

Brian Peck

00:00:01

- Welcome, everybody. Thank you for joining us today. Our Center for Transnational Law and Business at USC Gould School of Law is very pleased to host and present today's webinar that features a very distinguished group of leading experts to discuss the new DOJ and FTC draft merger guidelines that were released just last Wednesday. To get us started I will turn it over to our moderator, Daniel Sokol, who is a professor of law here at USC, and the faculty director for our center. Danny.

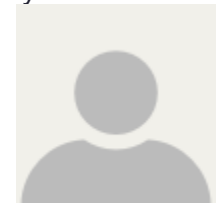


Danny Sokol

00:00:28

thank you. thank you everyone for joining. There's a lot to cover in only 1 h. So if you don't already know the bios of our distinguished panelists, look them up. But basically we have Debbie Andrea, Rich, Carl and Steve are going to share their insights into essentially the institutions of antitrust: courts, agencies, and sort of how these guidelines play into all of that.

- What we're going to do is, just get some opening statements first, then follow with some targeted discussion and some back and forth. Debbie, I'm going to start with you.



Debbie Feinstein

00:01:05

Thanks. I'm pleased to be here. I probably need to read these guidelines three more times before I can really talk intelligently on them. The Guidelines cover a lot of ground, but I have a few preliminary observations. First. I think this is largely what we expected. It is a very broad document, talking about all the many ways transactions could harm consumers or competition. There are very few off ramps in terms of explaining how the agencies will conclude a transaction does not harm competition. The Guidelines set forth lower concentration levels at which there may be concerns, more concerns about monopsony, more concerns about potential competition. None of that is particularly surprising.

- Second, I think there were some good things in these guidelines. I was asked last fall what I hoped to see in the new guidelines, and I said it would be great if there were discussions of how the Agencies define cluster markets and bundled markets. Those come up all the time in cases, and there was never any articulation of that in the guidelines. I think there could have been more detail in the draft Guidelines explaining the situations in which the Agencies will define those kinds of markets, but at least they were mentioned.
- Third, I think there are some missed opportunities, some things in the prior guidelines, and the case law that from the perspective of my former role as a government enforcer were missed, I think there could have been more discussion of unilateral effects and reference to cases like H&R Block/Tax Act, which made clear that there can be harm under a unilateral effects theory even if the companies aren't each other's closest competitors, i.e., as long as a substantial portion of customers view them as closest competitors there can be harm.
- I think the description of targeted customers was good. But I was surprised not to see references to cases that have really spelled out those theories in ways that I think would be helpful given that the draft Guidelines did not just cite Supreme Court cases.



Danny Sokol

00:03:23

Andrea.



Andrea Murino (K&E Antitrust)

00:03:25

Thank you, Danny, and thanks for having me here today, and has been an interesting couple of days. You know, I was actually at the DOJ as a counsel to Christine Varney in 2010 when Carl and others released that version, and I remember distinctly that the goal of that document was to reflect agency practice, couple it with the state of the art in terms of what the law said, and what economic thinking said.

- Now, undoubtedly you can debate how successful that was. But that was the objective. I think it's pretty clear as I read these guidelines, that their objective here is very different. I'm not saying anything that anybody listening to this call right now doesn't already know. But what they want is new policy.
- It's obvious that the 40 years – they keep talking about that number -- that the 40 years of previous antitrust enforcement, they see it as a failure, and they're looking for a return to something that does not exist or that didn't exist
- As a practitioner, the thing I keep bearing in mind is that we have to meet the agencies where they are, and that includes making clear that the vast majority of deals are not anti-competitive, and, in fact, most of them are pro procompetitive. What we have here, though, is an exacting picture about what the agencies think about the case law and how they plan to use it.
- The thing that I find most telling, though, are the omissions as Debbie mentioned in her opening. I'm a former legal research and writing instructor, and as I read these, that hat came flying back onto my head.
- They ignored wins.
- They ignored wins, even where I think they might have helped them. Like Simon Shuster and Penguin, a recent win. They ignored losses that they told me were wins like Meta/Within where after the case came out the FTC told us it was actually a win.
- And they've also tried to merge the horizontal and vertical guidelines in a way that you know, I think there might be a way to thread, but they are fundamentally two different types of transactions. We all know this, and I don't think it's useful for the agency to have conflated them the way they do in this document.
- But when you think about vertical deals today, which is an enormous focus of both agencies,

I was really surprised they didn't take on United/Change or Microsoft/ Activision. They just left those completely out of the guidelines. If I were trying to use these guidelines to convince the next Article 3 Judge that those vertical losses are not what we think they are, this was a missed opportunity for them.

- I've heard the FTC and DOJ, including in this morning's OpEd from Lina Khan and Jonathan Kanter talking about how they're reflecting the laws that are on the books, and that's what these guidelines try and do. But as I saw on Twitter or whatever it's called now, X, right, we have a new name. As I saw on X over the weekend and I'm sorry I can't remember who did this analysis, but what I do remember very clearly is that the average year of the cases that these guidelines cite to is 1982,

and the weighted average was actually in the mid 1970s.

- So to me, there are some fundamental questions about how the agencies are going to actually be able to deploy these Guidelines in the courts, and I think we'll get into this a

little later. But there are actually some positives that I think we can draw out in terms of practitioners, and how we can use these to advance our clients' interest. So, It is going to be interesting times, to be sure.



Danny Sokol

00:07:09

Rich.



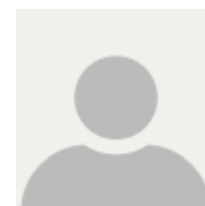
Rich Parker

00:07:10

Thank you for getting me involved, and thank you for being magnanimous enough to invite a UCLA graduate to participate in this SC event.

- I have 4 points that I want to make The first is to say, look Somebody spent a lot of time on these and I know how hard this is having tried to do it back in the day.
- And they came up with a detailed document, and I know it took a lot of work, and so we are to commend them for that.
- And I say that also because we all know that transparency is really helpful. And I think they've come up with new things on vertical mergers, potential competition, etc. And so I think they should be complemented on the effort, without regard to what you may think of what the standards say.
- Point two. This is no surprise; Elections matter in this country, and we all know who won, and the people who won believe that antitrust has been fundamentally under enforced
- for over 30 years. And what I think they did was they read every appellate antitrust case in the history of the world since Sherman Act I, and came up with concepts
- in those cases that they believe, should have been at work in antitrust, and it would have resulted in lower concentrations.
- Point 3. And I think it is time for counsel to do some work. We're going to have to.
- There are more theories of harm with which we need to deal. And we have to figure out what is proper advocacy to address the new theories.
- And remember that these guidelines identify a lot of different ways in which a merger can get in trouble.

- But you know, they can't sue everybody and so there's still going to be a lot of deals that get through.
- And this is almost like what they say, you don't have to outrun the bear. You just have to run a couple of other mergers so you won't get caught. That's essentially where we are, because they don't have the resources to do every one of these cases, and they're going to pick out the best one
- our job is to make sure our clients aren't in that number.
- And finally, there's going to be a colossal legal fight on these guidelines. Also, you're going to see motions to dismiss merger cases potentially. Also,
- I would think that you'd have motions after the government's case. when they rest. And if you don't, you will have a colossal closing argument. I've done a lot of these closing arguments for and against the government. And it's all facts. Now
- that's going to be about half the argument. The rest is going to be on the law and that's going to be new. It will test whether
- these cases are good law or whether Justice Kavanaugh was correct in his
- opinion in the Anthem case and that General Dynamics overruled them.



Danny Sokol

00:11:14

Carl.



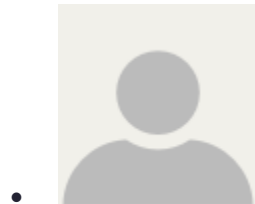
Carl SHAPIRO

00:11:16

Thanks, Danny.. I have a mixed reaction to the guidelines. There's actually a lot that I like, particularly on the horizontal side that builds on what we did in 2010.

- although the economics, for some reason, all in the appendix. Now I can live with that. But I think it's meaningful. on the vertical side. I don't not so much. I think there are some pretty serious problems.
- I will be talking about the substance ahead. So I want to at this point talk more at a higher level.
- Now for 55 years the guidelines have been articulations of economic principles that are widely accepted, by which the agencies implement the case law and are consistent with the case law. They've guided enforcement. I know, from reading the cases in the work I've done with Howard Shelanski that for 25 years every case we can read based on the decisions.

- Not only did the agencies go in with the guidelines.
- the defendants, the merging party said, Yeah, the guidelines framework is good. We like that. We'll work with that. But we should win if you apply it correctly. So it's been a powerful tool. We often talk about a dialogue between the agencies and the courts by which the agencies have advanced. Merger law differs, of course, different administrations. Different authors have their own views of things. It's been a powerful tool to assist and aid merger enforcement, and to move the law forward.
- And I think 2010. You know we see how that happened with now our markets targeted customers, unilateral facts, and more skepticism about entry, for example.
- all that I think is now gone.
- If these guidelines are put out in the final version in in what they look like now, when they say all that's gone, I mean the deference to the guidelines
- it. They've been demoted
- from this articulation of, and economic principles consistent with the case law into a legal brief
- they do not have. So it's a demotion. And I I'm that's why I've been asking. And the trust lawyers, as we'll hear about today what's going to happen when they litigate? Because I don't think the merging party is going to say, Oh, yeah. Well, this is fine. We'll go with your guidelines, and you know, and just so it seems to me there's been a little something really lost from the guideline project
- For all these years the effect of this, I mean, I've been advocating for stricter merging enforcement for at least 25 years in my testimony and my writings.
- and I'm just concerned that the effect will be contrary to the goal of stated goal of both agencies. That is, it will actually make it more difficult to enforce mergers. It will not help with get us to stricter merger enforcement for the reasons I've just given
- subsequently, and then I'll stop. We see now what it means to drop the consumer welfare standard. There's a lot of focus on structure, very little on effect on customers.
- And so I think we'll hear about that in the next hour. Thanks.



Danny Sokol

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Steve.

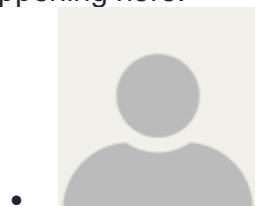


Steven Sunshine

00:14:22

Great thanks, Danny. Well, I was impressed that Debbie started with an apology for not being well informed quite yet. I will say, I've never apologized for my lack of information and don't intend to start that now. So I'm just going to dive right in.

- I mean, I don't think anybody should be surprised by these guidelines, and, in fact, anybody who's been paying attention for the last 2 years have known more or less that these are the positions of the agencies when it comes to enforcement, and we know it stems from a core belief on the part of the current administration that the world is just too concentrated and anti-trust enforcers being asleep at the switch is a root cause of that state of the world. And so this is their attempt to kind of write the balance, and I think they run into 2 fundamental problems. And Carl really alluded to both of these. They're interconnected. It's the precedent and a consistent economic welfare standard underneath an evaluation of a merger's effects on competition. And these guidelines, if we call them guidelines, because I think that they are really more in the way of kind of signposts than guidelines—but these guidelines try to sidestep those problems by identifying 13 different principles or thoughts or ways the transactions can affect competition.
- And I think if we sat down amongst this group we would all agree that, under each of those 13, we could find a set of facts where we would all agree that a merger is anticompetitive, but the guidelines don't really tell us how to do the analysis. They don't tell us what policy underlies. They don't tell us whether we should apply economic standards. They don't think about how to do any balancing of total effects. And so again, you know, I agree with Carl. Is the economist understanding what courts are going to do.
- The courts are going to kind of take these as legal arguments. But look to the precedent that's out there. Look to the underlying economic paradigms and try to come to decisions for me. And again, kind of full disclosure, I was representing Activision in Microsoft / Activision. I think that's a microcosm of what happened.
- The FTC came with its view of what a vertical merger analysis should look like. And the judge said, "Thank you very much. I'm going to apply the law, and here are the facts as I see it, and how they apply to the law." And if your goal as an agency is to increase and strengthen and tighten merger enforcement, I would argue that that case had the opposite goal.
- So long term, what's that effect going to be? Not so clear. We'll talk later. I think it's important to compare this to what Bill Baxter and the 1982 guidelines did, and why they were successful. And why there's some contrary distinction to what's happening here.

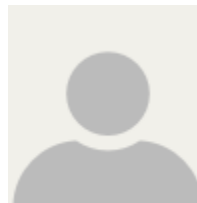


Danny Sokol

00:17:11

Great. So thank you, everyone. So if this is the opening act we now move to part 2

- just very briefly. they have a bifurcated discussion. What are the guidelines mean in court under the law? And what do the guidelines actually mean? Both in front of the agencies and in terms of client counseling. So on this first part, I'm going to say with regard to court.
- Steve, I'll just have you build on what you said, then go to rich and coral, and then agencies and client counseling Debbie and Andrea Steve back to you

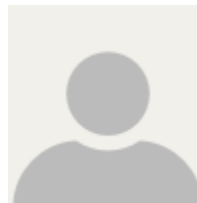


Steven Sunshine

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That the agencies are relying on—I find it a bit ironic that one of the underlying statements is that—from the agencies—is that we need better case law to handle the modern digital economy and then start citing Supreme Court cases from the thirties and the fifties as if those courts were better situated to understand digital platforms than the courts who've looked at them in the last few years. So I think there is just this precedential abyss in what the guidelines are doing. We have 15 merger cases in the last decade or so—Danny, you're probably more on top of it and can give a count—and in my experience in front of Federal judges trying to do a merger analysis, these Federal judges are very serious jurists who want to understand the law.

- And they want to, they want to take the law. They don't want to make new law. They want to take the law, and they want to apply it to the facts in front of them. And I think that they have been convinced over the last many years to understand that their job is to be predictive on what the likely future effects on competition are going to be and that's the analysis they want to do. I, you know, as an advocate like Rich, you know, have kind of been on both sides of the caption in merger cases. A court's going to expect candor. And so the questions that are going to be asked—are you following the law? Are you trying to change the law? Where are you moving? How do you explain this case versus the other case? How does your case fit into Baker Hughes? How does your case fit into ATt&T / Time Warner? And the judges are going to want answers to those questions, and I think that from there it's going to then turn to, you know, a battle of the facts.
- I've actually found too that I think that it's really the facts that persuade the Federal judges. I think the Federal judges decide based on their review of the evidence, the testifying experts, the documents, the economists—do they think this is a good or a bad merger? And then they write their opinion afterwards. So you know, the long and short of it is I would be nervous as a Federal prosecutor going in and trying to strictly argue these guidelines in front of a very smart Federal judge that wants to apply the law.



Danny Sokol

00:20:25

Rich?



Rich Parker

00:20:27

I have commended the government for all the work that went into these guidelines, and I also commend the federal judiciary, to issue with a series of opinions, all of which are 80 or 90 pages that really wrestle with the facts, in these cases

- And you know I've tried some of those cases, and, haven't won all of them. But the judges that struggle hard and have come up with a pretty good body of law.
- That said, legal issues are almost never presented. In the cases since 2010 everybody bought into the 2010 guideline. I'm thinking back
- about what we were thinking, but I never said there was anything wrong with the 2010 guidelines. I don't think anybody else did. All we did was say, Hey, we win under these guidelines.
- And so these judges have never been faced with huge legal issues.
- I imagine a Federal judge who has been a US Attorney, or a public defender facing
- a closing argument, that not only talks about a complex sense of facts.
- but argues about what, Supreme Court opinions really mean today, if anything. At the risk of stating the obvious. We're looking at some real monumental battles on this, and I understand how old these cases are, but it's not like nobody ever cites *Erie v. Tompkins* or *Marbury v. Madison*. They do.
- And those cases are out there, and they and they say what they say, and what they say now becomes part of merger litigation for advocates that advocates to deal with, I think it's a fascinating issue. One thing that concerns me is the Supreme Court. They're supposed to solve these problems, and it's very hard, to get a merger even to the Court of Appeals most times, let alone the Supreme Court,
- All I can say is, I sure hope somebody does, because this really needs to be straightened out.



Danny Sokol

00:23:29

Carl. I wonder if I could throw you into what is this mean under law? Only because you've spent more hours in court for either government or for parties than just about anybody. How does the economists play in courts



Carl SHAPIRO

00:23:50

What do you think they mean? How do these guidelines? Well, anything I'd look I mean, if I go like, how would I testify as an expert witness? And let me, you know, let me focus on horizontal, because that's most of the litigated cases, and most of my experience except one.

- So I guess, like I said, there's a lot of pieces here. I look to guideline to basically is if you've got significant competition between the between the 2 merging firms, we're done. The government wins.
- Okay? And I have some sympathy like that. A lot of economists say, Yeah, that's what we did with. You know, all the fact that we don't need to define markets, and we look at diversion and margins and pricing pressure, and so forth. We've been doing that. That's kind of us like that.
- But we didn't put that in 2010, because
- I was told by the lawyers, turns out you have to look at markets, have the defined markets and market concentration matters, and that's the case. Law.
- So
- So I'm wondering, for example, under guideline, what does the economist say? Yeah, I did this calculation. I've got an upward pricing pressure.
- and I don't know about the market. I don't know. I don't need it, guideline to says you don't need it, and maybe they say, well, what if there's a market? And the market for shares are 8 and 4%? Do you care?
- Does it matter.
- you know? And because they all. Remember, if the Herfindahls are high, you just go to a standard structural presumption. So if this is going to operate separately, you think it has to operate when the other ones aren't met. Right. There's these 8 things, any one of them alone so could trigger a challenge. So I just don't know how that's going to work another example. But I don't know again. I like that one where it's going, but I don't work. And then something I don't like. For example, efficiencies.
- efficiencies don't count here. These guidelines say they're not cognizable if they further a trend towards concentration.
- even if they benefit customers. Right. So I'm like, what is it kind of supposed to say with that? I I don't know just I didn't look at that. I don't care about a facts, or this is the law. I'm not sure what you say at that point. If you're an economist, seems to me you kind of in a in an awkward position.

- So there's some problems there again, even parts that I like. I don't see quite how it's going to work.

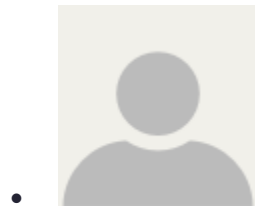


Danny Sokol

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I want to move from what we see in court, since so many deals

- don't end up in court. you argue essentially in front of the agencies, and certain deals don't even get before the agencies, because you client counsel in a way that you suggest. Certain things are riskier and maybe not worth doing or maybe structuring bit differently. Debbie and Andrea. I wonder if the 2 of you can weigh in on that type of analysis.
- Debbie?



Debbie Feinstein

00:26:31

- It's hard to counsel these days. Deals are getting done but I think predicting the deals that are going to get a second request is a bit harder than it used to be, and it goes both ways. I have deals that get second requests that I believe would not have gotten a second request in the past. I also hear repeatedly from practitioners about deals they thought for sure would get a second request -- even under prior administrations -- that aren't getting second requests now. And is that because there are just different enforcement priorities? Is this prosecutorial discretion taking hold at the second request stage? Is it because attorneys at the agencies are busy and they're missing things? It's not clear. But I've heard it so many times that I have to believe that it's happening.
- The other thing you have to tell clients is not only what is likely to happen at the agency but what will happen if they are willing to litigate because the results in court may be different. Talking about litigation is a much more common discussion than we used to have given the Government's track record where they have lost a number of cases. Of course the Agencies note that a number of transactions have been abandoned in the face of litigation and say those count as wins for the government. So companies have to decide whether they are willing to litigate

through to a decision. And of course both parties have to agree to litigate – and to do a deal in the first place. Before a deal is signed, I would say, probably 75% of my time actually looking at the substance of the antitrust issues. And 25% of the time is spent talking about what the deal agreement is going to say because you have to consider how the parties are going to allocate the antitrust risk. Deals are still going to get done. But there's going to be increased uncertainty. Given how expansive these guidelines are, I don't think they give as much guidance as they could because, as everyone's been saying, they can't possibly challenge every deal that comes before them.



Andrea Murino (K&E Antitrust)

00:29:10

Yes, as Debbie said it is hard to counsel these days. I want to go back one, if you don't mind one quick half step back to just follow up on what Rich, Carl and Steve, were talking about. One other problem That I think will come up with using these Guidelines in court is that the previous versions of the Guideline, as I've always understood them and as they were taught to me, there was some power in them because they reflected a consensus across party lines.

- This version has none of that, and nobody's going to even apologize. No one should apologize for it. But when you talk about the serious, thoughtful judges that look at the facts in cases that Rich and Steve and others are bringing before them, that is going to occur to them, too. And so I think inherently, the application of this document is already going to have a deduction against it, because it comes in the context where it really just represents the singular focus of the Biden appointees.
- But what are we going to do about it? What do we do about a day to day?

Unknown Speaker

00:30:07

Well, I know Carl was joking about the appendices. But that's actually the section of this document where I spent most of my time over the weekend.



Andrea Murino (K&E Antitrust)

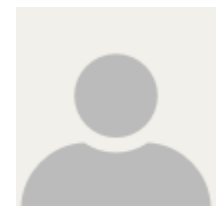
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It lays out the pathway for any individual investigation. You are going to be able to present facts that are persuasive to the staff, and management decision makers, to convince them that your transaction is among again the vast majority that are pro-competitive

- Substitution still matters. I know it doesn't matter as much as it did before, but it still matters. Geography still matters. You're still can look at a SSNIP; customer switching stories matter. All of those things plus “relevant historical strategic decision making”, which I think, is code for your documents still matters. So there really is an arsenal of weapons you can go

to explain why this particular transaction is not going to be anticompetitive. It's not going to be necessary to move into the very rigid, incredibly rigid presumptions, nor are the agencies going to start having to tick through those 8 or 9 areas and into these novel, expansive theories of harm.

- I think the other thing that I'm going to be doing for my clients is using these presumptions and these theories affirmatively. And that's basically just the flip side of what I said. For the past 2 years we've had transactions investigated at length without, candidly, the greatest transparency. There wasn't a cognizable theory. We would ask “what is it that you're investigating?” FTC or DOJ, help us help you. It was very hard to try and read those tea leaves and now we figured it out.
- But it sure would have been easier for them to start with this document at the beginning of their tenures than to have waited 2 years, and so on some level I'm relieved to finally have a document that I can put in front of them and say, you are worried about this, and let me tell you why you do not need to worry about this in the context of my transaction.
- I think we still have some optionality. We still have really great ways to explain to the staff and to management why a particular transaction is lawful.
- At the same time, to Debbie's point, this is moving into a new litigation era, I think it's fair to say, and so preparing clients for that eventuality, what that means in terms of timing, how long it will take to comply with the second request, all of the other myriad risk shifting provisions, you're going to be thinking about all of that. That is something that is moving to the very front end of discussions with clients when they first call about a transaction.



Steven Sunshine

00:32:52

Hey, Dan, if I could just throw in one point, I agree with the point that that Debbie made about kind of the opaque predictiveness of what mergers are going to get investigated.

And I think that there is a secret appendix that hasn't been published, that goes something like this: It's like, are you a large tech company or a pharma company? Do you own a platform? Is your purchase price in excess of \$10 billion? Or, can we make a cool theory like labor monopsony or nascent competition?

- If you fit those guidelines, you are much, much more likely to get investigated and sued, and if you don't, you are much less likely. As Debbie said, rumors abound about transactions that probably would have gotten second requests in the last administration, they are getting cleared. So I think there is a secret appendix that just hasn't been disclosed to us.



Danny Sokol

00:33:47

So

- I'm going to go with what has been disclosed. And so act 3. We're going to start with just some very traditional topics to get
- initial reactions. And then afterwards we'll mix it up a bit. Rich, I wonder if you could start with the traditional horizontal part, the increased concentration and highly concentrated markets discussion and give us some thoughts.



Rich Parker

00:34:13

I think, Andrea said a minute ago that the Guidelines look like almost business, as usual on the horizontal side.

- You look at coordinated effects. You look at unilateral effects. I thought the market definition section was well written.
- I guess the change is the is the thresholds. But can anybody think of a case in which the HHI. I was between 1,800 and 2,500,
- Answer is, maybe it's just me but I end up in court plenty of times, and they're always talking about 5,700 HHI.

- The reason is, the 2010 guidelines as they raise the thresholds, but they made it possible for DOJ to get narrow markets. So the thresholds don't matter
- and I don't see anywhere under these guidelines where they're not going to be able to continue going for the narrow markets
- that they always used to back in the Obama administration or back in the day, and so the thresholds are never, never going to mean anything.
- As to the effect of the presumption, the government always gets it and That kind of puts structure around the analysis, and I think judges find the the presumption to be very, very, very important.
- and so to the extent this helps them get the presumption. at whatever level they're talking about, I think it's extremely important. for the government, and I've never been in a case
- yeah, where the government didn't get the presumption. So, on the horizontal side, I don't
- see a huge amount of change except for some of the new
- theories, what if I have a 38% merger? And it looks good on the, unilateral and coordinated side. But there's been 2 transactions in this

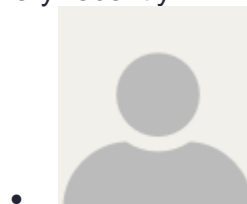
in this industry and the last 5 years. It remains to be seen how the trend issue works out. It obviously depends on your facts. To state the obvious, the government will look for the right set of facts where things have become massively con more concentrated over the last X number of years by zoom.

Danny Sokol

00:37:53

Steve.

- I wonder if we can shift them to vertical, or, as the guidelines suggest close competition? This is an issue that has been that shows it near and dear to your heart very recently.



Steven Sunshine

00:38:06

Sure, no, happy to well, have the guidelines to make it clear to us that the agencies are bringing vertical merger cases. But I think we kind of knew that right? We've seen that several times going back to AT&T / Time Warner. They kind of curiously identify 3 theories in 2 guidelines. Guideline 5 and guideline 6.

- Guideline 5 is talking about denying rivals access to inputs and 6 is about foreclosure. I'm sure Carl can explain to me why those are fundamentally different concepts, but they are very, very similar. There's a competitively sensitive information piece as well, which is not a new concept; as a concept that has been around. I think that the guidelines try to create some presumptions. Of course there's no precedent for a presumption. They try to say, you know, a 50% share. It kind of creates the presumption I think, in the way the 30% share creates the presumption. So I think in that perspective, it's all kind of not that interesting. I think the part where the guidelines really fall down. And I would say in 2 areas. One I'll mention briefly with respect to horizontal mergers. How do you think about efficiencies or pro-competitive effects in the vertical merger context? It's completely absent of any kind in these. What are the pro-competitive effects? What are the efficiencies, and I think it's pretty accepted doctrine that vertical mergers, as compared to horizontal mergers, are more likely to have efficiencies and less likely to have competitive effects, and so the absence is pretty striking.
- And then, I think, at the same time, there's case law out there now, starting with AT&T / Time Warner, which went up to the D.C. Circuit and was affirmed that really says you do a Baker Hughes analysis, where the government has to put together a prima facie case, and can't avail itself of the presumption. And that analysis was followed to a T by Judge Corley in Microsoft / Activision, even though she was sitting in the Northern District of California, she still applied that case law. So there still is this whole paradigm to go through and I think that as cases develop, judges are going to apply those laws. And you know my guess is that we're going to be more likely to see decisions like Microsoft / Activision than decisions stretching the boundaries of vertical mergers and creating presumptions.
- Two kind of additional points, too. I think the agencies try to help themselves out a bit. They talk about evidence, and so they talk about evidence to foreclose as being very meaningful, but then they try and have their cake and eat it too by saying the absence of evidence to foreclose is not very meaningful. And I think a judge is going to find that curious. I mean yes, you could make the argument that perhaps you know the merging parties to some extent kind of gained what was in their files, but I think judges have seen, you know too many large companies and too many documents to you know, to really find that persuasive
- So I, you know, again, I think, kind of the absence to the site, to the real world. You have to look at it both ways. And then just the second point, I know there was a lot made in the in the press about kind of Microsoft's promise and Activision in the Activision merger to make Call of Duty available and kind of the reaction that oh, my gosh, you can't use promises to cure vertical mergers, and I think that that's too fast a little look as to what's really going on in the underlying question. And the guidelines say, this is, let's look at the incentive and the ability and the question on those underlying contracts really can be put into 2 buckets. If you're defending the merger, one is, what does the existence of those commitments tell you about the underlying incentives of the merging parties, and it may well be that making those commitments is the proverbial sleeves off the vest, because the merging parties had every incentive not to foreclose those products and to provide it with rivals.
- And then I think there is a secondary element. Rich referred to it with Arch Coal, but it's also true in United Healthcare, kind of the old litigating the fix. If you have legally enforceable agreements, you know, is that a modified condition in which the court is obligated to look at the modified condition as it goes forward. Sometimes that's contracts which are legally enforceable, but not perfectly enforceable. Sometimes they're commitments to other regulators, the EC.

- And so, I think, kind of the attempt to backfill behind contracts is going to face some serious issues with courts going forward and for parties thinking about vertical mergers. I think these kind of contracts with the right kind of underlying economic justifications—why you're entering into those contracts—I think, can still be powerful.



Danny Sokol

00:43:16

Thanks, Carl.

- and entrench or extend.



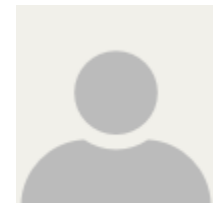
Carl SHAPIRO

00:43:21

So that's guideline 7. I think it links very much with 5 and 6. But Steve was just talking about on vertical.

- and there's a couple of unifying themes that we find here first is, I think, a great skepticism, maybe one might say, hostility towards a successful large firm growing further.
- for example, particularly by extending into adjacent markets. So this is about non horizontal deals again.
- And so we see that I'm very concerned about this guideline. Let me read this one sentence from it. It says, the agencies evaluate whether a merger involving, quote an already dominant firm, they substantially reduce the competitive structure of the industry.
- Now that's a quote most of that from the *Procter & Gamble* case in 1967.
- So it's a cite.
- I found myself reduced the competitive structure. What does it mean? That that's kind of a weird phrasing. Right? You could talk about it. I don't know what I think they name. Keep things concentrated and make things more concentrated. So there's a very much a structural approach here, which also is in guideline 6 very structural.
- And I don't mean horizontal structure, though, right? This is like something about well, it's horizontal structure, but it's also a vertical consolidation. So, and they're talking about. This applies to firms that are dominant firms where dominant is a defined as having at least a 30% market share.
- the other thing that's really notable here is all the analysis is focused on.
- Will the firm be able to trench or extend, make its position stronger, or grow its position into adjacent markets, and the evaluation is not based on the impact on consumers

- or counterparties generally. And this is what this. This is. The consequence of dropping the consumer welfare standard that we've been hearing about.
- The analysis is not focused on. What will this deal hurt customers again? Or workers? I'm not going to keep saying that counterparties okay?
- And instead, it's really will it? Will it make it harder for rivals to compete.
- and if you read the different parts then particularly for entrench.
- you know the parts are a is increasing barriers to entry.
- Well, if I improve my product through an acquisition that will
- increase the expertise needed to develop a competing product, it will make it harder for somebody that that's the word they have.
- If I improve my product.
- there's a very much elements here of what we call an efficiency offense, which is, if the the merger makes the firm more efficient, it gets share, it gets scale, it makes it harder for others to enter. That's the those are the criteria there are listed here for evaluating whether a merger will entrench a
- dominant firm. Normally, we would historically, over the 40 years that we've been that that are now being criticized
- that those would be have viewed as pro-competitive, even though they would strengthen the position of a firm that already has at least 30% of the market
- extending. Also there's a presumption, almost. It feels like a presumption that an extending will be a substantial invest of competition. If I buy another product. I stand into an adjacent area. I have more than 30% in my home area. I'm likely to get more than 30 in this adjacent area. Maybe I'll do multi product discounting. Maybe I'll do a technical integration of the 2 products
- that that is that's what they're talking about and expressing concern.
- and again I read it as mostly because rivals will find it harder to compete, not because it'll hurt customers so that worries me, and I wonder how that'll hold up in court. Given the recent case law
- on vertical relations, for example, I mean, there's no Supreme Court rules on vertical mergers. Where are all the vertical merger cases? The government hasn't done so well. What about don't we learn something from the Supreme Court about other vertical issues through vertical contracting. So I, not seeing how this works. This is one of the most troubling areas of these, the draft in my mind.



Danny Sokol

00:47:40

Debbie. potential competition.



Debbie Feinstein

00:47:44

This is a tough area. I know this from experience. The one case we did not ultimately win when I was Bureau Director was the Steris/Synergy case, which was based on a potential competition theory. I'm going to go back to what Rich said -- that judges look at facts in a case like this more than they do what the precise law should be on potential competition. In Steris, the judge gave us the law that we asked for, whether it was likely that they were potential competitors. We did not fight about the law in that case, nor did we fight about the economics. He did not want to hear from economists. He thought it was a simple question of whether the acquired entity would or would not have entered. I believe there was both objective and subjective evidence in that case. But judges tend to focus on subjective evidence. They're going to look at the question of whether or not somebody was actually taking the steps to enter -- not just whether they could have.

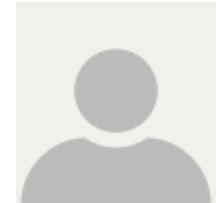
I think the current articulation of the standard in the guidelines, notwithstanding the older case law, is going to present some challenges for the government. And we've seen those challenges in some of the potential competition cases that they Agencies have brought and lost.

I want to talk about the perceived potential competition section, because I frankly find it a bit confusing. The say "to assess whether the acquisition of a perceived potential entrant may substantially lessen competition the agencies consider whether a current market participant could reasonably consider one of the merging parties to be a potential entrant, and whether that potential entrant has a likely influence on existing competition." It says nothing about the market that we're going to look at there. They're not talking about whether the acquiring entity perceives them as a potential entrant. It's whether anybody perceives them. It doesn't say that it even has to be in the same market as the acquiring company. I don't know whether they meant to be that broad. Suppose that Company A and B merge. Company A was going to get into a market that Company B isn't in. Company C perceives that Company A was a potential entrant into some market. What does that say about harm? Wouldn't you need to show that Company B would take steps to keep Company A from entering that new market? Is that the theory? This could be spelled out more clearly.

- In terms of effects the question whether it has a likely influence on existing competition, not whether it's significant, not whether it's unique.

Finally, there's a lot of focus on what they call objective evidence -- whether a company could enter -- not subjective evidence -- whether the company is actually taking steps to enter. I think the recent court cases, including Meta/Within and the Altria/JLI case I was

involved in show that the courts are going to have to be convinced that they ought to look at objective evidence, not subjective evidence. That's not to say that that I don't think there are potential competition cases out there that that ought to be challenged. I just think that there's a way they're going to have to be put together, and I think learning the lessons of the cases that have been lost are going to be instructive on how best to do that.



Danny Sokol

00:51:47

Andrea.

- Thoughts on partial ownership. Broadly.



Andrea Murino (K&E Antitrust)

00:51:53

Yes, so this is number 12 of the of the 13 areas, and in many ways the points they make in this section are not new. The fact they are putting these points into a set of Guidelines is maybe what is new. But I think all of us have always understood that there are concerns arising from entities having multiple investments in competitors. Clayton Section 8, being the one that is most obvious, but also section 8, as it potentially connects to Sherman Section 1. So, from my perspective, I again appreciate the fact that they have laid out the types of concerns that give them pause, because now that we understand what those concerns are, we can explain how any given transaction will not give rise to those concerns.

- I think what goes unsaid in this section and in this document is a focus on private equity, and that that is not new to anyone either. Both Lina Khan and Jonathan Kanter, and all of their teams, the top leadership teams, have spoken extensively in the press their focus on private equity, their focus on so-called roll ups. And I think that that's something we're going to have to continue to monitor.

And certainly for those of us who happen to have private equity firms as clients looking at the totality of their majority and minority investments, is now among the first day one questions you pose to them once a new deal enters the door. But you know this section again, I found myself somewhat grateful for it, because it does enumerate what their major areas of interest are and that gives us a better position to be able to have an informed

debate with the staff, and with the management, about whether any particular transaction gives rise to violations of this twelfth commandment.



Danny Sokol

00:53:46

Great! We've got 5 min left. Not really enough for real Q. & A.

- So what I want to do instead, and for those of you who have been waiting for that opportunity.
- follow up privately via email with whomever Instead. We've heard enough of initial thoughts on specific topics. I want to invite our panelists to maybe
- extend or contrast what they heard from their fellow panelists. Carl, you're an academic, and you're normally on one side of the podium. I'm going to put you on the other side. You're on call - anybody you want to respond to?

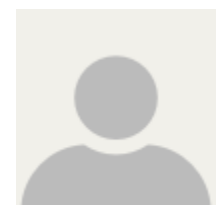


Carl SHAPIRO

00:54:25

Well, I want, I want to thank everyone. I appreciate a number of the lawyers here are being very friendly to the agencies, and yes, they did a lot of hard work, and so forth. But I do still have concerns that I I'm not hearing a lot of support for the case law, and that this legal brief.

- And so I guess I just want to have that ongoing conversation. This is why? Because I want strict to merger enforcement. But I'm concerned these are not going to do it.
- for example, other areas where this is, they really nailed the case law in a useful way that I'll help the world know that. What? What are they doing?



Danny Sokol

00:55:04

Feel free to jump in whomever on whether or not we're close enough in terms of case law to actually get somewhere, or whether this is a selective recasting of case law.



Rich Parker

00:55:17

I think, that things are not going to change that much. I think that the facts are going to matter.

- People who run the agencies. I know their business.
- And they will bring cases, maybe, under these new theories, but they will be on strong facts. And so I think the real battle is still going to be as it always was, on, on, on facts. And I think that you have to convince the agency that They got a dead bang loser And you got to convince a judge that no matter what the theory is, no matter what these cases. Say
- nobody's going to get hurt by this merger customers. Nobody's going to get hurt by this merger. And I still think, you know, I still think that's going to prevail. And you know, no matter what the guidelines say.
- I think that with Karl that there's a real, a real legal issue here. and I think it will be you know, teed up at some point. But I think it's going to be in the context of very good facts for the government, because that's the way they do business. And that's going to make it tougher.



Steven Sunshine

00:56:37

Yeah, yeah, just to follow up a bit on what Rich and Carl are saying, which I agree with, a number of us on this panel were actually enforcers serving in Democratic administrations looking for increased aggressive enforcement; that is in our DNA. We believe in the antitrust cause, but I think the thing that's missing in these guidelines, and I will contrast it with Baxter's '82 guidelines. Bill Baxter did those guidelines and his successors, and obviously those guidelines evolved and improved over time. But there was an underlying paradigm in a way of thinking about things that that just made sense. And they became bipartisan. Yeah, there's been amendments to the merger guidelines. But basically from '82 to 2010, the fundamental tenants of the guidelines went where it stayed in place. I think

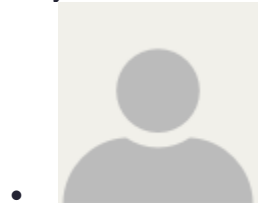
these, you know, present guidelines, and I call them signposts and you know perhaps I meant to be provocative. I'm not sure but they really are an attempt to just go in a different direction, but to an audience that is primed—and I'm talking about Federal judges—to an audience that is primed, taught in business to kind of follow the law and applied back to it. And so, you know again Carl said this, I just think that a collection of cases over time is more likely to have the opposite effect than perhaps the FTC and DOJ are looking for.



Rich Parker

00:58:07

- If I was an enforcer, I'd say that I have a strong case on the facts here, and we win under every guideline, from Bill Baxter to today. I suspect that's what you will see.



Danny Sokol

00:58:31

Andrea Debbie, these guidelines have staying power, do you think?

- Put differently, if there is regime change in 2 years does this suffer the same consequences as the Section 2 Report, where on day one it is rescinded, and we go back to the 2010 guidelines.



Andrea Murino (K&E Antitrust)

00:58:49

- I don't know. If I knew that, I wouldn't be a lawyer. I'd be somewhere on a beach right now. But I think that the reality is this is a partisan document, and I completely agree with Rich, and everyone who says elections have consequences. But I think it's much easier to dismiss partisan documents when they, when they don't actually reflect a fair and balanced assessment of what law enforcers are supposed to do. We sometimes refer to the FTC and DOJ as regulators and it is really important to

remember, they are not. They are law enforcement agencies, and they're supposed to be a certain balance that takes place. I don't think these guidelines do that, mostly because they ignore so much of the case law out there.



Carl Shapiro

00:59:31

I don't think it's fair to call these guidelines as a fair and balanced snapshot.



Andrea Murino (K&E Antitrust)

00:59:37

of the Enforcement landscape, and so do I think there is a likelihood or a possibility that the next person in the White House, if he or she is not a Democrat would appoint people who would remove them. I do think I see that possibility. By the way, I think the people who wrote these guidelines also see that as a possibility, and that may have impacted, at least in part, why they took the approach they did and why they decided to craft these in the way that they did.



Debbie Feinstein

01:00:03

I don't necessarily think that you go back to the 2,010 guidelines. I have some frustration and take it a little personally with the notion that the Biden administration did nothing to enforce the antitrust laws. I feel like saying, "please don't cite any of the cases that we won that made good law if you think we did nothing to advance merger enforcement".

- I think there was a lot prior administrations have done that could be built on. Every time we brought a case I would read the guidelines, and I'd think there were things missing from the guidelines that would have been helpful in making clear the basis for our actions. No guidelines are perfect either for the enforcers or for the merging parties. I think that there's always an evolution, as we learn more about economics as we learn more about how to try cases, as we see different kinds of evidence.

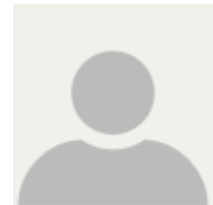
I think rather than throwing these out and going back to the 2010 guidelines, there will be further evolution in a new administration, especially if there is a bi-partisan Commission at the time.



Carl SHAPIRO

01:01:21

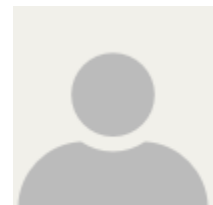
And this is why it's like a missed opportunity to me, Danny, because there's so much to build upon whether it's the multi-sided platforms, the cluster markets. There's a lot of good stuff in here, but it seems to me it's staying power, and its credibility is undermined because of the way it was done, and the other things in here that are weaker. So that's why it's disappointing, because it's a missed opportunity to build.



Danny Sokol

01:01:45

I think, with those thoughts we're going to sign off Brian. I'm going to turn it back to you.



Brian Peck

01:01:52

Thank you, Danny. On behalf of our center, I want to thank each of our panelists for sharing their expertise and insights on these new draft guidelines. I think a lot was shared with our audience here today, and I'd like to thank our audience for joining us. A recording of this session will be available on our website later on this week. We certainly will let everyone know about our next webinar in the coming months. So thank you, everybody, and thank you to the panelists.



Andrea Murino (K&E Antitrust)

01:02:17

Thank you.