Federal Agencies Publish Updated Merger Guidelines Formalizing Heightened Antitrust Scrutiny

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January 9, 2024 — On Wednesday, December 18, 2023, the Federal Trade Commission and the U.S. Department of Justice Antitrust Division published new Merger Guidelines. In an accompanying joint press release, the agencies stated that their goal in publishing these new Guidelines was to "enhance transparency and promote awareness of how the agencies undertake merger analysis before deciding whether or not to challenge an acquisition." The Guidelines reflect the heightened antitrust scrutiny that the Biden administration believes is necessary to combat increasing consolidation that has reduced competition in the U.S. economy over the past several decades. The Merger Guidelines include modifications the agencies made in response to over 30,000 comments they received during a public comment period following the release of draft Merger Guidelines in July.

The new Guidelines retain much of the same substantive analysis as earlier versions of the guidelines. However, they adopt an entirely new framework compared to the guidelines promulgated in 1982 during the Reagan administration and revised in 1992 and 2010 by the Clinton and Obama administrations. Importantly, for the first time since 1992, the two agencies will now have a single set of Merger Guidelines that apply to both horizontal and vertical mergers and acquisitions, as well as to mergers with or of potential competitors.

The new framework begins by listing eleven "guidelines" that the two agencies will now apply in evaluating whether a merger or acquisition—horizontal, vertical, or otherwise—violates the federal antitrust laws. They are:

1. Mergers raise a presumption of illegality when they significantly increase concentration in a highly concentrated market.
2. Mergers can violate the law when they eliminate substantial competition between firms.
3. Mergers can violate the law when they increase the risk of coordination.
4. Mergers can violate the law when they eliminate a potential entrant in a concentrated market.
5. Mergers can violate the law when they create a firm that may limit access to products or services that its rivals use to compete.
6. Mergers can violate the law when they entrench or extend a dominant position.

7. When an industry undergoes a trend toward consolidation, the agencies consider whether it increases the risk a merger may substantially lessen competition or tend to create a monopoly.
8. When a merger is part of a series of multiple acquisitions, the agencies may examine the whole series.
9. When a merger involves a multi-sided platform, the agencies examine competition between platforms, on a platform, or to displace a platform.
10. When a merger involves competing buyers, the agencies examine whether it may substantially lessen competition for workers, creators, suppliers, or other providers.
11. When an acquisition involves partial ownership or minority interests, the agencies examine its impact on competition.

These eleven guidelines provide a litany of ways in which a merger or acquisition may lessen competition, all of which both the FTC and DOJ have considered in the past in evaluating the likely competitive effects of a proposed merger. In that sense, they do not break any new ground. There are, however, some important changes in how the two agencies say they will apply some of these guidelines.

Expect opposition to smaller transactions in less concentrated markets

Under the first guideline, the agencies say that they will presume a transaction is anticompetitive if it results in market concentration, as measured by the Herfindahl-Hirschman Index (HHI), over 1,800 and an increase in the index of 100 or more. This is a significantly lower threshold than under the previous guidelines. Under the 2010 guidelines, the agencies presumed that a merger was anticompetitive only if it raised market concentration to more than 2,500 and increased the HHI by at least 200. The HHI is calculated as the sum of the squares of the percentage market shares of all market participants. It is lower when there are many firms in a market, each with a small market share, and rises when a transaction reduces the number of firms.[1] A market comprised of six firms with equal shares has an HHI of 1,667; a merger of any two would result in an HHI of 2,222. Such a 6-to-5 merger would not have been presumptively anticompetitive under the 2010 guidelines but would be under the new Guidelines.

The Guidelines also assert that a transaction is presumptively anticompetitive if it "creates or further consolidates a highly concentrated market" or if it creates a firm with a share over 30%, and increases the HHI by more than 100, even if the resulting HHI is less than 1,800. An incremental increase in market share of as little as 2%, from 29% to 31%, would be presumptively anticompetitive under this test, no matter how many other firms are in the market.

All of these changes are consistent with the Biden administration's promises to enforce the antitrust laws much more aggressively than previous administrations did, including the Clinton and Obama administrations, in order to prevent further increases in economic concentration, which the White House blames for suppressing wages and inflating prices.

Expect opposition to mergers of employers that increase concentration in labor markets

The tenth principle articulated by the Guidelines states specifically that the agencies will examine whether a merger is likely to substantially lessen competition for workers by holding down wages. This focus on labor markets has been a hallmark of the Biden administration antitrust program, as illustrated by the criminal no-poach prosecutions DOJ has brought and the FTC's proposed ban on non-compete clauses in employment agreements. It is particularly noteworthy that the new Guidelines state that "the level of concentration at which competition concerns arise may be lower" in labor markets than in consumer markets because of labor markets' "unique features." These include the potentially high costs of finding and landing a new job, the burdens that relocating for work can involve, and the fact that matching an employee to an employer is typically more complex than simply picking a product. The Guidelines maintain that these labor market characteristics can exacerbate the anticompetitive effects of a merger between employers that compete for the same workers.

The agencies are expected to move aggressively to try to establish precedents for blocking transactions that may have anticompetitive effects in labor markets. In October 2022, the DOJ succeeded in blocking Penguin Random House's proposed $2.2 billion acquisition of Simon & Schuster on the grounds that it may substantially lessen competition

between book publishers for authors of best-selling books. The agencies' determination to bring such cases may, in part, be in response to the string of defeats the DOJ has suffered in criminal cases alleging unlawful wage fixing and "no poach" agreements among competing employers. Most prominently, in April 2023 a judge in the District of Connecticut acquitted six executives of such conduct (one of whom Hughes Hubbard & Reed represented) at the end of the government's case, finding that the DOJ's case was so weak that no reasonable juror could have found the defendants guilty.

Expect greater scrutiny of acquisitions by private equity firms and other investors

Two of the new guidelines have significant ramifications for acquisitions by private equity firms. One of these new guidelines is directed at industry roll-ups that may substantially lessen competition in violation of Section 7 of the Clayton Act. The other addresses acquisitions of minority interests that may substantially lessen competition.

The eighth guideline states that "When a merger is part of a series of multiple acquisitions, the agencies may examine the whole series." The Guidelines explain that under this principle, a "pattern or strategy of multiple acquisitions in the same or related business lines may violate Section 7." The agencies, therefore, may review not just the most recent transaction in an industry roll-up, but may consider the cumulative effect on competition of the consolidation in its entirety. The Guidelines warn that in conducting their review, the agencies may examine "a pattern or strategy of growth" including the acquirer's history, its strategic incentives and overall plans, and "its position in the industry more broadly."

The eleventh guideline states, "When an acquisition involves partial ownership or minority interests, the agencies examine its impact on competition." The concern arises not just when the investor itself competes with the target, but also in the context of common ownership, that is, when an investor holds "non-controlling interests in firms that have a competitive relationship that could be affected by those joint holdings." The Guidelines explain that the acquisition of less than full control of a firm may substantially lessen competition by giving the investor rights to appoint board members, observe board meetings, select managers, influence capital budgets, impact operational decisions, access competitively sensitive information, or otherwise affect the target's competitive decision-making. Even further, the agencies assert that even if the investor does not obtain such rights, a minority interest may be inherently anticompetitive if it "blunt[s] the incentive of the partial owner to compete aggressively because it may profit through dividend or other revenue share even when it loses business to the [partially owned] rival."

Expect opposition to vertical mergers that may limit access to products that rivals use to compete

The fifth guideline states that "mergers can violate the law when they create a firm that may limit access to products or services that its rivals use to compete." The agencies say that under such circumstances they will examine the extent to which the merger creates a risk that the merged firm will limit rivals' access to the products or services, gain or increase access to competitively sensitive information, or deter rivals from investing in the market.

This guideline emphasizes that vertical mergers (where firms operate at different levels in the same supply chain) can raise serious antitrust concerns where the merged entity has the ability and incentive to foreclose dependent rivals by limiting access to important products, services, or routes to market that are necessary to compete effectively. This includes transactions that reduce rivals' scale efficiencies by eliminating access to a particular input. Further, if the merged entity has a market share above 50% for a particular input (a "related market"), that share is sufficient under this guideline to presume that a transaction raises vertical foreclosure concerns. According to this guideline, a transaction may still substantially lessen competition if the merging entities have less than a 50% share in a related product, particularly when that related product is important to their trading partners.

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The Guidelines are an important avenue for the DOJ and FTC to influence merger policy in the years ahead. The message is clear: expect increased antitrust scrutiny of mergers and acquisitions involving competitors or potential competitors. Nonetheless, open questions remain concerning the reception of the Guidelines by the courts, which are not bound by them yet ultimately decide the reach of the antitrust laws. Only time will tell—in the meantime caution and careful planning are warranted.

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1. For example, in a market with 10 firms, each with an equal 10% share, the HII would be 1,000 ($10 \times 10^2 = 1{,}000$). The maximum HHI is 10,000, where a market has only one firm with 100% of the market share ($100^2 = 10{,}000$). ↩

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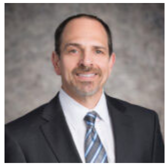

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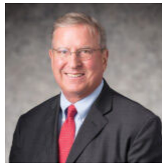

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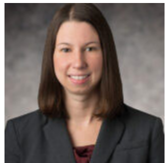

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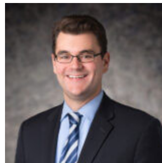

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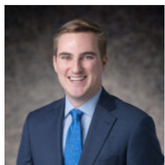

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