th Cir. 2016), *with* FTC v. Advoc. Health Care, No. 15 C 11473, 2017 WL 1022015, at *7 (N.D. Ill. Mar. 16, 2017).

265. *See, e.g.*, *IQVIA*, 710 F. Supp. 3d at 368 n.19, 401; *Anthem*, 855 F.3d at 349, 369; *ProMedica*, 749 F.3d at 565, 573; *CCC Holdings*, 605 F. Supp. 2d at 37, 77; *Heinz*, 246 F.3d at 716 n.9, 727; *Swedish Match*, 131 F. Supp. 2d at 167 n.12, 173-74.

266. 310 F. Supp. 3d at 192 n.18, 254.

267. *See, e.g.*, FTC v. Peabody Energy Corp., 492 F. Supp. 3d 865, 883 n.9 (E.D. Mo. 2020) ("relied on"); FTC v. Tronox Ltd., 332 F. Supp. 3d 187, 206 (D.D.C. 2018) ("relied on"); FTC v. Staples, Inc., 190 F. Supp. 3d 100, 117 n.9 (D.D.C. 2016) ("relied on them for guidance"); FTC v. Sysco Corp., 113 F. Supp. 3d 1, 38 (D.D.C. 2015) ("looked to them for guidance").

Bertelsmann SE & Co. KGaA, for example, the court observed that "[a]lthough the Merger Guidelines are not binding, courts have consistently *looked to* them *for guidance* in merger cases."[268] As with the other labels, some courts have specifically noted which provisions of the Guidelines they are looking to or relying on for guidance, such as the sections on defining the geographic market[269] or determining if there is a sufficient prospect of entry.[270] Yet again, while some correlation exists between the use of a label and government success,[271] it is not a strong one.[272]

4. No label

The remainder of cases that rely on the Guidelines in a meaningful way affix no label at all to what work the Guidelines are doing in the analysis,[273] but they cite to sections all over the Guidelines, including definitions of market power, HHI, unilateral and coordinate effects, and efficiencies.[274] Here, too, there is no correlation between the absence of a label and case outcome. In *FTC v. Whole Foods Market, Inc.*, for example, the district court below had quoted language characterizing the Guidelines as "provid[ing] guidance" in denying a motion for a preliminary injunction, whereas the D.C. Circuit used no label at all in its reversal.[275]

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268. 646 F. Supp. 3d 1, 23 n.16 (D.D.C. 2022) (emphasis added).

269. *See, e.g.*, FTC v. Foster, No. CIV 07-352, 2007 WL 1793441, at *53 (D.N.M. May 29, 2007) ("The *Merger Guidelines*, while not binding on the federal courts, also provide guidance for determining the relevant geographic market."); FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 123 (D.D.C. 2004) ("The *Merger Guidelines* also provide guidance for determining the relevant geographic market.").

270. *See* United States v. Aetna Inc., 240 F. Supp. 3d 1, 52 (D.D.C. 2017) ("Although the Guidelines are not binding, courts have frequently relied on their formulation of 'timely, likely, and sufficient' to guide the analysis concerning entry." (quoting 2010 GUIDELINES, *supra* note 72, § 9)).

271. For government wins, see *Bertelsmann*, 646 F. Supp. 3d at 23 n.16, 56; *Peabody*, 492 F. Supp. 3d at 883 n.9, 920; *Aetna*, 240 F. Supp. 3d at 52, 99; *Staples*, 190 F. Supp. 3d at 117 n.9, 138; *Sysco*, 113 F. Supp. 3d at 38, 88; and FTC v. Tronox Ltd., 332 F. Supp. 3d 187, 206 (D.D.C. 2018).

272. For government losses, see *Foster*, 2007 WL 1793441, at *1, *53; and *Arch Coal*, 329 F. Supp. 2d at 123, 160.

273. Of the thirty-five cases that meaningfully discuss the Guidelines, ten affix no label to them. Five are government losses and six are government wins. For the full list of cases, outcomes, and labels, see Appendix below.

274. *See, e.g.*, FTC v. Meta Platforms Inc., 654 F. Supp. 3d 892, 912, 919-22, 941 (N.D. Cal. 2023) (referring to the Guidelines' hypothetical monopolist test and HHI, but ultimately holding the FTC failed to establish a likelihood it would succeed on the merits).

275. *Compare* FTC v. Whole Foods Mkt., Inc., 502 F. Supp. 2d 1, 8 (D.D.C. 2007) (quoting *Arch Coal*, 329 F. Supp. 2d at 123), *rev'd*, 533 F.3d 869 (D.C. Cir. 2008), *opinion amended and superseded*, 548 F.3d 1028 (D.C. Cir. 2008), *with* 548 F.3d 1028.

* * *

The absence of a strong correlation between government success and the court's reliance on the Guidelines can be read to suggest that the value that courts place on the Guidelines is not solely linked to whether the court finds the government's argument on the merits persuasive. Or to put it another way, judges don't throw in a citation to the Guidelines just to layer on another reason for finding for the government. The Guidelines themselves have substantive value in merger analysis, independent of which party actually prevails in the case. To judges, these documents are, inherently, worthy of deference.

B. Explaining the "Deference"

Regardless of the label attached or the litigation outcome, it cannot be denied that courts are extensively relying on a nonbinding guidance document in their analysis. One explanation for this phenomenon can be found in the courts themselves: Merger enforcement suffers from a deficit of case law. There has not been a single horizontal merger case decided by the Supreme Court since *United States v. General Dynamics Corp.* in 1974.[276] The guidance from appellate and district courts is not much better. My analysis of merger challenges brought by the government over the past two decades uncovered just forty-nine decisions across all federal courts, many of which were district court opinions.[277] Given that few district court opinions in this area are appealed, there is a distinct lack of controlling precedent within circuits, as well.[278] As the D.C. Circuit recognized in *AT&T*, a "dearth of modern judicial precedent" similarly plagues vertical mergers.[279]

This deficit has been exacerbated by the reality that most merger cases are settled out of court. It often does not make sense for businesses to take the time to litigate a merger, much less go down the long road of appellate review: Facing litigation and delay costs, companies will choose to settle or drop the deal altogether.[280] A 1995 paper estimated that roughly 70% of all DOJ

276. 415 U.S. 486 (1974); *see also* United States v. Marine Bancorporation, 418 U.S. 602, 631 (1974) (applying *General Dynamics* presumption in potential competition case); United States v. Conn. Nat'l Bank, 418 U.S. 656, 676-70 (1974) (applying *Marine Bancorporation*).

277. *See supra* Part III.A; *infra* Appendix.

278. *See* Thomas C. Arthur, *The Law Deficit in Merger Cases*, CPI ANTITRUST CHRON., July 2019, at 1, 3.

279. United States v. AT&T, Inc., 916 F.3d 1029, 1037 (D.C. Cir. 2019).

280. *See* Arthur, *supra* note 278, at 4. When mergers are delayed, "market conditions and [company] strategies may change, so that the merger may no longer be in the interest of one of the parties." Steven C. Salop, *Merger Settlement and Enforcement Policy for Optimal Deterrence and Maximum Welfare*, 81 FORDHAM L. REV. 2647, 2655 (2013). The risk of delay thus incentivizes settlement.

complaints ended in a consent order—a form of settlement in which the agency and parties agree on a cure for the merger, such as the divestiture of problematic assets.[281] Another study of cases from 2000 to 2020 revealed approximately 65% of filed cases were settled without a court decision—by agency consent order, parties changing the terms of the merger themselves, or full abandonment of the merger.[282]

When courts are actually tasked with making a merger enforcement decision themselves, they are faced with what is effectively a graveyard of outdated judicial precedent,[283] wholly unhelpful for today's market realities.[284] Generalist judges, lacking firm precedential footing and economics Ph.D.s, are forced to turn to other sources to guide their merger analysis.[285] That is where the Merger Guidelines come in. They are "a superior body of rules to the confusing and inconsistent case law."[286] In the face of silence, they "are for all practical purposes the law on merger

281. Stephen J. Squeri, *Government Investigation and Enforcement: Antitrust Division and the Federal Trade Commission*, *in* 236TH ANNUAL ANTITRUST LAW INSTITUTE 519, 564 (1995).

282. *See* Logan Billman & Steven C. Salop, *Merger Enforcement Statistics: 2001-2020*, 85 ANTITRUST L.J. 1, 10-12 (2023) (noting only twenty-six out of seventy-four cases were litigated to a decision).

283. *See supra* notes 276-79 and accompanying text. To be sure, the D.C. Circuit in *United States v. Baker Hughes Inc.* recognized that while the Supreme Court had not decided a case regarding the legal standard since *General Dynamics*, its decisions on other issues had still "lightened the evidentiary burden" on section 7 defendants. United States v. Baker Hughes Inc., 908 F.2d 981, 991 (D.C. Cir. 1990). But notably, the cases the D.C. Circuit cited for this proposition were both from fifteen years earlier, a detail which underscores the rarity of Supreme Court jurisprudence on mergers. *See id.* (citing United States v. Marine Bancorporation, 418 U.S. 602, 631 (1974); and United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 120 (1975)). Regardless, the high rate of merger settlement cannot be denied.

284. *See* Arthur, *supra* note 278, at 2-3 (discussing the lack of modern Supreme Court jurisprudence on mergers).

285. A 2006 American Bar Association study found that only 24% of antitrust economists believed that judges "usually" understand the economic issues in a case. Memorandum from Jonathan B. Baker & M. Howard Morse, Co-Chairs, Econ. Evidence Task Force, Final Report of Econ. Evidence Task Force to Officers and Council, app. II at 2 (Aug. 1, 2006), https://perma.cc/W53U-SE9X. Many judges who have actually received antitrust training did so over twenty-five years ago. Letter from Herbert Hovenkamp, Professor, Univ. of Pa. Sch. of L., to David N. Cicilline, Chairman, & F. James Sensenbrenner, Jr., Ranking Member, Subcomm. on Antitrust, Com., & Admin. L. of the House Comm. on the Judiciary 2 (Apr. 17, 2020), https://perma.cc/H5WP-C9BY ("Since then, notable progress in theoretical and empirical economics has both improved our techniques of analysis and shown the need for greater enforcement, particularly in markets with a significant technological or digital component."). As a result, their economics knowledge tends to be limited and outdated. *See id.*

286. Bhagwat, *supra* note 206, at 1306.

liability."[287] And therefore, just as Phillip Areeda prophesized in 1968, judges, "particularly one[s] not experienced in anti-trust matters, . . . give the Guidelines considerable weight."[288]

In some ways, then, courts' reliance on the Guidelines can be characterized as generalist judges' deference to economics experts. New iterations of the Guidelines often reflect recent advances in economic thinking on antitrust. The efficiency analysis in the original 1968 Guidelines was generally consistent with AAG Turner's own 1965 article on the topic.[289] The hypothetical monopolist test introduced in the 1982 Guidelines was similarly pulled from new antitrust scholarship by Lawrence Sullivan, Phillip Areeda, and AAG Turner from the late 1970s.[290] And the Agencies updated the 2010 Guidelines, in part, to reflect "considerable new economic learning about unilateral effects."[291]

Beyond a case law deficit and the economic complexities of antitrust, there's one more factor underpinning courts' reliance on the Guidelines: the symbiotic relationship between the Guidelines and early merger jurisprudence. As discussed in Part I, case law has influenced at least some of the substance of the Guidelines. That does not mean that the Agencies are mechanically copying and pasting from case law when drafting new Guidelines. While the Agencies

287. Rebecca Haw Allensworth, Essay, *The Influence of the Areeda-Hovenkamp Treatise in the Lower Courts and What It Means for Institutional Reform in Antitrust*, 100 IOWA L. REV. 1919, 1929 (2015); *see also* Edward Cavanagh, *Antitrust Remedies Revisited*, 84 OR. L. REV. 147, 183 (2005) ("The vast majority of judicial precedent in the merger area . . . is largely irrelevant to merger practice today . . . .").

288. *See* McLaren et al., *supra* note 96, at 879.

289. Hillary Greene & D. Daniel Sokol, *Judicial Treatment of the Antitrust Treatise*, 100 IOWA L. REV. 2039, 2058 (2015) (citing 1968 GUIDELINES, *supra* note 5; and Donald F. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313 (1965)).

290. *See* Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, 71 ANTITRUST L.J. 253, 255-57 (2003) (citing LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST (1977); and PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (1978)); *see also* Malcolm B. Coate, *Economics, the Guidelines and the Evolution of Merger Policy*, 37 ANTITRUST BULL. 997, 1001 (1992) (observing that the 1982 Guidelines "brought public policy more into line with economic thinking," then dominated by the Chicago school).

291. Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49, 60 (2010); *see also* Nathan H. Miller & Gloria Sheu, *Quantitative Methods for Evaluating the Unilateral Effects of Mergers*, 58 REV. INDUS. ORG. 143, 145 (2021) ("[B]y accurately characterizing the state of antitrust practice, the 2010 Guidelines have spurred (and continue to spur) research into unilateral effects."); *cf.* FTC v. Tronox Ltd., 332 F. Supp. 3d 187, 206 (D.D.C. 2018) ("[A]s Dr. Shehadeh testified, the Merger Guidelines are 'an excellent summary of a very broad set of tools that are used by economists' to engage in antitrust analysis." (quoting Transcript of Preliminary Injunction Hearing at 478, *Tronox*, 332 F. Supp. 3d 187 (No. 18-cv-01622), ECF No. 112)).

have occasionally adopted standards laid out in the case law, they have also explicitly turned away from the courts and charted new paths in merger enforcement. It would be inaccurate to say that the apparent deference to the Guidelines is no more than courts indirectly relying on case law through the prism of a guidance document. By the same token, however, it would also be inaccurate to say that the perceived influence of prior case law has *no* effect on the Guidelines' persuasiveness to courts. Rather, it is this very interplay between the courts and the Agencies that confers persuasive weight on the Guidelines—with early merger case law providing the foundation for the Guidelines' persuasiveness, but modern merger enforcement realities giving the Guidelines their own independent persuasive weight.

C. Explaining the Silence

One might wonder why courts don't simply admit they're applying *Skidmore* when they grapple with the Guidelines. There are several potential explanations. One is that the Guidelines haven't been substantively consistent. They are reissued and altered dramatically from administration to administration.[292] This feature makes the Guidelines an imperfect fit for *Skidmore*, which asks for "consistency with earlier and later announcements."[293] Nonetheless, the Guidelines were crafted with the Agencies' "considerable"[294] antitrust expertise and reflect a "thoroughness" in their consideration given the public comment process.[295] Should a court want to explicitly invoke *Skidmore*, it would have a doctrinal foothold in these features.

A more probable explanation is that courts have simply not been pushed to provide a label. Defendants have not raised a challenge to the Guidelines themselves during merger litigation. Courts, in turn, have not been tasked with clarifying their deference level either. Merger litigation is largely about which party has the best arguments *given* the Guidelines (and other case law). If a defendant explicitly briefed such a challenge, perhaps a court would be obligated to address it.

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292. *See supra* Part I.

293. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). One could certainly push back that the most basic ideas in the Guidelines—such as market definition and market share presumption—have stayed consistent over the years. *See supra* note 95. But it cannot be denied that the actual substance of what these threshold questions require has significantly changed. *See id.*

294. *Skidmore*, 323 U.S. at 137-40 (observing that the agency administrator had "accumulated a considerable experience" which bolstered the persuasiveness of his rulings). Recall that several courts have labeled the Guidelines as "useful" in light of the Agencies' antitrust expertise. *See supra* Part III.A.2.

295. *See supra* Part II.D.

But such challenges have not been brought because defendants benefit from the business certainty that the Guidelines afford them. By issuing a guidance document outlining merger enforcement priorities, the Agencies put their proverbial "cards on the table" and signal to regulated entities what kinds of behavior the Agencies will (and won't) scrutinize.[296] Given the absence of a strong correlation between courts' reliance on the Guidelines and government success,[297] parties can rest assured that a court's deference to the Guidelines will not torpedo their chances of ultimately prevailing in a merger action.

To put it simply, the status quo of nameless deference has worked, so there has been no need to change it. But Judge Rochon's invocation of *Skidmore* in her October 2024 decision places us at an interesting crossroads for the future of this nameless deference regime.[298] Judges hoping to rely on the Guidelines may follow Judge Rochon in "showing their work" by applying *Skidmore*, lest their repeated citations of a guidance document be picked apart by a less agency-friendly panel on appeal. But other more risk-averse judges may read the Court's recent shifts in administrative law as a call to avoid citing the Guidelines altogether. The next Part details these doctrinal shifts and considers how they may have complicated the path for the Guidelines' future deference.

IV. End of Deference?

In the months since their issuance, the 2023 Guidelines have been met with both extensive praise and severe criticism. Supporters have applauded the Agencies for bringing economic analysis of merger enforcement into the twenty-first century, with particular appreciation for its new theories about the impact of mergers on workers.[299] Opponents, meanwhile, have attacked the new Guidelines for taking a draconian approach to merger enforcement that will chill beneficial mergers and ultimately be rejected by courts.[300]

296. *Cf.* WELBORN, *supra* note 22, at 168-69 (discussing reluctance among staff to issue a guidance statement for fear of unnecessarily restraining the agency's enforcement strategy).

297. *See supra* Part III.A.

298. *See supra* notes 249-51 and accompanying text.

299. *See, e.g.*, Fiona Scott Morton, *The New and Improved 2023 Merger Guidelines*, PROMARKET (Dec. 18, 2023), https://perma.cc/F837-TLE8; Steven C. Salop, Some Comments for Improving the 2023 Draft Merger Guidelines 2 (Sept. 12, 2023) (unpublished manuscript), https://perma.cc/6L69-U2WH.

300. *See, e.g.*, CONSUMER TECH. ASS'N, THE 2023 MERGER GUIDELINES: A GIANT LEAP IN THE WRONG DIRECTION 3 (2024) ("If enforced as written, the New Guidelines will prevent beneficial voluntary movements of capital that lie at the core of how market economies benefit society."); Am. Hosp. Ass'n, Comment Letter on Draft Merger Guidelines (Sept. 13, 2023), https://perma.cc/R779-M65U ("The Agencies propose a structural presumption that is arbitrarily low and potentially fatal to beneficial transactions. . . . The Draft Guidelines also abandon the bipartisan spirit of the 2010

footnote continued on next page

The 2023 Guidelines are the first to rely on case law. They cite to, inter alia, *Brown Shoe* (over a dozen times), *Philadelphia National Bank* (five times), and *Procter & Gamble* (twice).[301] In a November 2023 interview, just one month prior to the release of the 2023 Guidelines, then-FTC Chair Khan acknowledged the Guidelines' novel attention to case law was motivated, in part, by a need to play to judicial preferences.[302] And the Agencies have also, for the first time, painstakingly repeated in every public statement that the Guidelines are not binding documents.[303]

A. A Brave New Anti-Agency World

History tells us that panic about the Guidelines losing power to persuade judges tends to be overblown. Consider, for example, how critics of the 2010 Merger Guidelines lamented that courts would not find a policy document with such substantial changes convincing.[304] The data ended up telling a different story. A 2021 study found that the 2010 Guidelines continued to be "well accepted," with courts welcoming the "incorporation of new economic learning and agency experience."[305] The alarm over judicial acceptance of the

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Guidelines, replacing it with a transparently partisan approach that is far less likely to be respected by courts."); Alden F. Abbott, Senior Rsch. Fellow, Mercatus Ctr., George Mason Univ., Comment Letter on Draft Merger Guidelines (Sept. 13, 2023), https://perma.cc/5XWG-47GR ("[O]ne would expect that lower federal courts would accord zero weight to such final Agency Guidelines in their merger decisions.").

301. 2023 GUIDELINES, *supra* note 85, §§ 1 nn.5-7, 2.5 nn.29-30, 2.7 n.41, 2.8 n.44, 4.3 nn.75-77 & 80 (*Brown Shoe*); *id.* §§ 2.1 nn.9 & 16, 2.7 n.41, 3.3 n.67, 4.3 n.79 (*Philadelphia National Bank*); *id.* §§ 2.6 n.32, 3.3 n.67 (*Procter & Gamble*). The 2023 Guidelines also cite to a slew of circuit court decisions. *See supra* notes 158-60 and accompanying text.

302. Interview by Helena Li with Lina Khan, Chair, FTC, in Stanford, Cal. (Nov. 2, 2023), https://perma.cc/AGE8-ZW6P (explaining that the FTC is "doing a full canvassing of all the legal precedent on the books" in response to a question from the Author about what steps the agency is taking the ensure the Guidelines' persuasiveness).

303. *See, e.g.*, December 18, 2023 Press Release, DOJ, *supra* note 143 ("[T]he 2023 Merger Guidelines are not themselves legally binding . . . ."); *2023 Merger Guidelines*, DOJ, https://perma.cc/UC4U-73MV (archived Apr. 8, 2025) ("The *2023 Merger Guidelines* are a non-binding statement . . . .").

304. *See, e.g.*, Leah Brannon & Kathleen Bradish, *The Revised Horizontal Merger Guidelines: Can the Courts Be Persuaded?*, ANTITRUST SOURCE, Oct. 2010, at 1, 3-4 (cautioning that "courts may be reluctant to embrace the 2010 Guidelines" because they "ask more of the courts than previous versions have . . . [and] courts may not be willing to forgo market definitions in Section 7 cases"); James A. Keyte & Kenneth B. Schwartz, *"Tally-Ho!": UPP and the 2010 Horizontal Merger Guidelines*, 77 ANTITRUST L.J. 587, 650 (2011) ("[O]nce judicial scrutiny is applied . . . the 2010 Guidelines will be in mortal danger."); Carl Shapiro & Howard Shelanski, *Judicial Response to the 2010 Horizontal Merger Guidelines*, 58 REV. INDUS. ORG. 51, 53 (2021) (recalling former senior DOJ official Deborah Garza's prediction that the then-new 2010 Guidelines would be "more difficult to rely on . . . in court").

305. Shapiro & Shelanski, *supra* note 304.

2023 Guidelines, just like Representative Fish's assault on the Guidelines' lack of participation procedures,[306] could just be a smokescreen for personal dissatisfaction with the contents of these particular Guidelines. An unhappy critic does not make a wholly abandoned policy statement.

But the 2023 Guidelines also face an obstacle that previous editions have not: a Supreme Court that has become increasingly hostile toward agency action. With *Loper Bright Enterprises v. Raimondo*, the Court put the final nail into *Chevron* deference's coffin.[307] Additional constraints flow from the new major questions doctrine.[308] From now on, when agencies exercise powers of vast "economic and political significance," the Court will "'hesitate before concluding that Congress' meant to confer such authority."[309] When an action is "major," there must be "clear congressional authorization" for it to be proper.[310]

The relatively underdeveloped case law on the major questions doctrine does not clarify whether it will apply to nonbinding guidance.[311] But in this grey area, two factors may give the Agencies some pause when it comes to the Merger Guidelines. The first is the undeniable economic and political significance that the Guidelines have—arguably more so than any other policy statement promulgated by an agency—given industry's reliance, courts' longstanding de facto deference, and the sheer number of public comments that are now submitted with each new version.[312] This significance suggests

306. *See supra* Part II.A.

307. 144 S. Ct. 2244, 2273 (2024) ("*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority . . . ."). *Loper Bright* contemplates some level of "respectful consideration" for agency interpretations of statutes they administer—a nod to the still-standing *Skidmore*—but it's unclear what that would look like in practice. *See id.* at 2258-59 (quoting United States v. Moore, 95 U.S. 760, 763 (1878)). *But see id.* at 2309 (Kagan, J., dissenting) ("If the majority thinks that the same judges who argue today about where 'ambiguity' resides are not going to argue tomorrow about what 'respect' requires, I fear it will be gravely disappointed." (citation omitted)).

308. West Virginia v. EPA, 142 S. Ct. 2587, 2609-10 (2022).

309. *Id.* at 2608 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-60 (2000)).

310. *Id.* at 2614 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

311. *See* Todd Phillips & Beau J. Baumann, *The Major Questions Doctrine's Domain*, 89 BROOK. L. REV. 747, 749 (2024) ("Until now, the MQD has only ever applied to legislative agency actions . . . ."); United States v. Freeman, 688 F. Supp. 3d 1, 16 n.34 (D.N.H. 2023) ("It is not clear that the major questions doctrine applies to an agency's interpretative guidance on a regulation . . . , which do[es] not have the force of law.").

312. *See supra* Parts II-III (discussing public participation and courts' deference).

that the Guidelines could be swept under the major questions doctrine's ever-expanding reach and found lacking in authorization.[313]

The second factor is the Court's newfound willingness to treat guidance documents as final and reviewable for substance. Historically, courts have held that an agency action needed to be final and legally binding in order to be judicially reviewable under the APA; this meant that guidance and policy statements were categorically not subject to review.[314] In *United States Army Corps of Engineers v. Hawkes*, however, the Supreme Court held that a jurisdictional determination was reviewable because, "for all practical purposes," it would bind the parties.[315] If the Guidelines were found to be practically binding because of their influence, they could be deemed final and therefore reviewable.[316]

Of course, the Court has not unambiguously held that guidance documents are final. In *Hawkes*, which is widely considered the turning point in the Court's finality analysis,[317] the agency action at issue was a jurisdictional determination—not a guidance or policy statement.[318] The Court crept closer to an express statement on finality and guidance in *National Park Hospitality Association v. Department of the Interior*, when it briefly indicated that the policy statement at issue was final.[319] But *National Park* ultimately held that the regulation was not ripe for review, and no further clarification has come in the twenty years since.[320] In the absence of clear doctrine, many lower courts have

313. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2373-75 (2023) (holding the "economic and political significance" of the student-loan-forgiveness plan suggests the HEROES Act did not authorize it (quoting *West Virginia*, 142 S. Ct. at 2608)); Nat'l Fed'n of Indep. Bus. v. U.S. Dep't of Labor, 142 S. Ct. 661, 665-66 (2022) (per curiam) (holding the OSHA Act did not "plainly authorize[]" emergency COVID-19 vaccine/testing mandate for the workplace). There is a robust literature on the expansion of the major questions doctrine. *See generally, e.g.*, Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CALIF. L. REV. 899 (2024).

314. Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 811 (D.C. Cir. 2006) (explaining that "'if the practical effect of the agency action is not a certain change in the *legal* obligations of a party, the action is non-final for the purposes of judicial review' under the APA" (emphasis added) (quoting Nat'l Ass'n of Home Builders v. Norton, 415 F.3d 8, 15 (D.C. Cir. 2005))); *see also* 5 U.S.C. § 704 (authorizing judicial review for final agency action).

315. 578 U.S. 590, 597-602 (2016).

316. *See* Pierce, *supra* note 12 (suggesting courts will now apply *Hawkes* to the Merger Guidelines).

317. *See generally, e.g.*, Funk, *supra* note 8; Emily Parsons, Comment, *The Substantial Impact Approach: Reviewing Policy Statements in Light of APA Finality*, 95 WASH. L. REV. 495 (2020).

318. *See Hawkes*, 578 U.S. at 595.

319. 538 U.S. 803, 809, 812 (2003).

320. *Id.* at 812.

taken their own approach to finality. The D.C. Circuit, for example, has repeatedly held that guidance documents are categorically not final, and therefore the Guidelines may be on safer ground there.[321]

Assuming arguendo that the Guidelines are final and reviewable, courts scrambling to comply with the nebulous major questions doctrine could conceivably "hold unlawful and set aside"[322] the Guidelines on the grounds that Congress has not given a clear statement authorizing such a policy statement. After all, the Agencies are charged with enforcing the antitrust laws broadly, not promulgating merger guidelines specifically.[323] Given these changes in administrative law doctrine, the Agencies' scramble to ground the Guidelines in case law and deny their ability to bind becomes understandable.[324]

Notably, underlying both the major questions doctrine and the turn against *Chevron* is a purported desire to adhere to congressional intent,[325] and there is no evidence that Congress disapproves of the Agencies' issuance of Guidelines. The congressional record suggests the opposite, in fact. While members of Congress have regularly criticized the contents of a version of the Guidelines over the years, whether for being too stringent or too lax, they have never questioned the Agencies' authority to issue them in the first instance, either through legislation or on the floor.[326] In the 1980s, for example, at the height of congressional heat on the Guidelines, members criticized the Reagan DOJ for not abiding by the Guidelines to stop the sale of Conrail to Norfolk Southern,[327] and for failing to take into account considerations put forth by the rivaling NAAG Guidelines[328]—all gripes about

321. *See, e.g.*, Nat'l Ass'n of Home Builders v. Norton, 415 F.3d 8, 13-17 (D.C. Cir. 2005); Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta, 785 F.3d 710, 712-13 (D.C. Cir. 2015). *But see* Cal. Cmtys. Against Toxics v. EPA, 934 F.3d 627, 634-35 (D.C. Cir. 2019) (criticizing prior circuit precedent for failing to recognize that "the finality analysis is distinct from the test for whether an agency action is a legislative rule").

322. 5 U.S.C. § 706(2).

323. *See supra* notes 229-31 and accompanying text.

324. *See supra* notes 301-03 and accompanying text.

325. Another view, of course, is that the major questions doctrine is just a judicial power grab. *See, e.g.*, Kimberly Wehle, *The Supreme Court's Extreme Power Grab*, ATLANTIC (July 19, 2022), https://perma.cc/A69D-MGPX. Regardless of the merits of this view, this Note takes the Court's congressional-intent justification at face value for the sake of evaluating its application to the Merger Guidelines.

326. Representative Fish's bill is of course a notable exception. *See supra* notes 108-13 and accompanying text. But the bill failed, and no such similar legislation has emerged since the Agencies have themselves adopted robust procedures. *See supra* Part II.B. Of course, it's possible members of Congress have questioned the Guidelines at times in interviews or statements off the Hill, but informal statements, by their nature, would not pose the same threat to the Guidelines as actual legislative action.

327. 132 CONG. REC. 557 (1986) (statement of Sen. Alan J. Dixon).

328. 133 CONG. REC. 6695-96 (1987) (statement of Sen. Joseph R. Biden, Jr.).

the Guidelines' substance or application, but not their existence. Other members only mentioned the Guidelines to approve of their existence. One member said the Guidelines "exemplified" modern merger analysis;[329] another introduced an oil pipeline bill that stated briefly the Attorney General would "use recognized antitrust standards for defining markets (e.g., as set forth in the Department of Justice Merger Guidelines)."[330] In more recent years, members have seemed to take it as a given that the Agencies could issue the Guidelines. Their quibbles tend to focus on what exactly the Agencies should include, with members proposing new topics that the Guidelines should address.[331]

B. The Early Cases and Their Prognosis for the 2023 Guidelines

It is too early to tell whether the critics are right that the 2023 Guidelines have fallen or will fall from judicial favor. Only a handful of merger cases have been decided since the Agencies issued new Guidelines. *United States v. JetBlue Airways Corp.* and *FTC v. IQVIA Holdings* were the first two.[332] Neither, however, cited to the new Guidelines. The *JetBlue* court did not reference the Guidelines directly, opting instead to include several quoting and citing parentheticals to the 2010 Guidelines.[333] *JetBlue* did recognize that the new Guidelines had been issued, but observed that this had not occurred until after trial was over.[334] The *IQVIA* court relied extensively on the 2010 Guidelines, and similarly did not use the new version.[335] This exclusion can be most logically explained by the fact that the case was decided just eleven days after Agencies issued the 2023 Guidelines.[336] After all, the FTC itself had only cited to the 2010 Guidelines in its briefing.[337]

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329. *Id.* at 3621 (submission of Sen. Robert J. Dole) (introducing the Trade, Employment, and Productivity Act of 1987, S. 539, 100th Cong.).

330. 135 CONG. REC. 17964 (1989) (submission of Sen. Donald L. Nickles) (introducing the Oil Pipeline Regulatory Reform Act of 1989, S. 1471, 101st Cong.).

331. 153 CONG. REC. S3133 (daily ed. Mar. 14, 2007) (statement of Sen. Herbert H. Kohl) (introducing a bill instructing the DOJ to "revise its Merger Guidelines to take into account the special conditions prevailing in the oil industry"); 153 CONG. REC. S15434 (daily ed. Dec. 13, 2007) (statement of Sen. Charles E. Grassley) (introducing an amendment instructing the Agencies to develop new guidelines for merger enforcement in the agricultural sector).

332. United States v. JetBlue Airways Corp., 712 F. Supp. 3d 109 (D. Mass.), *appeal dismissed per stipulation*, No. 24-1092, 2024 WL 3491184 (1st Cir. Mar. 5, 2024); FTC v. IQVIA Holdings, 710 F. Supp. 3d 329 (S.D.N.Y. 2024).

333. 712 F. Supp. 3d at 151, 153, 155-57.

334. *Id.* at 151 n.51.

335. *See* 710 F. Supp. 3d at 368-70, 373, 378-80, 382, 385, 387, 393, 396.

336. *See id.* at 368 n.19.

337. Complaint for Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act ¶¶ 7, 64-65, *IQVIA*, 710 F. Supp. 3d

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FTC v. Community Health Systems, Inc., decided in June 2024, was the first merger action in which the Agencies relied on the new Guidelines in the prima facie case.[338] The FTC sued to block Novant Health from acquiring two hospitals from Community Health Systems.[339] The FTC initially lost at the district level but then won an injunction pending appeal.[340] The district court cited extensively to the "long accepted 2010 Merger Guidelines" in its rejection of the FTC's position,[341] while the Fourth Circuit's two-sentence order did not cite them at all.[342]

The 2023 Guidelines have found their strongest support yet in *FTC v. Tapestry, Inc.* and *FTC v Kroger Co.*[343] In *Tapestry*, the FTC relied, in part, on new theories from Guidelines 2, 6, 7, and 8.[344] In its complaint, the FTC alleged that (1) Tapestry and Capri are close competitors, which in and of itself makes their merger unlawful,[345] (2) Tapestry will "entrench" itself as the "dominant player" in "'accessible luxury' handbags and make it harder for new brands to

329 (No. 23-cv-06188), ECF No. 1; Plaintiff's Memorandum of Law in Support of its Motion for Preliminary Injunction, at 2, 20-22, 44, *IQVIA*, 710 F. Supp. 3d 329 (No. 23-cv-06188), ECF No. 174.

338. Memorandum in Support of Preliminary Injunction at 3, 14 & n.48, 16, 18 & n.55, 31-32, FTC v. Cmty. Health Sys., 736 F. Supp. 3d 335 (W.D.N.C. 2024) (No. 24-CV-00028), ECF No. 88.

339. 736 F. Supp. 3d at 343-44.

340. FTC v. Novant Health, Inc., No. 24-1526, 2024 WL 3042896, at *1 (4th Cir. June 18, 2024).

341. *Cmty. Health Sys.*, 736 F. Supp. 3d at 369; *see, e.g.*, *id.* at 344 ("[T]he FTC is correct that in one or more 'relevant markets' the level of combined market share and market concentration will be outside the permitted guideline range . . . ."). Judge Bell cited to the Guidelines in defining the relevant geographic market (the hypothetical monopolist test and SSNIP) and concentrations within the relevant market (HHI). *Id.* at 367-70. But Judge Bell ultimately found that the FTC's analysis under the 2023 Merger Guidelines failed to take into account "the already heavy concentration of the relevant market." *Id.* at 370.

342. *Novant Health*, 2024 WL 3042896, at *1 (order enjoining transaction pending appeal). The parties subsequently abandoned the transaction, and the case was dismissed as moot. Dave Muoio, *Novant Health Gives Up $320M Hospital Deal After FTC Secures Appeals Court Injunction*, FIERCE HEALTHCARE (June 18, 2024, 5:20 PM), https://perma.cc/TL43-Z4WX; FTC v. Novant Health, No. 24-1526, 2024 WL 3561941 (4th Cir. July 24, 2024), at *1 (dismissing the appeal as moot and vacating the district court decision).

343. FTC v. Tapestry, Inc., 755 F. Supp. 3d 386 (S.D.N.Y. 2024); FTC v. Kroger Co., No. 24-CV-00347, 2024 WL 5053016 (D. Or. Dec. 10, 2024).

344. *See* Complaint for Temporary Restraining Order & Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act ¶¶ 13, 48, 78, *Tapestry*, 755 F. Supp. 3d 386 (No. 24-cv-03109), ECF No. 1; 2023 GUIDELINES, *supra* note 85, § 2.2, .6-.8.

345. *Compare* Complaint, *supra* note 344, ¶ 48, *with* 2023 GUIDELINES, *supra* note 85, § 2.2 (Guideline 2).

both enter and have a meaningful presence,"[346] (3) Tapestry has contributed to a "trend of consolidation,"[347] and (4) Tapestry has "engaged in an anticompetitive pattern and strategy of acquisitions in the 'accessible luxury' market" with an intent to "continue this pattern and strategy" through the proposed acquisition of Capri.[348]

In October 2024, the district court enjoined the merger.[349] After citing to the Guidelines, the court applied the Guidelines' long-standing market definition framework and concluded that the merger violated the 2023 HHI thresholds.[350] Given the sheer size of the post-merger HHI and HHI change, this merger would have also exceeded the more lenient 2010 thresholds.[351] The court's reliance on the 2023 thresholds, while less dispositive to the outcome, suggests an intentional deference to the Agencies' choice to issue new guidance.[352]

At first blush, the *Tapestry* court's opinion reads like a resounding adoption of the 2023 Guidelines. But the court ultimately sidestepped the FTC's more novel theories of harm, ignoring its arguments on Guidelines 6, 7, and 8 and swiftly disposing of Guideline 2 in a footnote: Because the FTC had already met the traditional test of showing that the merger would significantly increase market concentration, the court believed it was not necessary to consider whether the FTC could make its case purely by "demonstrating that the merger 'will eliminate head-to-head competition'" between two rivals.[353]

In *Kroger*, the FTC's novel theories fared slightly better. The FTC relied on the new HHI thresholds and tested out the Guidelines' new labor market

346. *Compare* Complaint, *supra* note 344, ¶ 78, *with* 2023 GUIDELINES, *supra* note 85, § 2.6 (Guideline 6).

347. *Compare* Complaint, *supra* note 344, ¶ 13, *with* 2023 GUIDELINES, *supra* note 85, § 2.7 (Guideline 7).

348. *Compare* Complaint, *supra* note 344, ¶ 78, *with* 2023 GUIDELINES, *supra* note 85, § 2.8 (Guideline 8).

349. *Tapestry*, 755 F. Supp. 3d at 498.

350. *Id.* at 412 & n.3, 413-14, 458-59; 2023 GUIDELINES, *supra* note 85, § 2.1 & n.15 (discussing HHI).

351. *Tapestry*, 755 F. Supp. 3d at 459 (reporting a post-merger HHI of 3,646 and a HHI change of 1,499). The 2010 HHI thresholds for triggering a structural presumption were a post-merger HHI of over 2,500 and a HHI change of over 200. *See* 2010 GUIDELINES, *supra* note 72, § 5.3.

352. *See Tapestry*, 755 F. Supp. 3d at 458 ("Under the 2023 Merger Guidelines, which the Court deems persuasive on this point . . . .").

353. *Id.* at 486 n.43 (quoting Plaintiff FTC's Post-Hearing Proposed Findings of Fact & Conclusions of Law ¶ 71, *Tapestry*, No. 24-cv-03109, ECF No. 330). Tapestry and Capri abandoned the merger shortly thereafter. *See* Joint Status Report, Tapestry, Inc., FTC File No. 9429 (Dec. 2, 2024), https://perma.cc/KU5A-S5DE. Upon stipulation of the parties, the Second Circuit issued a mandate withdrawing the appeal. *Id.*

theory[354] by alleging that the merger would harm competition in the union grocery labor market.[355] In December 2024, the district court enjoined the merger.[356] The opinion referenced the 2023 Guidelines over thirty times.[357] Deeming the 2023 Guidelines "persuasive authority," the court saw "no reason to reject" the 2023 HHI thresholds in favor of the more lenient 2010 thresholds.[358] The court went on to note that "[i]n the short time in which the 2023 Merger Guidelines have been in effect, *multiple courts* have cited them as persuasive authority without weighing their relative merits vis-à-vis the 2010 Merger Guidelines."[359] Because the FTC had already met its burden on its traditional consumer competition claim, the court found it unnecessary to address the labor theory.[360] But the court still affirmed the viability of this theory for future antitrust cases[361]: "Based on the limited evidence presented," the court "tentatively [found] that the proposed union grocery labor market . . . [was] a plausible, relevant market for antitrust purposes."[362] The DOJ is also pursuing a labor theory in ongoing *United States v. UnitedHealth Group*.[363]

The FTC has also challenged its first vertical merger under the new Guidelines in *FTC v. Tempur Sealy International, Inc.*[364] In a nod to Guideline 5, the FTC alleged that allowing Tempur Sealy to acquire Mattress Firm would allow Tempur Sealy to "wield significant power over its rivals" and "cut or limit their access to [a] critical retail channel."[365] In February 2025, the District

354. 2023 GUIDELINES, *supra* note 85, § 2.10.

355. Complaint for Temporary Restraining Order & Injunctive Relief ¶ 101, FTC v. Kroger Co., No. 24-cv-00347 (D. Or. Dec. 10, 2024), ECF No. 1.

356. *Kroger*, 2024 WL 5053016, at *39. Albertsons subsequently abandoned the merger and sued Kroger. Alina Selyukh, *Albertsons Sues Kroger and Ends Failed Grocery Megamerger*, NPR (Dec. 11, 2024, 10:52 AM ET), https://perma.cc/DVG4-VQQW.

357. *See generally Kroger*, 2024 WL 5053016.

358. *Id.* at *16.

359. *Id.* (emphasis added). The cited decisions were *Tapestry* and *Community Health Systems*, discussed above, and *Tevra Brands LLC v. Bayer HealthCare LLC*, a private antitrust action alleging exclusionary practices. No. 19-cv-04312, 2024 WL 1909156, at *1 (N.D. Cal. May 1, 2024).

360. *Kroger*, 2024 WL 5053016, at *32.

361. *Id.* (acknowledging that "plaintiffs present a compelling and logical case for applying traditional antitrust analysis to labor markets").

362. *Id.* at *34.

363. Complaint, United States v. UnitedHealth Grp. Inc. ¶ 18, No. 24-cv-03267 (D. Md. Nov. 12, 2024), ECF No. 1. The DOJ filed suit to enjoin a proposed merger between UnitedHealth and Amedisys on the grounds that it would substantially lessen competition in local home health, hospice, and nurse labor markets. *Id.* The case is ongoing as of May 2025.

364. No. 24-cv-02508, 2025 WL 617735 (S.D. Tex. Feb. 26, 2025).

365. *Compare* Complaint for Temporary Restraining Order & Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act ¶ 5, *Tempur Sealy*,

footnote continued on next page

Court for the Southern District of Texas denied the FTC's motion for a preliminary injunction in an opinion that did not cite to the 2023 Guidelines at all and mentioned the 1992 Guidelines once in a citing parenthetical.[366] Curiously, the court relied extensively on a different non-judicial source, the "well-respected" Areeda and Hovenkamp treatise.[367] The complete shut out of the 2023 Guidelines in favor of a treatise could suggest that the Guidelines' new provisions on vertical mergers are on thinner ice than other provisions. But until the Agencies bring another vertical merger challenge, *Tempur Sealy* is only one data point.

On balance, these early cases suggest that courts will be receptive to the 2023 Guidelines. Admittedly, that reliance has largely focused on the Agencies' tweaks to traditional frameworks (market definition and concentration), leaving the fate of the wholly new theories unclear. But even with large shifts in administrative law doctrine and a mixed track record for the new revision, it seems unlikely that courts will stop deferring to the Guidelines for the same reasons articulated by AAG Turner when the first Guidelines were issued: a continuing need for business certainty.[368] That need has only been supplemented by the added weight of decades of industry reliance. Defendants themselves rely on the Guidelines to steer their arguments during litigation—taking for granted that these guidance documents set the rules of the game.[369] When the Agencies have taken a harsher approach on enforcement, industry

No. 24-cv-02508, ECF No. 1, *with* 2023 GUIDELINES, *supra* note 85, § 2.05 ("Mergers can violate the law when they create a firm that may limit access to products or services that its rivals use to compete." (capitalization altered)).

366. *Tempur Sealy*, 2025 WL 617735, at *24, *54.

367. *Id.* at *11, *14, *21, *28, *30, *33, *35-*38, *40, *43, *47, *52-53.

368. *See supra* Part I.

369. *See, e.g.*, Petition for a Writ of Certiorari at 34-35, Anthem, Inc. v. United States, 137 S. Ct. 2250 (2017) (No. 16-1342), 2017 WL 1832038; Brief for Defendant-Appellee Lundbeck Inc. at 3, 35, 38, 62, 74, 86-87, FTC v. Lundbeck, Inc., Nos. 10-cv-3258 & 10-cv-3459, 2011 WL 683159 (8th Cir. Feb. 17, 2011), ECF No. 46; Defendants' Post Trial Brief and Conclusions of Law ¶¶ 33, 68, 74, 100, 107, 112, FTC v. H.J. Heinz Co., 164 F. Supp. 2d 659 (D.D.C. 2001) (No. 00CV01688), 2000 WL 35765658, ECF No. 89; Defendants' Post-Trial Brief at 10, 13, United States v. JetBlue Airways Corp., 712 F. Supp. 3d 109 (D. Mass. 2024) (No. 23-cv-10511), 2023 WL 9111112, ECF No. 450; Defendants' Motion to Dismiss All Claims Related to a Light Petroleum Products Market at 2-4, 3 n.2, 4 n.3, FTC v. Foster, No. CIV 07-352 (D.N.M. May 29, 2007), 2007 WL 1514768, ECF No. 112.

has not boycotted the comment process.[370] Rather, revision after revision, year after year, buy-in to the Guidelines' comment process continues.[371]

Modern merger analysis demands frameworks with a level of economic sophistication that simply cannot be provided by fifty-year-old case law that has never been overruled. In judicial darkness, Congress has chosen to leave the merger rules to the merger experts. The Agencies are, after all, the ones who are free to revise standards quickly enough to keep up with a rapidly evolving economy. Despite grumblings about a particular administration's enforcement philosophy, "the present system of merger enforcement has worked well."[372]

Conclusion

Since their first iteration in 1968, the Merger Guidelines have served as the north star of modern antitrust jurisprudence. Their substantive contents are often the subject of fierce disagreement and reproach, especially as the Agencies have encouraged greater public participation and received it in turn. Each round of public comment has brought forth warnings that a certain set of Guidelines has gone too far. And yet the courts, Congress, commentators, and corporations have continued to rely on the Guidelines for over fifty years. If the history of deference tells us anything, it's that the alarm bells can stop ringing. Even with the Agencies' pursuit of new (potentially controversial) theories in the 2023 Guidelines and shifts in administrative law doctrine, courts will likely remain steadfast in their unnamed, but undeniable deference.

But setting aside these predictions, this Note's exploration of the Agencies' promulgation procedures has also uncovered several reasons why courts should follow in Judge Rochon's footsteps and apply *Skidmore* to the Guidelines. First, the Agencies' voluntary adoption of the APA's notice-and-comment procedures over iterations of the Guidelines—soliciting public comment, receiving it, and engaging with it in the final product—reflects a "thoroughness" in their "consideration" of the substance of the Guidelines.[373] Second, the Agencies, as the entities charged with enforcing the antitrust laws,

370. *See, e.g.*, Verizon Commc'ns Inc., Biotechnology Indus. Org., Fin. Servs. Roundtable, Microsoft Corp., Nat'l Ass'n of Mfrs. & U.S. Chamber of Com., Comment Letter on the Horizontal Merger Guidelines Revision Project (June 4, 2010), https://perma.cc/XSL9-NRWC; U.S. Chamber of Com., Comment Letter on Draft Merger Guidelines (Sept. 15, 2023), https://perma.cc/PK95-DL5T.

371. *See supra* Part II. Another example of industry support for guidance can be found in pharmaceutical companies and the FDA. Regulated entities "benefit greatly from knowing in advance what types of toxicological studies the Agency will deem acceptable" in food and color petitions. Lars Noah, *The FDA's New Policy on Guidelines: Having Your Cake and Eating It Too*, 47 CATH. U. L. REV. 113, 122-24 (1997).

372. Cavanagh, *supra* note 287, at 184.

373. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *see supra* Parts I, II.D.

have developed a significant "body of experience and informed judgment" in merger enforcement,[374] especially in light of the ongoing deficit of merger case law, judicial unfamiliarity with the complexities of antitrust, and the Guidelines' embrace of updated economic thinking.[375] The final rationale is a nakedly pragmatic one. Any court to drop the axe on the Guidelines would be faced with a bleak question in the aftermath: What now?

374. *Skidmore*, 323 U.S. at 140; *see supra* Part III.

375. *See supra* Part III.

Appendix: Merger Challenges, December 2000 to February 2025

Merging Companies	Case Citation(s)	Result	Reliance	Label
Tempur Sealy/ Mattress Firm	FTC v. Tempur Sealy Int'l, Inc., No. 24-cv-02508, 2025 WL 617735 (S.D. Tex. Feb. 26, 2025)	Loss	Minimal	None
Kroger/ Albertsons	FTC v. Kroger Co., No. 24-cv-00347, 2024 WL 5053016 (D. Or. Dec. 10, 2024)	Win	Yes	Persuasive
Tapestry/ Capri	FTC v. Tapestry, Inc., 755 F. Supp. 3d 386 (S.D.N.Y. 2024)	Win	Yes	Persuasive/ *Skidmore*
Novant Health/ Community Health Systems	FTC v. Cmty. Health Sys., Inc., 736 F. Supp. 3d 335 (W.D.N.C.), *granting motion for injunction pending appeal sub nom.* FTC v. Novant Health, Inc., No. 24-1526, 2024 WL 3042896 (4th Cir.), *and vacated, appeal dismissed as moot*, No. 24-1526, 2024 WL 3561941 (4th Cir. July 24, 2024)	Win	Yes	None (W.D.N.C.)
Jetblue/ Spirit	United States v. JetBlue Airways Corp., 712 F. Supp. 3d 109 (D. Mass.), *appeal dismissed per stipulation*, No. 24-1092, 2024 WL 3491184 (1st Cir. Mar. 5, 2024)	Win	Minimal	None
IQVIA/ Propel Media	FTC v. IQVIA Holdings, 710 F. Supp. 3d 329 (S.D.N.Y. 2024)	Win	Yes	Helpful/ Useful
Illumina/ Grail	Illumina, Inc. v. FTC, 88 F.4th 1036 (5th Cir. 2023)	Loss	No	None

Microsoft/ Activision Blizzard	FTC v. Microsoft Corp., 681 F. Supp. 3d 1069 (N.D. Cal. 2023)	Loss	Minimal	None
Meta/ Within	FTC v. Meta Platforms Inc., 654 F. Supp. 3d 892 (N.D. Cal. 2023)	Loss	Yes	None
Penguin Random House/ Simon & Schuster	United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1 (D.D.C. 2022)	Win	Yes	Looked to/ Relied on/ Guidance
Booz Allen Hamilton/ EverWatch	United States v. Booz Allen Hamilton Inc., No. 22-1603, 2022 WL 9976035 (D. Md. Oct. 17, 2022).	Loss	Minimal	None
US Sugar/ Imperial Sugar	United States v. U.S. Sugar Corp., No. 21-1644, 2022 WL 4544025 (D. Del. Sept. 28, 2022), *aff'd*, 73 F.4th 197 (3d Cir. 2023)	Loss	Minimal	None (D. Del) None (3d Cir.)
UnitedHealth/ Change Healthcare	United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118 (D.D.C. 2022)	Loss	Minimal	None
Hackensack Meridian Health/ Englewood Healthcare Foundation	FTC v. Hackensack Meridian Health, Inc., No. 20-cv-18140, 2021 WL 4145062 (D.N.J. Aug. 4, 2021), *aff'd*, 30 F.4th 160 (3d Cir. 2022)	Win	Yes	Persuasive (D.N.J.) Persuasive (3d Cir.)
Jefferson Health/ Albert Einstein Healthcare Network (Thomas Jefferson University)	FTC v. Thomas Jefferson Univ., 505 F. Supp. 3d 522 (E.D. Pa. 2020)	Loss	Yes	Persuasive

Peabody Energy/ Arch Coal	FTC v. Peabody Energy Corp., 492 F. Supp. 3d 865 (E.D. Mo. 2020)	Win	Yes	Looked to/ Relied on/ Guidance
Sabre/ Farelogix	United States v. Sabre Corp., 452 F. Supp. 3d 97 (D. Del. 2020), *vacated as moot*, No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020)	Loss	Yes	None (D. Del.)
Evonik/ PeroxyChem	FTC v. Rag-Stiftung, 436 F. Supp. 3d 278 (D.D.C. 2020)	Loss	Yes	Persuasive
Tronox/ Cristal	FTC v. Tronox Ltd., 332 F. Supp. 3d 187 (D.D.C. 2018)	Win	Yes	Looked to/ Relied on/ Guidance
Wilhelm Wilhelmsen/ Drew Marine	FTC v. Wilh. Wilhelmsen Holding ASA, 341 F. Supp. 3d 27 (D.D.C. 2018)	Win	Yes	None
AT&T/ Time Warner	United States v. AT&T Inc., 310 F. Supp. 3d 161 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019)	Loss	Yes	Helpful/ Useful (D.D.C.) Helpful/ Useful (D.C. Cir.)
Sanford Health/ Mid Dakota	FTC v. Sanford Health, No. 17-cv-133, 2017 WL 10810016 (D.N.D. Dec. 15, 2017), *aff'd*, 926 F.3d 959 (8th Cir. 2019)	Win	Yes	None (D.N.D.) None (8th Cir.)
Energy Solutions/ Waste Control Specialists	United States v. Energy Sols., Inc., 265 F. Supp. 3d 415 (D. Del. 2017)	Win	Minimal	None

Advocate Health Care Network/ NorthShore University HealthSystem	FTC v. Advoc. Health Care, No. 15 C 11473, 2016 WL 3387163 (N.D. Ill. June 20, 2016), *rev'd and remanded sub nom.* FTC v. Advoc. Health Care Network, 841 F.3d 460 (7th Cir. 2016) FTC v. Advoc. Health Care, No. 15 C 11473, 2017 WL 1022015 (N.D. Ill. Mar. 16, 2017)	Win	Yes	None (ND. Ill) None (7th Cir.) (rev'd) Helpful/ Useful (ND. Ill.) (remand)
Anthem/ Cigna	United States v. Anthem, Inc., 236 F. Supp. 3d 171 (D.D.C.), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017).	Win	Yes	Looked to/ Relied on/ Guidance (D.D.C) Helpful/ Useful (D.C. Cir.)
Aetna/ Humana	United States v. Aetna Inc., 240 F. Supp. 3d 1 (D.D.C. 2017)	Win	Yes	Looked to/ Relied on/ Guidance
Penn State Hershey Medical Center/ PinnacleHealth System	FTC v. Penn State Hershey Med. Ctr., 185 F. Supp. 3d 552 (M.D. Pa.), *rev'd and remanded*, 838 F.3d 327 (3d Cir. 2016)	Win	Yes	Looked to/ Relied on/ Guidance (M.D. Pa.) Persuasive (3d Cir.)
Staples/ Office Depot	FTC v. Staples, Inc., 190 F. Supp. 3d 100 (D.D.C. 2016)	Win	Yes	Looked to/ Relied on/ Guidance
Steris/ Synergy Health	FTC v. Steris Corp., 133 F. Supp. 3d 962 (N.D. Ohio 2015)	Loss	No	None
Sysco/ US Foods	FTC v. Sysco Corp., 113 F. Supp. 3d 1 (D.D.C. 2015)	Win	Yes	Looked to/ Relied on/ Guidance

Saint Alphonsus/ St. Luke's Health System/ Saltzer Medical Group	Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., Nos. 12-cv-00560 & 13-cv-00116, 2014 WL 407446 (D. Idaho Jan. 24, 2014), *aff'd*, 778 F.3d 775 (9th Cir. 2015)	Win	Yes	None (D. Idaho) Persuasive (9th Cir.)
Bazaarvoice/ PowerReviews	United States v. Bazaarvoice, Inc., No. 13-cv-00133, 2014 WL 203966 (N.D. Cal. Jan. 8, 2014)	Win	Yes	Persuasive
Polypore International/ Microporous Products	Polypore Int'l, Inc. v. FTC, 686 F.3d 1208 (11th Cir. 2012)	Win	No	None
OSF Healthcare System/ Rockford Health System	FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069 (N.D. Ill. 2012)	Win	Yes	None
H&R Block/ Tax Act	United States v. H&R Block, Inc. 833 F. Supp. 2d 36 (D.D.C. 2011)	Win	Yes	Persuasive
ProMedica/ St. Luke's Hospital	FTC v. ProMedica Health Sys., Inc., No. 11-cv-47, 2011 WL 1219281 (N.D. Ohio Mar. 29, 2011) ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559 (6th Cir. 2014)	Win	Yes	Looked to/ Relied on/ Guidance (N.D. Ohio) (preliminary injunction) Helpful/ Useful (6th Cir.) (divestiture)
Labcorp/ Westcliff Medical Laboratories	FTC v. Lab'y Corp. of Am., No. SACV 10-1873, 2011 WL 3100372 (C.D. Cal. Mar. 11, 2011)	Loss	Minimal	None

Lundbeck/ Ovation Pharmaceuticals	FTC v. Lundbeck, Inc., Nos. 08-6379 & 08-6381, 2010 WL 3810015 (D. Minn. Aug. 31, 2010), *aff'd*, 650 F.3d 1236 (8th Cir. 2011)	Loss	Minimal	None
CCC Information Services/ Mitchell International	FTC v. CCC Holdings, 605 F. Supp. 2d 26 (D.D.C. 2009)	Win	Yes	Helpful/ Useful
Chicago Bridge & Iron/ Water Division Pitt-Des Moines	Chi. Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410 (5th Cir. 2008)	Win	Yes	Persuasive
Whole Foods/ Wild Oats	FTC v. Whole Foods Mkt., Inc., 502 F. Supp. 2d 1 (D.D.C. 2007), *rev'd*, 533 F.3d 869 (D.C. Cir. 2008), *opinion amended and superseded*, 548 F.3d 1028 (D.C. Cir. 2008).	Win	Yes	Looked to/ Relied on/ Guidance (D.D.C.) None (D.C. Cir.) (rev'd)
Western Refining/ Giant Industries	FTC v. Foster, No. CIV 07-352, 2007 WL 1793441 (D.N.M. May 29, 2007)	Loss	Yes	Looked to/ Relied on/ Guidance
Arch Coal/ Trition Coal Company	FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004)	Loss	Yes	Looked to/ Relied on/ Guidance
Oracle/ Peoplesoft	United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004)	Loss	Yes	None
UPM-Kymmene Oyj/ Bemis MACtac	United States v. UPM-Kymmene Oyj, No. 03 C 2528, 2003 WL 21781902 (N.D. Ill. July 25, 2003)	Win	Minimal	None
Libbey/ Newell Rubbermaid	FTC v. Libbey, Inc., 211 F. Supp. 2d 34 (D.D.C. 2002)	Win	Minimal	None

SunGard Data Systems/ Comdisco	United States v. Sungard Data Sys., Inc., 172 F. Supp. 2d 172 (D.D.C. 2001)	Loss	Yes	None
Heinz/ Beech-Nut	FTC v. H.J. Heinz Co., 116 F. Supp. 2d 190 (D.D.C. 2000), *rev'd*, 246 F.3d 708 (D.C. Cir. 2001)	Win	Yes	None (D.D.C) Helpful/ Useful (D.C. Cir.) (rev'd)
Swedish Match/ National Tobacco	FTC v. Swedish Match, 131 F. Supp. 2d 151 (D.D.C. 2000)	Win	Yes	Helpful/ Useful

Note. This Appendix does not include mergers that were abandoned by the parties pre- and post-complaint, or mergers that were abandoned after an FTC administrative hearing. Including those cases would exponentially increase the agency "win" rate. But our universe is limited to *decided* cases—that is, cases where a district or appellate court has issued a decision—so that we may understand how courts specifically are evaluating the Guidelines. Last updated February 28, 2025.