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What Once Was Old Is New Again: DOJ and FTC Issue Draft New Merger Guidelines

Update

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On July 19, 2023, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued a draft version of new Merger Guidelines (Merger Guidelines), which would replace the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines (the latter were rescinded by the FTC in September 2021). The Merger Guidelines explain how the current DOJ and FTC review mergers and acquisitions to determine compliance with federal antitrust laws, in particular Section 7 of the Clayton Act.[1] They are "designed to help the public, business community, practitioners, and courts understand the factors and frameworks the Agencies consider when investigating mergers" in the modern economy.

While the new Merger Guidelines are subject to a 60-day public comment period and may be revised before being finalized, they are yet another step in the ongoing effort by the antitrust agencies under the Biden Administration to entrench a more aggressive approach to antitrust merger enforcement that considers a wide range of potential competitive harms, some of which are yet to gain acceptance in the courts.

The Merger Guidelines are built around 13 principles or "guidelines" that reflect the most common issues that arise in merger review:

1. Mergers should not significantly increase concentration in highly concentrated markets.
2. Mergers should not eliminate substantial competition between firms.
3. Mergers should not increase the risk of coordination.
4. Mergers should not eliminate a potential entrant in a concentrated market.

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5. Mergers should not substantially lessen competition by creating a firm that controls products or services that its rivals may use to compete.
6. Vertical mergers should not create market structures that foreclose competition.
7. Mergers should not entrench or extend a dominant position.
8. Mergers should not further a trend toward concentration.
9. When a merger is part of a series of multiple acquisitions, the agencies may examine the whole series.
10. When a merger involves a multi-sided platform, the agencies examine competition between platforms, on a platform, or to displace a platform.
11. When a merger involves competing buyers, the agencies examine whether it may substantially lessen competition for workers or other sellers.
12. When an acquisition involves partial ownership or minority interests, the agencies examine its impact on competition.
13. Mergers should not otherwise substantially lessen competition or tend to create a monopoly.

At first glance, several of these guidelines appear to reflect well-established principles of antitrust merger law. However, a closer examination reveals a major shift away from the prevailing analytical frameworks of the 2000s and 2010s towards an overall stricter approach as espoused in foundational Supreme Court and appellate cases from the 1940s-1970s. For example:

- In applying guideline #1, the Merger Guidelines revert to much lower market concentration and market share thresholds from older merger guidelines to assess whether a merger of competitors is presumptively anticompetitive. Specifically, any transaction resulting in a market with a post-merger Herfindahl-Hirschman Index (HHI) greater than 1,800 or a firm with more than 30 percent market share, and an increase in the HHI of more than 100 points, would trigger a structural presumption of illegality, even if one of the merging parties is a relatively small competitor (the 30 percent figure comes from a 1963 Supreme Court case, *United States v. Philadelphia National Bank*).
- In applying guideline #6, vertical mergers would be presumed anticompetitive where the merged firm would have a greater than 50 percent share of a market to which its rivals need access, while even below such a 50 percent "foreclosure share," other factors could render a vertical merger unlawful.

In addition, several of the 13 guidelines articulate newer legal theories that have been pushed by the Biden DOJ and FTC. Among these are a focus on companies that engage in a pattern of making multiple small acquisitions in the

same or related business lines, such as roll-up acquisition strategies by private equity firms (guideline #9), and recognition that mergers can lessen competition for buyers of labor, resulting in lower wages or slower wage growth, worse benefits or working conditions, or other degradations of workplace quality (guideline #11).

In their public announcement of the new Merger Guidelines, the agencies emphasized several core goals, two of which are that "the guidelines should reflect the law as written by Congress and interpreted by the highest courts," and that they should "provide frameworks that reflect the realities of the modern economy and the best of modern economics and other analytical tools." However, most of the cases cited in the Merger Guidelines are several decades old, and while they may technically remain good law since they have not been overturned, it is difficult to reconcile a reliance on such old cases with a purported desire to incorporate modern economic thinking into merger review.

Importantly, the Merger Guidelines do not have the force of law and are not binding on courts, although older versions of DOJ/FTC merger guidelines have been favorably cited and afforded weight by judges in the past. A major open question is whether courts will embrace the new Merger Guidelines once they are finalized. Though the draft Merger Guidelines accurately describe the current enforcement approach of the DOJ and FTC under the Biden Administration, that enforcement approach has so far led to a string of recent court defeats in litigated merger cases. As a practical matter, however, only a small percentage of mergers end up in court; indeed, the DOJ and FTC have noted that several deals have been abandoned in the face of agency opposition, and they have also pointed to a potential deterrent effect on deals that may have been contemplated but not pursued for fear of a challenge.

The deadline for public comments on the draft Merger Guidelines is September 18, 2023. The Merger Guidelines should be considered together with the FTC's recent proposed changes to the Hart-Scott-Rodino (HSR) premerger notification process, which would require transaction parties to provide significantly more information and documentation upfront. Those changes could make it easier for the DOJ and FTC to pursue the broader and/or newer theories of competitive harm described in the Merger Guidelines.

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[1] 15 U.S.C. § 18.