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Federal Antitrust Enforcers Release Long-Awaited Draft Merger Guidelines

The U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) released a draft update of the guidelines that describe and govern how the agencies conduct antitrust reviews of mergers & acquisitions. Those draft guidelines, which are subject to a 60-day comment period, signal a continued focus on more aggressive merger investigations and challenges that has been a hallmark of the Biden Administration. The draft guidelines would replace existing guidance, including the Horizontal Merger Guidelines (HMG), which were last updated in 2010, and the Vertical Merger Guidelines, which were released in 2020 but withdrawn by the FTC and criticized by the DOJ just a year later.

In announcing the draft guidelines, Attorney General Merrick Garland noted that "unchecked consolidation threatens the free and fair markets" that are the foundation of the economy and asserted that the draft guidelines "respond to modern market realities" and will enable the government to "transparently and effectively protect the American people from the damage that anticompetitive mergers cause."

While both the DOJ and FTC have asserted that the draft guidelines merely restore fidelity to the "law as written by Congress and interpreted by the highest courts," they represent a significant break from pre-2020 enforcement trends and are in tension with recent judicial decisions. They lay out far more stringent market concentration standards for "horizontal" transactions between competitors that hark back to case law from the 1960s and 1970s. In addition, they incorporate and institutionalize a range of creative enforcement theories that the agencies have pursued under current leadership, many of which have received a mixed reception from federal courts.

While the draft guidelines are not binding law, they are of significant importance because they signal how the agencies will analyze and review mergers and can be used as a persuasive framework in federal court if a lawsuit is brought to enjoin or unwind a transaction.

Overview of the Draft Guidelines

The draft guidelines begin by articulating 13 broad principles or "guidelines" that the agencies will apply in evaluating whether a merger is unlawfully anticompetitive. Most of these principles are broadly consistent with long-standing enforcement principles:

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.

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.

The first eight of these guidelines describe the basic principles that the agencies will apply in assessing the risk a transaction poses to competition. Guidelines 9–12 provide more details about how the agencies will evaluate specific types of transactions, including deals that are part of a "roll-up" strategy, deals involving technology or other "platforms," or acquisitions of partial ownership interests. Guideline 13 is a catch-all.

Apparently drafted with a broader audience in mind, few of these guidelines are obviously revolutionary or likely to generate much controversy. Beyond these principles, however, the draft guidelines embody significant changes to enforcement policy that could have major implications for many companies' future M&A plans.

Key Proposed Revisions

More deals will be presumptively illegal

Historically, the HMG have recognized a presumption that transactions that create or exacerbate high levels of concentration are unlawful. The draft guidelines tighten those standards meaningfully. The prior HMG recognized this presumption when the post-merger Herfindahl-Hirschman Index (HHI) exceeded 2,500 and the transaction increased that measurement by at least 200 points.

The new draft guidelines lower the threshold for a presumption to 1,800 and an increase of 100 points. They also recognize a new presumption of illegality for any deal that creates a firm with a market share of 30% or greater. In the draft guidelines, the HHI continues to be defined as the sum of the squares of the market shares of market participants; it is small when there are many small firms and grows larger as the market becomes more concentrated, reaching 10,000 in a market with a single firm.

Moreover, gone is the "safe harbor" for deals that lead to unconcentrated markets. Going forward, while market definition is very often a hotly contested issue, far more deals are likely to trigger the presumption under these thresholds. For example, in a market with six equally sized competitors, a merger of two firms would trigger a presumption in the draft guidelines, but not under the prior guidance.

Perhaps most ominously, the draft guidelines accurately recognize that historically the government has tended to challenge deals only if the concentration levels "greatly exceeded" the prior (higher) threshold. The agencies may have signaled their intent to take a harder line on deals that may exceed even the new lower thresholds by a small margin.

New standards for vertical deals

Enforcers have long asserted that a transaction between companies at different levels in the supply chain can harm competition if it enhances a buyer's ability or incentive to foreclose its competitors from a key input or to raise their rivals' costs. But enforcement actions based on such theories have been relatively sparse until the past decade. The draft guidelines provide more clarity on the current Administration's playbook on this issue, recognizing that a deal that allows the buyer to control 50% or more of a key input is presumptively unlawful.

New emphasis on the loss of perceived potential competition

The agencies have long recognized that a transaction eliminating a "potential" competitor can violate the antitrust laws: as the 2010 guidelines recognized, "merger between an incumbent and a potential entrant can raise significant competitive concerns." But prior guidelines focused largely on deals involving companies that were actually "committed to entering the market in the near future," and courts generally recognized the risk posed by a potential entrant only if there was compelling evidence that it planned to do so.

The draft guidelines, in contrast, suggest that a firm that operates in an adjacent market might be considered a potential entrant merely because it has both "sufficient size and resources" and an incentive to enter. Going forward, large successful companies that propose to acquire a company in an adjacent market in which they do not currently compete may find their acquisitions investigated or challenged even if they have no actual plans to enter and compete.

Labor concerns

The draft guidelines highlight the agencies' recent scrutiny of deals that could lead to a loss of competition that benefits workers' employment opportunities. While the previous HMG recognized that a merger can violate the antitrust laws by enhancing buyer power, the draft guidelines for the first time emphasize the potential loss of competition between the parties as "buyers" in the labor market.

Notably, the guidance indicates that the agencies may narrowly define labor markets to include employers that have the same specific demands for experience, skills, and other attributes in their employees, and they may take into account potential employee preferences for particular types of work. Both these factors increase the odds that the agencies may find harm to labor markets, even if employees might be qualified for other types of work and regardless of the efficiencies otherwise generated by the merger.

Partial ownership

The draft guidelines pay particular attention to situations where a buyer acquires less-than-full control but may still influence decision-making at the target firm. The agencies assert such situations may substantially lessen competition, such as when a buyer holds multiple minority stakes in rivals. This comes amidst renewed agency enforcement of Section 8 of the Clayton Act, which prevents many "interlocking directorates" between competing firms, especially in connection with private equity stakeholdings.

Roll-up strategies

The agencies have indicated that they won't limit their review to the deal in front of them. Instead, when either party "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." Private equity firms and other companies engaged in roll-up strategies need to be aware that an investigation of a proposed deal is now more likely to result in the government reaching back to challenge prior deals, or even a series of transactions that, in the aggregate, might be alleged to "substantially lessen competition or tend to create a monopoly." *See* Guideline 9.

Assessing the Potential Impact

The draft guidelines represent an inflection point in merger enforcement and a rejection of the "Chicago School" of economics that recognized the pro-competitive (and pro-consumer) effects of M&A activities. Notwithstanding the agencies' efforts to cast the changes as mere fidelity to case law and long-standing antitrust principles, they are likely to generate significant commentary.

On the one hand, they represent a return to a 1960s perspective of the potential risks of even moderate levels of market concentration. Companies contemplating acquisitions of horizontal competitors will need to calibrate their planning to reflect these more stringent standards. At the same time, the draft guidelines institutionalize a range of aggressive enforcement theories that could create new risks for non-horizontal deals, including vertical and conglomerate deals.

Ultimately, however, federal courts are likely to have the final say on whether these new, more aggressive standards represent the future of U.S. merger enforcement. The agencies' checkered record in court over the last two years – including on theories incorporated into the draft guidelines – suggests that the outcome is far from certain.

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