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DOJ and FTC Finalize New Merger Guidelines

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On December 18, 2023, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued the final version of new merger review guidelines (Merger Guidelines), five months after the agencies published a draft for public comment. The new ***2023 Merger Guidelines*** describe the analytical frameworks used by the current DOJ and FTC to assess whether mergers and acquisitions are likely to substantially lessen competition or tend to create a monopoly in violation of federal antitrust laws.

These Merger Guidelines replace the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines. Like the prior merger guidelines, the new Merger Guidelines are not legally binding on courts, but they provide transparency into the federal antitrust agencies' decision-making process. The final Merger Guidelines, like the draft version, signify the current aggressive approach to antitrust merger enforcement under the Biden Administration.

According to the press release announcing the final 2023 Merger Guidelines, the DOJ and FTC received over 30,000 comments on the July draft from numerous stakeholders, including consumers, workers, academics, interest organizations, attorneys, enforcers, and others. The agencies also held three workshops to discuss the draft Merger Guidelines. Despite the vast quantity and breadth of public feedback, most of the content from the July draft was retained, with the agencies making only modest changes.

For example, while the final Merger Guidelines are organized around 11 principles or "guidelines" instead of the 13 guidelines in the draft version, two of the original guidelines relating to vertical mergers were merged into one, and the final catch-all Guideline 13 from the July draft is removed from the list but its content is retained with an unnumbered warning that the guidelines are not exhaustive of all the ways mergers can harm competition. Similarly, the four appendices from the draft Merger Guidelines have been removed, but much of the same content is now included in Section 4 of the final version, which "sets forth a non-exhaustive discussion of analytical, economic, and evidentiary tools the agencies use to evaluate facts, understand the risk of harm to competition, and define relevant markets."

Significantly, the final Merger Guidelines retain the same structural presumptions of illegality for horizontal mergers that appeared in the July draft: a post-merger Herfindahl-Hirschman Index (HHI) greater than 1,800 or a combined market share of more than 30%. For vertical mergers, the presumption of illegality from the July draft, where one merging party has a greater than 50% share of an input used by rivals, has been replaced by a statement that there will be a sufficient basis to challenge a vertical merger where one of the parties has monopoly power, which is defined as a firm with a market share greater than 50%.

The 11 guidelines in the final version are as follows:

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.

As we explained in our ***discussion of the draft 2023 Merger Guidelines***, several of the guidelines articulate newer legal theories of competitive harm that have been advanced by the Biden DOJ and FTC but have not yet gained acceptance in the courts. It is therefore not surprising that the final Merger Guidelines include several citations to a December 2023 Fifth Circuit Court of Appeals decision that largely supported the FTC's challenge to a vertical merger involving the acquisition of cancer testing company Grail by DNA-sequencing provider Illumina.

While the final Merger Guidelines do not deviate significantly from the July draft, there are some differences. For example, Guideline 6 in the final version contains an expanded discussion of the ways in which an acquisition of a nascent competitor can lessen competition by entrenching the acquiring firm's dominant position, and Guideline 7 clarifies how a trend towards industry consolidation can heighten competition concerns regarding a proposed merger. The final Merger Guidelines also slightly expand on the July draft's discussion of rebuttal evidence, such as entry by other firms and procompetitive efficiencies from the proposed transaction.

The new Merger Guidelines spell out in detail what antitrust practitioners have known for some time: that the Biden DOJ and FTC are attempting to reshape merger law by entrenching a more skeptical view of M&A that leads to more transactions being blocked, abandoned or deterred. Whether this effort will ultimately prevail will be determined in future merger litigation, as courts decide whether to adopt the theories and principles described in the new Merger Guidelines. In the meantime, merging parties should continue to expect enhanced scrutiny of proposed transactions, even if the parties do not directly compete. It is therefore important to engage in early risk assessment to help shape antitrust strategy and to assist with negotiating deal terms, including efforts covenants, timing provisions, and reverse termination fees.