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TWO FUNDAMENTAL CHANGES IN ANTITRUST REGULATION
A White Paper for Business Leaders

Change in antitrust law often comes slowly, as entrenched economic theories, legal principles, and regulatory practices yield to reforms only begrudgingly. Debates over the primary purpose of antitrust—consumer welfare or efficiency—and appropriate policy statement guidance can last a long time. So, too, can the administrative and substantive practices of the enforcement agencies when it comes to evaluation of mergers and acquisitions. Now, for the first time in decades, fundamental changes are afoot.

The two key changes are the mechanisms for evaluation of proposed transactions under the Hart-Scott-Rodino Antitrust Improvements Act of 1976[1] ("HSR") and the proposal of entirely new Merger Guidelines for evaluation of the legality of mergers and acquisitions and other combinations. These changes will impact evaluation of the competitive aspects of proposed transactions and require an entirely new form for premerger review filings with new substantive content.

This paper addresses these important developments. Part 1 addresses the new premerger review proposal,[2] and Part 2 discusses the rejection of the long-standing horizontal and vertical merger guidelines, as well as implementation of the new guidance.

1. PREMERGER REVIEW PROCEDURES

This is the first major change to Hart-Scott-Rodino (HSR) procedures in 45 years.[3] The HSR Act and its implementing rules[4] require the parties to sizable mergers and acquisitions and joint ventures to submit premerger notification to the Federal Trade Commission ("FTC") and the Antitrust Division of the U.S. Department of Justice ("Antitrust Division") (together, the "Agencies") by completing HSR Forms[5] and waiting a specified period before consummating their transaction. (See my blog on the substantial changes made to these requirements in 2023.) The HSR Act, enacted in 1976, requires document-intensive submissions if the agency sees something in the initial submission that raises antitrust concerns and thus warrants a "second request" for a deeper HSR review.

[1] 15 U.S.C. § 18a.
[2] Proposed Rule, 88 FR 42178 (June 29, 2023).
[3] https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review

[4] 16 C.F.R. Parts 801-803.
[5] https://www.ftc.gov/enforcement/premerger-notification-program/form-instructions; https://www.ftc.gov/system/files/ftc_gov/pdf/hsrformver103dated02.27.23.pdf

The Agencies justify the need for change in terms of the difficulty they experience in collecting adequate information within the initial 30-day waiting period to evaluate transactions sufficiently. The FTC has further expressed concern that the effects of transactions may be masked, and a more detailed analysis of potential impacts is desirable. Innovation and pipeline products, labor and employment, supply channels, private equity structures, corporate governance, and deal structure all contribute to complexity in understanding competitive effects.

The proposed changes to the HSR Form and instructions would enable the Agencies to screen transactions "more effectively and efficiently" for potential competition issues within the initial waiting period, which is typically 30 days. This initial competition review is critical for the Agencies to identify transactions that require a broader "second request" for more information to allow an in-depth investigation. During an expanded investigation, the Agencies determine whether the proposed transaction would violate the antitrust laws and, if so, to seek to negotiate structural modification of the deal or block the proposed transaction to prevent competitive harm in relevant markets.

Transaction Documents and Narrative

Under current practice, filing parties generally file only the final versions of documents that discuss markets, market share, competition, competitors, and related subjects prepared by or for an officer or director to evaluate the transaction, as well as the transaction primary transaction agreement or letter of intent. For example, Items 4 (c) & (d) in the existing HSR Form seek documents related to the acquisition that have been prepared by or for officers and directors that analyze the competitive merits and synergies of the specific transaction. The changes contemplate much more.

The proposed HSR form would expand the scope of documents for submission by expanding the search for documents from "supervisory deal team leaders" to drafts of Item 4 (c) & (d) documents shown to any officer, director, or supervisory deal team leader.

The updated reporting form will require parties to submit a narrative on competitive effects and the rationale for the transaction, with details concerning the investment vehicles or corporate relationships involved. Significantly, filers must also now provide information on horizontal products and services and vertical relationships (such as supply agreements). This level of detail will require submission of analyses of why the firm really wants the deal, including projected revenue streams, transactional analyses, and internal documents on market conditions, as well as any related previous acquisitions and the deal's impact on labor.

With the proposed reforms, the Agencies will require more extensive document submissions right away, including:

- all agreements related to the transaction and all agreements between the parties, whether related to the transaction or not
- more "ordinary-course documents" such as semi-annual or quarterly plans and reports that discuss market shares, competition, competitors or markets for any product or service, whether specific to the transaction or not

- all documents—not just senior management/director reports—with competitive information provided to supervisory deal team leads in addition to officers and directors of the filing parties, together with drafts of these documents.

The narrative requirements pose other challenges. Both parties are to provide the rationale(s) and the strategy reason(s) for the transaction. They must further identify any horizontal overlaps or competition between them, with more detail than identification of NAICS (North American Industry Classification System) Codes. Specifically, parties will be required to list each current or known planned product or service that does or could compete with any current or known planned output of the other party. If there are overlapping products or services, the parties must provide customer information, sales, and a description of any licensing arrangements. The parties must also identify any non-competition or non-solicitation agreements with employees or business units. Separately, the buyer and seller are also required to provide a narrative of any common supply relationships.

Corporate Governance and Indirect Control

The proposed form also requires new details on corporate governance. Filings must include lists of all board members, officers, and board observers of every entity within the Filing Person for two years preceding the filing. Any proposed directors, officers, and board observers of the combined entity must also be disclosed. The current form requires information on certain minority investors and minority investments of the acquiring party and the target. For limited partnerships, the current form requires disclosure of the general partners' identities. The proposed form expands this to include limited partners and others who may have management influence on the combined entity [such as nonvoting securities, options and warrants holders, significant supply relationships, credit or financing entities (lending or investing ≥10% of the value of the combined entity) control, and those with management agreements]. The proposed revisions require submission of organizational charts for funds and master limited partnerships for filing parties, with a description of the ownership structure for both the acquiring and acquired parties.

Revenue Reporting

Revenue reporting on manufactured products through the Census Bureau's NAICS and NAPCS (North American Product Classification System) Codes is removed from the proposed form. For other revenue reporting, NAICS Code dollar values are replaced by reporting of revenue ranges by business unit. Those revenue ranges are:

- $1 million for developmental products expected to generate this level of revenue within two years.
- Less than $10 million
- $10 to $100 million
- $100 million to $1 billion
- More than $ 1 billion

As already noted, the proposed form significantly broadens reporting on prior acquisitions for the previous 10 years for any NAICS code overlap and any discussion in the narrative report on horizontal overlap. Filers must provide information on all acquisitions of 50% or

more of a company or all or substantially all the assets of an operating unit of a company, removing the revenue threshold in the current form.

Foreign Subsidies & U.S. National Security Contracts

The Merger Filing Fee Modernization Act of 2022[6] included disclosure of subsidies from foreign states ("Covered Nations") or entities that "threaten U.S. strategic interests." Filers will now be required to disclose and describe fully any subsidies received or committed from any Covered Nation or entity of concern within two years prior to the filing. Each filer must also disclose any procurement contracts with the Department of Defense or the intelligence community if the contracts are greater than $10 million in revenue.

Communications Mechanisms & Data Storage

In another area which had typically been an issue only for second requests, the parties will now be required to identify all internal communication systems (email, text, messaging apps) that could be used to communicate or transmit and store business documents or data. Each filer must take concrete steps to suspend auto-delete or network system file management protocols that could result in deletion of relevant information. The parties must certify their compliance with these steps. Further, if any documents are written in foreign languages, the filer must provide direct English translations prior to the filing.

Labor Information

Finally, the new reporting form creates a new Employee Classifications section which requires parties to "list their five largest categories of workers by the relevant 6-digit Standard Occupational Classification Code ("SOC"). Further, the parties are required to submit geographic data for overlapping commuter zones by SOC. Additionally, the parties are required to identify any penalties they incurred from the US Department of Labor's Wage and Hour Division, the National Labor Relations Board, or the Occupational Safety and Health Administration for five years prior to the transaction.

PRACTICAL IMPLICATIONS

Critics observe that the changes are burdensome and will drastically increase the cost of premerger clearance. The FTC's own Paperwork Reduction Analysis indicates completion of the form will take approximately 144 hours versus 37 hours under the current format. This amounts to approximately $350 million in legal fees and executive management time across all annual filings. Others complain that the initial filing will require document-intensive submissions approaching what was required for a second request for even competitively benign deals. As most transactions do not require that level of review or are not challenged, this increased cost will burden firms who are not proposing problematic combinations.

Multinationals that face more stringent review under other antitrust regimes around the world have already experienced tougher review processes. Many other countries already require narrative responses with competitive analyses and information on business segments, the transaction's structure and rationale, business overlaps, and vertical and

[6] https://www.congress.gov/bill/117th-congress/senate-bill/228/text.

other relationships. The Agencies' proposed premerger reporting changes alone are unlikely to be material to them for the right transaction, but with all the geopolitical and other challenges confronting them, this additional hurdle may be problematic.

Regardless, if the proposed reporting reforms are implemented, transaction parties clearly must:

- engage in closer competition review before a deal proposal leaves the boardroom
- evaluate any issues with disclosure of foreign interests
- analyze the relationship of the proposed deal to prior acquisitions
- tighten control over the generation of transaction documents and to whom they are circulated, including both draft and final forms
- assess the likelihood of ordinary-course documents posing problems
- assemble a legal and economic consulting team early in the process for competitive assessment and assistance with development of the narrative report.

The HSR reform proposal is not yet in effect. The detailed 133-page Notice of Proposed Rulemaking ("NPRM") opened the matter for public comment that will take time for the FTC and the Antitrust Division to digest. It is anticipated that the proposals, if adopted, could go into effect in four to six months. The NPRM provided for comments to be due by **August 28, 2023, but that period is now extended to September 27, 2013.** More details about the Notice of Proposed Rulemaking are available in the related FAQ of the Federal Register Notice page. We are submitting comments on behalf of interested parties. If you need assistance submitting your point of view, contact Glenn E. Davis of HeplerBroom LLC.

2. Revised Merger Guidelines

Mergers and acquisitions (M&A) have been subject to challenge under Section 7 of the Clayton Act[7] for over a century, Since 2021, the Biden Administration and the Agencies had signaled that updated Merger Guidelines would be forthcoming.[8] The pursuit of these reforms is consistent with a more aggressive but often unsuccessful enforcement agenda to protect consumer welfare and encourage (or at least not stifle) innovation, with several high-profile losses in recent merger cases in court. For example, the FTC sued Meta to block its proposed $400 million acquisition of the VR company Within. The FTC argued the acquisition would likely stifle innovation and competition in the VR industry, but Meta chose to challenge the FTC in court and prevailed.[9] While the Agencies may be focused on larger deals, any acquirer may need to be prepared to fight to acquire relatively small companies.

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[7] 15 U.S.C. § 18 (1914)

[8] President Biden was the first President to mention "antitrust" in a State of the Union address since President Jimmy Carter in 1979. Among other things, Biden seeks enforcement "to strengthen antitrust enforcement and prevent big online platforms from giving their own products an unfair advantage."

[9] *FTC v. Meta Platforms Inc*., Case No. 5:22-cv-04325 (N.D. Cal.2023) (Order denying Plaintiff's Motion for Preliminary Injunction) https://www.documentcloud.org/documents/23598337-ftc-vs-meta-within-ruling.

Nevertheless, during the last two years, the FTC and Antitrust Division have examined proposed mergers and acquisitions much more closely and have tried to modify or prevent more deals than in the past. The dramatic increase in antitrust inquiries has deterred corporate acquirers—especially big tech companies—from acquiring startups and other tech businesses. The healthcare and pharma sectors have seen similar M&A inactivity, in part due to the threat of antitrust challenges.

In July 2023, the FTC and the Antitrust Division released a revised draft of Merger Guidelines.[10] The revised Guidelines, like the preceding 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines, have no legally binding effect. However, they do influence courts, guide parties as to the Agencies' approach, and give parties pause for careful consideration as to what deals to advance. The revised Guidelines reflect some key themes the Agencies have advocated, including reduction or avoidance of concentration of markets, serial or progressive acquisitions that mask increasing concentration, competition in labor markets, and practices of dominant firms to entrench their position, block entry, and stifle competition.

FTC Chair Lina Khan and Assistant Attorney General Jonathan Kanter, head of the Antitrust Division, have explained there are "changing market realities" and advocated that antitrust analysis needs to evolve with the changes in the markets. Kanter remarked: "Competition today looks different than it did 50—or even 15—years ago." The proposed guidelines themselves do not change the law; in fact, they repeat language used in the Sherman and Clayton Acts: "Agencies [will] examine whether further consolidation may substantially lessen competition or tend to create a monopoly." The proposed Guidelines also invoke several long-standing, and sometimes criticized, Supreme Court cases.[11]

But the points of emphasis and approach do change. "Mergers that threaten competition or tend to create monopolies" invoke settled law and certainly describe circumstances warranting careful investigation. But the proposed Guidelines suggest more. Even mergers that might not themselves impede competition but could further a trend toward industry consolidation will now draw scrutiny. This is a full-throated call for broader application of an "incipiency standard" perhaps borrowed from the Clayton Act.[12] And there is consistency between the new Guidelines and the information sought in the new HSR premerger filing form.

The Changes Are Significant

The new Draft Merger Guidelines focus on 13 principles for evaluation of mergers:

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 or collusion.

[10] https://www.justice.gov/atr/d9/2023-draft-merger-guidelines.

[11] Proposed Guidelines, at 2 *citing California v. Am. Stores Co.,* 495 U.S.271 (1990); *United States v. Gen. Dynamics Corp*., 415 U.S. 486 (1974); *United States v. Penn-Olin Chem. Co*., 378 U.S. 158 (1964); *United States v. Phila. Nat'l Bank*, 374 U.S. 321 (1963); *Brown Shoe Co. v. United States*, 370 U.S.294 (1962).

[12] Proposed Guidelines at 2, citing *Brown Shoe*, 370 U.S. at 346.

4. Mergers should not eliminate potential competition in a market.
5. Mergers should not substantially lessen competition by creating a firm that controls products or services that rivals may use to compete.
6. 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 must examine the whole series.
10. When a merger involves a multi-sided platform (i.e., Amazon), 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 of competition.
13. Mergers should not otherwise substantially lessen competition or tend to create a monopoly.

The proposed Guidelines expand on structural and subjective considerations underlying each of these principles, which are not mutually exclusive. The first eight proposed Guidelines principles "identify several frameworks that the Agencies use to assess the risk that [a] merger's effect may be substantially to lessen competition or to tend to create a monopoly." The Guidelines on multiple acquisitions, multi-sided platforms, and partial ownership (9-12) address common situations. The 13 principles are also not exhaustive, and Guideline 13 deals with transactions that raise competitive concerns not specifically addressed in the others. Notably, the Agencies acknowledge that the "Guidelines must be applied to a broad range of factual circumstances, [and] the Agencies will apply them reasonabl[y] and flexibly to the specific facts and circumstances of each merger."[13]

Several key themes emerge. The Agencies intend to focus on tightening concentration levels that may reflect the likelihood of anticompetitive effects—particularly the ability of the merged parties to eliminate or hobble the competitive efforts of others or restrain entry, the change the transaction brings by eliminating competition between the merging parties, facilitation of coordination or an increased likelihood of collusion in the market, avoiding shortcuts to innovation, disruption of supply, entrenching a dominant position of one of the parties, and the new focus on labor markets and emerging new market forms, such as multi-sided platforms.

Two major areas warrant mention.

Concentration Ratios

The use of concentration ratios and indexes will change if the proposed Guidelines are implemented. Now, a merger resulting in a combined entity with 30% or more market share presents an impermissible threat of undue concentration, a far lower threshold of concern than the prior Guidelines' market concentration standards. In prior practice, while

[13] Proposed Guidelines, at 5.

each market is different, a market share of 30% would not raise concern, and much higher rules of thumb existed for monopolization considerations.

Under the existing horizontal merger guidelines (§5.3), a transaction is "presumed to be likely to enhance market power" if it increases the Herfindahl-Hirschman Index ("HHI") more than 200 points and results in a post-closing HHI exceeding 2500. There are also transactions that "potentially raise significant competitive concerns" when the increase in the HHI exceeds 100 points and the post-transaction HHI is at least 1500.

The proposed Guidelines use two post-merger HHI thresholds in a relevant market to inform decisions. Any transaction meeting either of the thresholds will be deemed presumptively anticompetitive.

1. A transaction with a post-transaction HHI of more than 1800 and an HHI increase of 100 points.
    - Under the old Guidelines, a finding of presumptive illegality requires HHI post transaction numbers of over 2500 and an increase of 200 points.

2. A new structural presumption threshold based on the merged firm's market share and the HHI point increase, disregarding the post-deal HHI levels in the affected markets.
    - A transaction is presumptively anticompetitive when there is a 100-point increase in the HHI and the combined parties' market share is 30%.

The proposed Guidelines summarize these thresholds as follows:[14]

Indicator	Threshold for Structural Presumption
Post-merger HHI	Market HHI greater than 1,800 AND Change in HHI greater than 100
Merged Firm's Market Share	Share greater than 30% AND Change in HHI greater than 100

This share-based threshold may increase the number of transactions deemed pre-sumptively anticompetitive, even in markets in which there are numerous competitors and the post-merger HHI does not reach the 1800 level the new Guidelines consider indicative of a highly concentrated market.

The new draft lowers the HHI thresholds under which a horizontal merger would be presumed to substantially lessen competition, returning to its 1992 benchmark, as well as adds a market-share threshold of 30% for the newly merged firm. The new draft also introduces several presumptions the prior guidelines did not use. For vertical mergers, for

[14] Proposed Guidelines, at 7.

example, a share above 50% in the market for what might be withheld from competitors creates a presumption that the merger may lead to a substantial lessening of competition.

Notably, the proposed Guidelines omit discussion of transactions with concentration levels or changes below defined levels as “unlikely to have adverse competitive effects.” This may mean that there are no presumptively legal combinations, and the Agencies may regard any transaction with competitive concerns as anticompetitive regardless of concentration metrics.

Market Definition

The proposed Guidelines offer more flexibility in antitrust market definition. This may have positive or negative consequences for deal advocacy and survival, as well as use of the Guidelines in private litigation. The less specific the Guidelines are about how to approach market definition, the more latitude there is for argument over the right approach. The lack of specificity can also cause issues for those seeking authority to support a particular approach. The 2010 Horizontal Merger Guidelines are often cited in support of a market definition in a wide range of antitrust cases, even those not involving mergers. Given that the burden of proof usually lies with the plaintiff, making the Guidelines less proscriptive could be a disadvantage to plaintiffs in privately litigated cases.

The 2010 Horizontal Merger Guidelines focused on the hypothetical monopolist test. The proposed Guidelines list four “tools to demonstrate that a market is a relevant antitrust market,” with the last of those being the hypothetical monopolist test.

The first two tools involve inferring the boundaries of a market based on evidence of direct competition between the merging firms or the exercise of market power. This provides ambiguity on definition of the boundaries of the market and lacks sufficient specificity to calculate market shares. While evidence relating to direct competition and market power is sometimes used in the context of a hypothetical monopolist test, the suggestion that these on their own would be sufficient to define a market is a change from past guidelines.

The third tool described is the “practical indicia” test long known as the *Brown Shoe* factors, which are often part of the evidence that the Agencies use to support market definition. But the *Brown Shoe* test is largely absent from the 2010 Horizontal Merger Guidelines.

The fourth tool, the hypothetical monopolist test, differs in important ways from the 2010 Horizontal Merger Guidelines description. Generally, the Draft Guidelines are less specific about how to perform the test. A larger number of different market definitions could be consistent with it. The proposed Guidelines omit the smallest market principle featured in the 2010 Guidelines (§4.1.1) that allowed parties to distinguish among several potentially valid markets and identify a relevant antitrust market by establishing that it should be no bigger than necessary to satisfy the test. The proposed Guidelines also omit the circle principle. The 2010 Horizontal Merger Guidelines state: “When applying the hypothetical monopolist test to define a market around a product offered by one of the merging firms, if the market includes a second product, the Agencies will normally also include a third product if that third product is a closer substitute for the first product than is the second product.” The removal of the circle principle may lead to a narrower market definition by

excluding some products that would have otherwise been included in the market under the 2010 Guidelines.

The proposed Guidelines include subsections on market definition, describing “Bundled Product Markets” and “One-Stop Shops in Markets.” Under the prior Guidelines, only products that were substitutes could be included in an antitrust market. The new Bundled Product Markets section makes clear that products that may not be strictly substitutable themselves but that tend to be “bundled” or sold together can be included in the same antitrust market. Similarly, the One-Stop Shops in the Markets section provides the Agencies broader discretion to define markets to cover suppliers who offer a range of products in a single market, even if other suppliers exist who only offer a narrow range of products. (The example given in the Draft Guidelines is grocery stores versus specialty shops like butchers, bakers, and green grocers.)

Key Takeaways

There is consistency in both the proposed HSR reporting and Merger Guidelines proposals. Both raise the likelihood of challenge and the potential cost and delay in securing approval of proposed deals. In combination, they may have the desired effect of deterring more risk-averse companies from pursuing deals that may carry some antitrust risk. The recent losses in merger cases in court, however, may mean that little will change for those willing to litigate the legality of their transactions.

Significant criticisms have emerged:

- As noted above, there are ambiguities that increase the opportunity for different approaches to be taken on market definition.
- The proposed Guidelines may find transactions to be presumptively anti-competitive that would not have been treated as such under the 2010 Horizontal Merger Guidelines.
- Aggressive pursuit of the proposed Guidelines standards may discourage emergence of new entities from venture capital early-stage development to bringing their products, services, and technologies to market.

Others find the proposed Guidelines offer more room for advocacy to get deals through and better transparency as to what the Agencies actually consider when evaluating transactions.

For many years, there have been important differences in enforcement policy between U.S. antitrust merger enforcement policy and other international antitrust authorities, such as the EU. Convergence to attain consistency has been an ideal that’s seldom been obtained. The approaches in the new Guidelines are still not the same but are closer to “dominance” based antitrust regimes in other countries.

Although the current antitrust regulators have been largely unsuccessful in blocking mergers, their approach is still likely to deter dealmaking. Acquirers must be ready for a lengthy review process and increased legal costs. While elevated antitrust risk has contributed to deflated M&A activity, potential acquirers are increasingly willing to fight the government in court after watching some buyers prevail by litigating merger challenges in court.

Practical Implications

The proposed merger guidelines are not binding law, but they are a critical embodiment of the Agencies' enforcement policies and directions. As past versions of the Horizontal Merger Guidelines have been important sources of guidance for the business community, the courts, and antitrust lawyers, the changes in the proposed Guidelines could have important consequences beyond merger enforcement. We are considering comments for submission.

For professional guidance on these issues from a skilled and experienced antitrust Litigation and Mergers & Acquisitions attorney, contact Glenn E. Davis of HeplerBroom LLC.

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