ALSTON & BIRD

Antitrust / Mergers & Acquisitions ADVISORY

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Federal Antitrust Enforcers Publish 2023 Final Merger Guidelines: A Reflection of Heightened Enforcement

On December 18, 2023, the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) published revised guidance on how they conduct antitrust reviews of mergers and acquisitions. The agencies' finalization of their changes to the merger guidelines is a long-anticipated part of the Biden Administration's aggressive antitrust enforcement agenda. In July 2023, the agencies received more than 30,000 public comments on their proposed revisions to existing merger guidelines. The final guidelines, which replace the 2010 Horizontal Merger Guidelines and the DOJ's 2020 Vertical Merger Guidelines, became effective immediately upon their release.

11 Final Guidelines

The 13 proposed guidelines were reduced to 11 final guidelines. The first six guidelines apply generally and outline the framework that the agencies use to analyze whether mergers and acquisitions present prima facie concerns under U.S. antitrust laws.

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

The remaining guidelines are aimed at targeting specific conduct or circumstances (e.g., serial acquirers). The agencies consider the unique circumstances outlined in the remaining guidelines when applying the framework from the first six guidelines.

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

Notable Updates from July 2023 Draft Guidelines

The final guidelines address some of the criticism raised during the public comment period, but many of the revisions from the draft guidelines are relatively minor (e.g., citing more recent cases, including the December 13, 2023, Fifth Circuit ruling in *Illumina Inc. v. FTC*, which agreed with the FTC that Illumina's proposed acquisition of a cancer test maker was likely to substantially lessen competition). The FTC and DOJ did soften the language used and adjusted the tone of the guidelines. The guidelines themselves were reworded from prohibitive statements to more neutral language (e.g., draft guideline 2 changed from "Mergers Should Not Eliminate Substantial Competition Between Firms" to final guideline 2 "Mergers Can Violate the Law When They Eliminate Substantial Competition Between Firms").

Guideline 5 and Draft Guideline 6 – Guideline 6 in the draft guidelines was folded into final guideline 5 with the revised guideline addressing vertical transactions and concerns about mergers that "may limit access to products or services that its rivals use to compete." In revised guideline 5, the agencies removed the statement that with a vertical merger where one party has at or near 50% market share, market structure alone indicates the merger may substantially lessen competition. However, the final guidelines now indicate in a footnote that the agencies will infer a firm is near or has monopoly power when it has greater than 50% share of the related product market.

Guideline 6 – The FTC and DOJ backed away from a bright line 30% market share standard to identify a dominant position among merging firms, instead relying on "direct evidence or market shares showing durable market power." The final guideline also retains the concept of assessing whether one merging party has a "dominant" position, which was not a concept in the 2010 Merger Guidelines, and whether a firm can extend that dominant position into new markets. According to the final guidelines, mergers that entrench or extend a dominant position could violate both Section 7 of the Clayton Act and Section 2 of the Sherman Act. In guideline 6 commentary, the agencies also note that dominant firms could acquire nascent competitive threats, and that a nascent competitor may not even "substantially constrain the acquiring firm at the time of the merger."

Guideline 7 – In the final guideline 7, a trend toward consolidation is now stated as an important factor in assessing the competitive effects of a transaction. This language is toned down from the draft guideline that further consolidation should be assessed for substantially lessening competition or tending to create a monopoly.

Guideline 8 – The final guideline 8 commentary on multiple acquisitions removed the statement that a series of acquisitions may violate Section 7 "even if no single acquisition on its own would risk substantially lessening competition or tending to create a monopoly."

Draft Guideline 13 – The catchall guideline 13, which stated that mergers should not otherwise substantially lessen competition or tend to create a monopoly, did not make it into the final guidelines. However, the final guidelines retain the statement that the guidelines are "not exhaustive," as well as examples of other mechanisms that the agencies have found to substantially lessen competition in previous mergers.

Restructured Sections – The final guidelines clarified that parties can rebut presumptions of competitive harm to show that a merger will not harm competition. For example, parties can show that new entrants in a market are likely, so a merger will not substantially lessen competition. In addition, a new Section 3 sets forth how rebuttal arguments fit into the agencies' analysis of competitive harm. Possibly in response to criticism that the agencies had relegated economic and evidentiary tools to appendices in the draft guidelines, appearing to discount their importance, the final guidelines have a new Section 4 setting forth analytical, economic, and evidentiary tools the agencies will use.

Major Takeaways

The major takeaways that we highlighted in our advisory on the draft guidelines are still valid –the agencies have set forth more aggressive standards for horizontal and vertical transactions and are targeting specific industries and conduct.

Lower concentration thresholds

Previous merger guidelines have included a presumption that mergers that create or increase high levels of market concentration are unlawful. These final guidelines reduce the concentration level that will trigger this presumption, reverting to pre-2010 guideline levels and setting a new presumption of illegality for most transactions that lead to a market share of 30% or greater.

Specific conduct targeted

The final guidelines emphasize the agencies' enforcement priorities, with some guidelines clearly targeted at specific industries and conduct. Certain guidelines are focused on conduct involving technology companies and digital platforms (e.g., the analysis of multisided platforms and concerns about limiting access to products or services that rivals use to compete) and companies that engage in multiple acquisitions or roll-ups. Serial acquirers or private equity firms engaged in a roll-up strategy cannot assume that they will avoid scrutiny or enforcement action for a series of acquisitions, which the agencies state could violate Section 2 and Section 7. Additionally, smaller acquisitions are more likely to catch the agencies' attention once the proposed changes to the Hart–Scott–Rodino (HSR) Act form and instructions requiring more information from parties are finalized, allowing the agencies to more easily identify and investigate these serial acquirers.

Minority acquisitions

Under the new guidelines, companies may face increased scrutiny and enforcement action for the acquisition of minority interests, particularly when a buyer is able to influence the decision-making at the target. Indeed, the

agencies have already increased enforcement actions involving "interlocking directorates" and concerns about the exchange of competitively sensitive information. The final guidelines also provide detail on how mergers can harm labor markets, notably stating that the level of concentration that raises competition concerns may be lower in labor markets than in product markets.

What Really Changes

The DOJ and FTC under the Biden Administration have already been operating under the principles espoused in the final guidelines, so the publication of the final guidelines does not constitute a marked change in enforcement philosophy or priorities.

That said, the final guidelines do serve as a warning to companies and set forth some more novel theories the agencies may use to evaluate the competitive harm of mergers. The 2023 final merger guidelines are statements of practice by the agencies that reflect their view of law and policy, although judges have cited and deferred to previous merger guidelines. It is an open question whether the judiciary will defer to the 2023 merger guidelines to the same extent. But their publication reinforces the need for companies active in any sector of the U.S. economy to give serious consideration to the impact of the Administration's new merger review approach before undertaking any transaction.

The comment period on the pending proposed revisions to the HSR form and instructions ended on September 27, 2023. However, the agencies have yet to publish the final revised HSR form and instructions, which, if substantially similar to those published in June 2023, would represent a marked shift in practice. The revised HSR form would require companies to submit significantly more information and require many more hours to prepare.

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