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FTC and DOJ Propose Major Overhaul of Merger Guidelines

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On July 19, 2023, the Federal Trade Commission (FTC) and the Department of Justice Antitrust Division (DOJ) (collectively, the Agencies) issued revised Merger Guidelines (Proposed Guidelines) that if adopted would lead to increased antitrust scrutiny of proposed transactions. The Proposed Guidelines contain significant changes from the current version of the Guidelines, which were issued in 2010, and follow on the heels of the Agencies' June 29, 2023 rulemaking which proposes sweeping changes to the Hart-Scott-Rodino (HSR) notification process.

The Proposed Guidelines reflect the Agencies' heightened doubts about the benefits of mergers and acquisitions and the inclination to revive theories of competitive harm from the mid-20th century.

Interested parties have until September 18, 2023, to comment on the Proposed Guidelines.

Background

The Merger Guidelines describe the analytical framework that the Agencies apply in reviewing transactions to determine compliance with the antitrust laws. They are intended to increase transparency about the merger review process and to provide guidance to companies that are considering a transaction. Included in the Guidelines are certain presumptions about which transactions are likely to substantially harm competition. Historically, courts have relied on those presumptions when considering whether to grant an agency's request to enjoin a proposed transaction.

Overview of Proposed Guidelines. In a change to the format intended to provide greater accessibility to non-antitrust specialists, the Proposed Guidelines set forth 13 high-level non-substantive principles which will drive merger review:

- Mergers should not significantly increase concentration in highly concentrated markets.
- Mergers should not eliminate substantial competition between firms.
- Mergers should not increase the risk of coordination.
- Mergers should not eliminate a potential entrant in a concentrated market.
- Mergers should not substantially lessen competition by creating a firm that controls products or services that its rivals may use to compete.
- Vertical mergers should not create market structures that foreclose competition.
- Mergers should not entrench or extend a dominant position.
- Mergers should not further a trend toward concentration.

- When a merger is part of a series of multiple acquisitions, the agencies may examine the whole series.
- When a merger involves a multisided platform, the agencies examine competition between platforms, on a platform, or to displace a platform.
- When a merger involves competing buyers, the agencies examine whether it may substantially lessen competition for workers or other sellers.
- When an acquisition involves partial ownership or minority interests, the agencies examine its impact on competition.
- Mergers should not otherwise substantially lessen competition or tend to create a monopoly.

We highlight below some of the additional noteworthy changes the Proposed Guidelines make to prior iterations of the Guidelines.

Significant Proposed Changes to the Existing Guidelines

1. Presumption of Anticompetitive Effects

Horizontal Mergers. The Proposed Guidelines would revert to the pre-2010 Herfindahl-Hirschman Index (HHI) market concentration thresholds which identify when a horizontal merger is presumed to have anticompetitive effects and warrant increased antitrust scrutiny (see chart below). The resetting of the HHI presumption to the lower threshold will likely result in more transactions being challenged as anticompetitive.

	2010 Guidelines	2023 Proposed Guidelines
Highly Concentrated Market	HHI > 2,500 after the merger	HHI > 1,800 after the merger
Increase in HHI as a Result of the Merger	Increase in HHI > 200	Increase in HHI >100

Additionally, the Agencies added a new market share threshold presumption that would capture transactions where the combined market share exceeds 30 percent and would result in a change of HHI of more than 100 points. In support of this departure from previous iterations of the Guidelines, the Agencies cite *U.S. v. Philadelphia National Bank*, a maligned but still operative 1963 Supreme Court case.

Vertical Mergers. For the first time, the Agencies identified when certain vertical transactions would be considered presumptively unlawful. Under the Proposed Guidelines, vertical transactions where the surviving entity would have above a 50 percent "foreclosure share." The term "foreclosure share" is defined as "the share of the related market that is controlled by the merged firm, such that it could foreclose a rival's access to the related product on competitive terms."

2. Potential Competition

Under the Proposed Guidelines, the Agencies signaled that they plan to increase their scrutiny of mergers involving potential market entrants. The Agencies, for the first time, state in the Proposed Guidelines that they plan to assess the merger of two potential market entrants in the same way as a merger between an incumbent and a potential entrant. In addition, the Proposed Guidelines state that mergers involving a party perceived as a potential entrant may substantially lessen competition, even absent any plans or consideration of any plans to enter.

3. Multisided Platforms

The Agencies provide a framework for analyzing multisided platforms that do not fall into "horizontal" or "vertical" merger categories. The Proposed Guidelines state that the Agencies will "seek to prohibit a merger that harms competition within a relevant market for any product or service offered on a platform to any group of participants." This may include (1) mergers involving two platform operators that eliminate the competition between them; (2) a platform operator's acquisition of a platform participant which can entrench the operator's dominant position; (3) acquisitions of firms that provide services that facilitate participation on multiple platforms and can deprive rivals of platform participants; and (4) mergers involving firms that provide other important inputs to platform services that can enable the platform operator to deny rivals the benefits of those inputs.

4. Labor Markets

Under the Proposed Guidelines, Agencies will consider whether a merger substantially lessens the competition for workers so that the reduction in labor market competition may lower wages or slow wage growth, worsen benefits, and working conditions. This marks a significant departure from previous merger analyses wherein the elimination of redundant positions was considered a pro-competitive merger efficiency.

5. Dominant Firms

In the Proposed Guidelines, the Agencies identify factors that they will consider when assessing whether a proposed merger would entrench a company's dominant position in a market. These include whether the merger increases barriers to entry, switching costs, customer ability to access alternative products or services from competitors, network effects, and the elimination of a potential rival.

The Agencies will also consider whether the proposed transaction would extend the company's dominant position to other markets.

6. Serial or Roll-Up Acquisitions

The Proposed Guidelines single out serial or roll-up acquisitions, stating that "a firm that engages in an anticompetitive pattern of strategy of multiple small acquisitions in the same or related business lines" may be illegal, even if "no single acquisition on its own would risk substantially lessening competition or tending to create a monopoly."

7. Partial Ownership Acquisitions

The Proposed Guidelines indicate that the Agencies will take a harsher look at acquisitions resulting in partial ownership in a number of competing entities. The Proposed Guidelines provide that the Agencies may consider the parties' post-merger relationship and incentives to determine whether a partial acquisition may substantially lessen competition.

Takeaways for Deal-Making

While the Proposed Guidelines are subject to public comment and revision, they reflect the principles that the Agencies have been applying for the past several years. Thus, unlike the proposed changes to the HSR reporting rules, many of the concepts in the Proposed Guidelines have already been put into action and are impacting the review of pending transactions.

As a result, companies contemplating mergers and acquisitions should consider the following:

1. Strategies for getting the deal through that worked in the past may not work now. Consulting with experienced antitrust counsel early in the transaction process is vital.

2. Modifying their existing due diligence review processes with a focus on identifying items that may lead to regulatory scrutiny under the Proposed Guidelines.

3. Developing persuasive cases of the pro-competitive benefits of their potential transactions to help rebut any potential anticompetitive harm arguments.

4. Addressing the uncertainty established by the novel anticompetitive theories of harm in deal documents and clearance strategy.

Conclusion

The Proposed Guidelines reflect the larger trend of increased antitrust scrutiny under the Biden Administration. As a result of this increased merger enforcement environment, companies considering mergers and acquisitions should consult with experienced antitrust counsel to understand their risks and formulate a strategy. Although the Guidelines do not bind courts, they do reflect current Agency enforcement priorities and should be addressed.

For more information about the Proposed Guidelines or antitrust-related questions, please contact Katherine I. Funk, Alex S. Lewis, or any other member of Baker Donelson's Antitrust Group.