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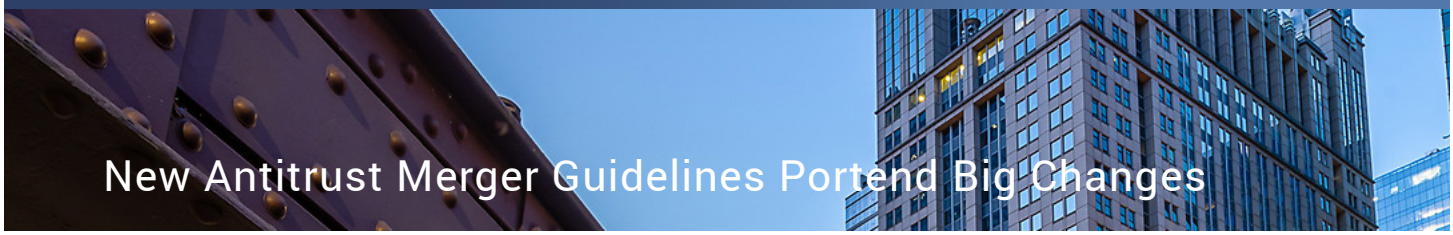

New Antitrust Merger Guidelines Portend Big Changes

By Glenn Davis on September 21, 2023
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In July 2023, the Federal Trade Commission and the Antitrust Division of the Department of Justice (the Agencies) released a revised draft of Merger Guidelines.

Key Takeaways

The proposed merger guidelines are not binding law, but they reveal the Agencies enforcement policies. As past versions of the Guidelines have been important sources of guidance for the business community, the courts, and antitrust lawyers, the proposed Guidelines could have important consequences beyond merger enforcement. As the implementation of these proposals moves forward, Mergers & Acquisition parties would be well advised to:

- engage in closer competition review before a deal progresses
- assemble a legal and economic consulting team early in the process to apply the refined and new threshold tests and consider market definition and statutory defense issues
- evaluate the impact of the anticipated heightened HSR review process
- build into the deal timeline adequate time to gather the additional data that will be required

Introduction

Mergers and acquisitions (M&A) have been subject to challenge under Section 7 of the Clayton Act for over a century, at times with varying levels of federal enforcement. Since 2021, the Biden Administration and the Agencies had signaled that updated Merger Guidelines would be forthcoming. These proposed Guidelines are consistent with a more aggressive antitrust enforcement agenda to protect consumer welfare and encourage (or at least not stifle) business' investment in innovation.

Despite recent setbacks in litigated antitrust merger cases, in the last two years the Agencies have examined proposed mergers and acquisitions much more closely and have tried to modify or prevent more deals than in the past. This dramatic increase 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 slowed by the threat of antitrust challenges.

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 commend careful evaluation of what deals to advance. The revised Guidelines reflect some key themes the Agencies have advocated, including reduction or avoidance of

concentration of markets, sequential acquisitions that mask increasing concentration, competition in labor markets, and practices of dominant firms to entrench their position, block entry, and stifle competition.

New Guidelines Create Significant Changes

Federal Trade Commission 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; instead, they repeat the same language used in the Sherman and Clayton Acts: "Agencies [will] examine whether further consolidation may substantially lessen competition or tend to create a monopoly."

But the points of emphasis and approach do change. The standards cited in the Clayton Act ("[m]ergers that threaten competition or tend to create monopolies") always described circumstances warranting careful investigation. But the proposed Guidelines suggest that 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 the Clayton Act's "incipiency standard" to stop transactions that might but have not yet caused harm. The proposed new Guidelines are also consistent with the heightened information sought in the new HSR premerger filing. (A blog post about that is available on our website.)

Underlying Principles

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.
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. Two major areas warrant mention.

Concentration Ratios

The use of concentration ratios and indexes will change if the proposed Guidelines are implemented. The familiar Herfindahl-Hirschman Index (HHI) thresholds are lowered to increase presumed concentration levels. 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. Proposed Guidelines use two post-merger HHI thresholds in a relevant market. Any transaction meeting either threshold is 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%.

Market Definition

The proposed Guidelines offer more flexibility in antitrust market definition. This may have positive or negative consequences. The less specific the Guidelines are about how to approach market definition, the more latitude there is for argument over the right approach. The 2010 Horizontal Merger Guidelines are cited in a wide range of antitrust non-merger cases. 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 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 tools 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. These provide ambiguous guidance on definition of the boundaries of the market.

The third tool is the "practical indicia" test resurrected from the Supreme Court's *Brown Shoe* decision from 1962. 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 Guidelines description. Generally, the Draft Guidelines are less specific about how to perform the test. Many different market definitions could be consistent with it, and it may exclude some products that would otherwise have 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 clarifies that products that are not direct substitutes but that tend to be "bundled" or sold together can be included in the same antitrust market. Similarly, the One-Stop Shops in 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 there exist other suppliers who only offer a narrow range of products.

Conclusion

There is consistency in both the proposed HSR reporting and Merger Guidelines proposals. In combination, they may deter 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.

Our White Paper provides more detailed information on the new Draft Merger Guidelines.

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

Tags: Federal Trade Commission, Mergers & Acquisitions