FTC AND DOJ RELEASE DRAFT OF UPDATED MERGER GUIDELINES: WHAT THIS MEANS FOR COMPANIES' M&A PLANS NOW AND IN THE FUTURE

Date: 20 July 2023

US Policy and Regulatory Alert

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After months of delays, on 19 July 2023, the United States Department of Justice Antitrust Division and Federal Trade Commission (collectively, the Agencies) released for public comment a draft update of their Merger Guidelines (Draft Guidelines). They also released a brief fact sheet summarizing the Draft Guidelines.

The Draft Guidelines reflect the Agencies' more aggressive recent interpretation and enforcement of the antitrust laws. If finalized, the Draft Guidelines would result in the Agencies investigating or potentially challenging transactions that were unlikely to be investigated or challenged under the prior Merger Guidelines. Although still subject to public comment, the Draft Guidelines likely reflect how the Agencies are already reviewing transactions, and businesses considering transactions that require a Hart-Scott-Rodino (HSR) filing should consult with antitrust counsel to understand the implications of these proposed changes on their deals.

OVERVIEW OF THE DRAFT GUIDELINES

The federal antitrust laws[1] provide the Agencies with the power to investigate and challenge mergers and acquisitions that may harm competition. Beginning in 1968, the Agencies periodically have published merger guidelines to help the public—including businesses, lawyers, and courts—understand how they assess mergers.

The Agencies previously withdrew the 2010 Horizontal Merger Guidelines in 2021 due to concerns that they were "overly permissive" and that many industries were becoming more concentrated and less competitive. The FTC also withdrew the 2020 Vertical Merger Guidelines. In January 2022, the Agencies announced their intention to overhaul and modernize the federal merger guidelines to strengthen merger enforcement, which culminated in the issuance of these Draft Guidelines.

Although the Draft Guidelines would not be enforceable rules or binding policy once finalized, courts have viewed prior iterations of the federal merger guidelines as highly persuasive authority when deciding merger challenges. The Agencies will likely continue to assert in court that this iteration of the guidelines is similarly persuasive.

WHAT ARE THE KEY CHANGES IN THE DRAFT GUIDELINES?

The Draft Guidelines reflect a comprehensive revision of prior federal merger guidelines. Whereas the 2010 Horizontal Merger Guidelines relied heavily on economic theory, the Draft Guidelines rely more on old, but still

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binding US Supreme Court decisions from the 1960s and 1970s. A comprehensive list of the revisions to prior merger guidelines is beyond the scope of this alert. However, certain key changes included in the Draft Guidelines are described below:

Consolidation of Horizontal and Vertical Merger Guidelines

In prior iterations of the federal merger guidelines, separate guidelines were published for horizontal and vertical mergers due to fundamental differences in the manner and likelihood in which horizontal and vertical mergers can affect competition. However, the 2020 Vertical Merger Guidelines noted that many of the same principles applied to vertical and horizontal transactions, and the Draft Guidelines have opted for a single set of guidelines for all transactions.

Market Concentration and Structural Presumptions

The Draft Guidelines reemphasize the use of Herfindahl-Hirschman Index (HHI) calculations, which attempt to measure how concentrated a market is using the sum of the squares of competitors' market shares. The 2010 Horizontal Merger Guidelines were notable for lessening the focus on the structural analysis of transactions using HHI calculations.

The Draft Guidelines decrease the HHI thresholds for determining “undue concentration” from 2,500 to 1,800 and apply a “structural presumption” that mergers above the 1,800 threshold may substantially lessen competition. Generally speaking, this means that the Agencies are likely to view transactions that result in five or fewer businesses in a particular market as presumptively anticompetitive whereas, previously, that threshold was four businesses.

The Draft Guidelines add a structural presumption that mergers that produce a merged entity with 30% or more market share are *presumptively anticompetitive* if the change in HHI is greater than 100.

Relying further on HHIs, the Draft Guidelines state that the Agencies are “more likely” to conclude that a merger will facilitate coordinated effects if the resulting HHI is above 1,000. For practical purposes, this means that even transactions with post-merger HHIs below the 1,800 threshold could still be investigated or challenged if the Agencies have concerns with potential coordination among competitors in the relevant market.

Because of the changes, many mergers that may not have received any agency attention or that may have received only a small voluntary investigation may now be subject to a Second Request[2] or challenge.

Vertical Mergers

The Draft Guidelines institute a “foreclosure share” concept in the context of vertical mergers. If a merged entity will control 50% of a rival's access to an input or customer, that fact alone is a “sufficient basis to conclude that the effect of the merger may be to substantially lessen competition.” If the foreclosure share is below 50%, the Agencies propose to examine a series of “plus factors,” such as whether there is a “trend” toward vertical integration, whether the nature and purpose of a merger is to foreclose rivals, whether a relevant market is already concentrated, or whether the merger may create barriers to entry.

Newly Articulated Competitive Concerns

Where one merging party is “dominant” in a relevant market, the Draft Guidelines propose to investigate whether the merger could entrench that position.

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The Draft Guidelines propose assessing whether a merger is part of a "further [] trend" toward concentration. Under this theory, a "trend" would exist if prior mergers have raised the HHI calculation for a relevant market above 1,000 and are bringing it close to 1,800 or if other factors such as recent mergers or exits of significant competitors have impacted competition.

The Draft Guidelines for the first time state that the Agencies would examine whether a proposed transaction is part of a "series" of transactions, and if so, the Agencies would evaluate the effects of all of the transactions. The Draft Guidelines do not indicate any certain number of years in which the Agencies would look for prior transactions.

The Draft Guidelines place greater emphasis on elimination of future competition. Specifically, they state that an acquisition could harm competition if it results in the acquisition and elimination of an actual nascent competitor or a potential future competitor whose potential entry is affecting or influencing current competitive behavior.

Multisided Platforms

The Draft Guidelines specifically address multi-sided platforms for the first time. Importantly, the Agencies state that they would evaluate the effects of a merger only on one "side" of the platform, without considering effects on other sides of the platform. In doing so, the Draft Guidelines attempt to limit only to transaction platforms (e.g., credit and debit cards) the U.S. Supreme Court's holding in *Ohio v. American Express*,[3] which held that both sides of a market must be evaluated in two-sided transaction platforms. This has implications for businesses that have been found to operate in two-sided markets, such as health insurance companies, healthcare providers, and some tech businesses.

Buyers' Power and Labor Markets

The Draft Guidelines state that a merger between competing buyers is "just as" harmful as a merger between competing sellers, and the Agencies would evaluate the effect of a merger on sellers and on employees for whose labor the merging parties compete. Historically, the Agencies have been less concerned with mergers that create powerful buyers because powerful buyers would likely use cost savings to lower consumer prices.

WHAT WILL BE THE IMPACT ON MERGER ENFORCEMENT?

The Draft Guidelines are likely to have profound effects on federal merger enforcement and, as a result, on businesses' ability to close transactions. Since the start of the Biden administration, merger enforcement has been more aggressive and less predictable. For businesses contemplating or engaging in transactions, this has meant increased uncertainty and, in some instances, greater costs and longer delays attributable to investigations. The release of the Draft Guidelines comes hot on the heels of the Agencies' proposed revision to the HSR filing process, discussed in detail in a prior alert. If finalized after the comment period, the Draft Guidelines will continue these trends.

However, while the Draft Guidelines increasingly reflect the policy preferences of the Agencies' current leadership, and therefore shed light on what types of mergers are likely to be challenged, they do not necessarily reflect how courts would apply the antitrust laws in merger litigation. The Agencies' recent losses in several merger challenges[4] demonstrate that their aggressive enforcement sometimes lacks support in law and fact. Accordingly, it is unclear whether courts in future merger cases will afford the Draft Guidelines the same level of

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deference as prior federal merger guidelines. Nonetheless, the Agencies will almost certainly argue that they should receive similar deference.

WHAT IS NEXT?

The Draft Guidelines will be subject to a 60-day comment period expiring on 18 September 2023, during which time the public may submit comments. Following the comment period, the Agencies will review the comments and then publish a final version of the Merger Guidelines.

While the Draft Guidelines will not take immediate effect, they likely reflect the Agencies' current merger enforcement objectives. Mergers reviewed by the Agencies in the coming months are likely to receive substantially similar scrutiny to that described in the Draft Guidelines. Accordingly, businesses contemplating mergers and acquisitions should expect their transactions to be evaluated pursuant to the principles and analyses described in the Draft Guidelines.

FOOTNOTES

[1] The Agencies enforce the federal antitrust laws, specifically Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45; and Sections 3, 7, and 8 of the Clayton Act, 15 U.S.C. §§ 14, 18, 19. Section 7 of the Clayton Act is the antitrust law that most directly addresses mergers, though mergers may also violate other of the above-referenced statutes.

[2] A “Second Request” is a discovery procedure by which the Agencies seek additional information through document requests and interrogatories to investigate mergers that they believe have the potential to be anticompetitive.

[3] 138 S. Ct. 2274 (2018).

[4] E.g., *United States v. U.S. Sugar Corp*., --- F.4th----, 2023 WL 4526605 (3d Cir. 2023); *Fed. Trade Comm'n v. Microsoft Corp*., --- F. Supp. 3d ----, 2023 WL 4443412 (N.D. Cal. July 10, 2023).

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