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The Antitrust Agencies' New Roadmap for How They Will Analyze M&A Deals

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On July 19, the Federal Trade Commission (FTC) and the U.S. Department of Justice Antitrust Division (DOJ) (collectively, the Agencies) released the long-anticipated updated draft Merger Guidelines[1] (the Guidelines) for a 60-day public comment period. For the first time, the FTC and DOJ have revised and combined the previous Vertical Merger Guidelines and Horizontal Merger Guidelines into one document. There are 13 new guidelines, which provide a road map of how the Agencies will analyze a proposed transaction.

While the Guidelines are not binding law,[2] courts typically have given previous merger guidelines considerable deference in reviewing merger challenges by the Agencies. The Guidelines should not come as a surprise, given that they reflect the Agencies' recent approach to mergers and acquisitions during the Biden administration.

Unlike the 2010 (Obama administration) Horizontal Merger Guidelines,[3] which explicitly sought to "identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral,"[4] the Guidelines fail to recognize either the benefits of mergers or the cost of blocking or impeding mergers that are unlikely to cause competitive harm. The Guidelines also outline several areas where strategic acquisitions are viewed as presumptively anticompetitive.

Regardless of whether the Guidelines are adopted as is and whether courts will give them the same deference given prior guidelines, it is important to recognize that the Guidelines reflect how the current FTC and DOJ are analyzing–and challenging, albeit for the most part unsuccessfully–mergers that come before them.

Here, we highlight the most significant changes to the prior Vertical and Horizontal Merger Guidelines, many of which appear to be directed at, or have particular relevance for, private equity buyers:

- **Guideline 1: Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets.** This Guideline states that the Agencies will use a significantly lower Herfindahl-Hirschman Index (HHI) value[5] when evaluating transactions. The 2010 Horizontal Merger Guidelines considered markets highly concentrated when they had an HHI above 2,500,[6] but the new Guidelines state that a market is highly concentrated when the HHI is above 1,800. In addition, the Guidelines create for the first time a structural presumption based on the merged firm having a 30% market share. "[A] merger that significantly increases concentration and creates a firm with a share over [30%] presents an impermissible threat of undue concentration regardless of the overall level of market concentration,"[7] i.e., the threshold for a structural anticompetitive presumption is a change of HHI greater than 100 and a resulting 30% or more market share. These lowered thresholds will give the FTC and DOJ grounds to challenge even more M&A transactions.

- **Guideline 4: Mergers Should Not Eliminate a Potential Entrant in a Concentrated Market.** Under this guideline, "[t]he Agencies examine whether, in a concentrated market, a merger would (a) eliminate a potential entrant or (b) eliminate current competitive pressure from a perceived potential

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[1] Available here.
[2] The Merger Guidelines are not subject to the requisite notice and comment rulemaking that is required by the Administrative Procedure Act, which is required for federal agencies to create binding law.
[3] Available here.
[4] 2010 Horizontal Merger Guidelines at 4.
[5] The larger the HHI value, the more concentrated a market is considered to be.
[6] 2010 Horizontal Merger Guidelines at 19.
[7] Guidelines at 7.

entrant."[8] This guideline goes to the issue of nascent competition, which the FTC and DOJ have been focusing on in recent years. The Agencies will be particularly wary of established market participants acquiring new entrants or potential new entrants in a given market.

- **Guideline 5: Mergers Should Not Substantially Lessen Competition by Creating a Firm That Controls Products or Services That Its Rivals May Use to Compete.** This guideline instructs that "[w]hen a merger involves products or services rivals use to compete, the Agencies examine whether the merged firm can control access to those products or services to substantially lessen competition and whether they have the incentive to do so."[9] This guideline relates to vertical mergers, of which the FTC and DOJ have been stepping up enforcement over the past few years, as well to transactions that may not involve either a current vertical or horizontal relationship between the parties. "Many types of related products or services can implicate this concern, such as: (1) related products rivals may use, now or in the future, as inputs; (2) related products that provide distribution services for rivals or otherwise influence consumer purchase decisions, or the firm's own purchases of intermediate products; (3) related products that provide the merged firm access to competitively sensitive information about its rivals; or (4) related products that are complementary to, and therefore increase the value of, rivals' products. Even if the related product or service is not currently being used by rivals, it might be competitively significant because, for example, its availability enables rivals to obtain better terms from other providers in negotiations."[10] The Agencies will also be looking to determine if the merged firm would have the ability or incentive to weaken or exclude rivals in any way. The Guidelines specifically note that "[a] merger may substantially lessen competition or tend to create a monopoly regardless of the claimed intent of the merging companies or their executives."[11]

- **Guideline 6: Vertical Mergers Should Not Create Market Structures That Foreclose Competition.** Similar to Guideline 5, this guideline requires the "Agencies [to] examine how a merger would restructure a vertical supply or distribution chain."[12] When there is about a 50% market share, that alone would indicate that "the merger may substantially lessen competition."[13] Below that 50% threshold, the Agencies will look to see whether the merged firm could otherwise foreclose rivals' access to the required input.

- **Guideline 7: Mergers Should Not Entrench or Extend a Dominant Position.** Under this guideline, the FTC and DOJ will "examine whether one of the merging firms already has a dominant position that the merger may reinforce. They also examine whether the merger may extend that dominant position to substantially lessen competition or tend to create a monopoly in another market."[14] To determine if a merging party has a dominant market position, the Agencies will "look to whether (i) there is direct evidence that one or both merging firms has the power to raise price, reduce quality, or otherwise impose or obtain terms that they could not obtain but-for that dominance, or (ii) one of the merging firms possesses at least 30 percent market share."[15] The FTC and DOJ will similarly look to see if the proposed merger will enable a party to extend a dominant position in one market into a related market through "tying, bundling, conditioning, or otherwise linking sales of two products, excluding rival firms and ultimately substantially lessening competition in the related market."[16]

- **Guideline 9: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.** Pursuant to this guideline, the FTC and DOJ will look at firms' acquisition practices, even for unconsummated transactions in any market, including markets unrelated to the transaction at issue. "Where one or both of the merging parties has engaged in a pattern or strategy of pursuing consolidation through acquisition, the Agencies will examine the impact of the cumulative strategy under any of the other Guidelines to determine if that strategy may substantially lessen competition or tend to create a monopoly."[17] Through this guideline, the Agencies appear to be discouraging roll-ups and "serial acquisitions."

- **Guideline 10: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform.** "Multi-sided platforms have characteristics that can exacerbate or accelerate competition problems. The Agencies consider the distinctive characteristics of multi-sided platforms carefully when applying the other Guidelines."[18]

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[8] *Id.* at 3.
[9] *Id.*
[10] *Id.* at 14.
[11] *Id.* at 16.
[12] *Id.* at 3.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 19.
[16] *Id.* at 21.
[17] *Id.* at 22.
[18] *Id.* at 3.

- **Guideline 11: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers.** This guideline reflects the FTC's and DOJ's increased focus on the effects of a transaction on labor markets, rather than just consumer markets, which have historically been the primary area of focus.

- **Guideline 12: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition.** Traditionally, merger enforcement has largely focused on majority acquisitions, but with this guideline, the Agencies are continuing to signal their increased focus on minority acquisitions. "The Agencies have concerns with both cross-ownership, which refers to holding a non-controlling interest in a competitor, as well as common ownership, which occurs when individual investors hold non-controlling interests in firms that have a competitive relationship that could be affected by those joint holdings. Partial acquisitions that do not result in control may nevertheless present significant competitive concerns. The acquisition of a minority position may permit influence of the target firm, implicate strategic decisions of the acquirer with respect to its investment in other firms, or change incentives so as to otherwise dampen competition."[19] This guideline expresses that these concerns generally arise from the rights associated with minority ownership, "such as rights to appoint board members, observe board meetings, veto the firm's ability to raise capital, or impact operational decisions, or access to competitively sensitive information."[20] With minority owners holding such powers, the Agencies are concerned that competition will be diminished through a minority acquisition by (1) "giving the partial owner the ability to influence the competitive conduct of the target firm,"[21] (2) "reducing the incentive of the acquiring firm to compete,"[22] and (3) "giving the acquiring firm access to non-public, competitively sensitive information from the target firm."[23]

The theories and the approach reflected in the Guidelines are and will continue to be tested by courts, which ultimately will shape the legal framework on deals. In the meantime, as merger enforcement continues to be more aggressive, parties contemplating transactions should proactively consider regulatory risk at the very outside of deals and should consult antitrust counsel to assess and mitigate regulatory risk in light of the merger review framework outlined in the Guidelines.

If you have any questions about the FTC's and DOJ's latest actions, please contact our Antitrust/Competition team or your usual Lowenstein Sandler contact.

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[19] *Id.* at 27.
[20] *Id.*
[21] *Id.*
[22] *Id.* at 28.
[23] *Id.*

Contacts

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