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Promises Kept – U.S. DOJ and FTC Release Long-Anticipated Revised Merger Guidelines

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On the heels of the historic proposed changes to the Hart-Scott-Rodino ("HSR") merger review process, the U.S. Department of Justice Antitrust Division and the Federal Trade Commission released the 2023 Draft Merger Guidelines for public comment. The single set of guidelines will replace the former horizontal and vertical guidelines, becoming the principal resource for merger review and challenges. The DOJ and FTC will finalize the Draft Guidelines following the close of the 60-day comment period on September 18, 2023. Together, the two sets of changes usher in a radically different climate for dealmaking in the U.S. and have the potential to grind transactions to a near halt just as M&A is beginning to regain steam.

The Draft Guidelines reflect the Biden administration's stated goal of re-energizing merger enforcement, including expanding review to scrutinize labor market impacts and minority-share private equity transactions. According to the agencies, the goal of the Draft Guidelines is to provide a flexible set of tools to analyze the competitive impact of a transaction in a changing economy and to inform the public, businesses, and the courts on how the Agencies will now approach merger analysis — which, in sum, will be with a highly skeptical eye.

The Draft Guidelines are grounded on 13 principles that the agencies will consider when evaluating deals. A transaction implicating any one or more should expect greater scrutiny.

1. Significantly increases concentration in an already highly concentrated market
2. Eliminates substantial competition among firms
3. Increases the risk of coordination
4. Eliminates a potential entrant in a concentrated market
5. Substantially lessens competition by creating a firm that controls products or services rivals may use to compete

6. Creates market structures that foreclose competition
7. Entrenches or extends a dominant position
8. Furthers a trend toward market concentration
9. Is part of a series of multiple acquisitions
10. Reduces competition related to a multi-sided platform
11. Lessens competition for workers or other sellers
12. Involves common partial ownership or minority interest among competitors
13. Otherwise substantially lessens competition or tends to create a monopoly

While the Biden administration's approach to merger review, and to antitrust enforcement more generally, has already shifted, the Draft Guidelines provide key insights to dealmakers and practitioners into how the agencies are viewing transactions, pursuing investigations, and arguing their cases in court — though often to an unreceptive judiciary skeptical itself of where the agencies want to take antitrust enforcement.

Beyond the conceptual elements in the guidelines directing when scrutiny will arise, they also include important structural changes in how markets, market definition, market concentration, and market shares are calculated and evaluated.

For example, under the new guidelines, a transaction raises a presumptive competition concern under the following circumstances:

- Where the merging parties' combined market share is over 30% and the Herfindahl-Hirschman Index (HHI) in the overall market increases by over 100. HHI measures market concentration levels — it increases as a market has fewer competitors with larger market share. No comparable presumption is contemplated by the current guidelines.
- Where the post-merger HHI is over 1,800, a highly concentrated market, and the deal increases HHI by over 100. The current guidelines set the threshold for a highly concentrated market at an HHI above 2,500 and an increase of more than 200 points will be presumed to enhance market power.
- Where the merger is in a highly concentrated market even when one of the parties has a very small market share.
- Where a party to a vertical merger has a market share above 50% for a particular input. Previous vertical merger guidelines included a presumptive "safe harbor" for

a vertically combined firm with a market share below 20%. The new presumption flips the script, creating a threshold that a 50% market share indicates the merger substantially lessens competition.

Important additional areas of emphasis will include:

- Transactions involving competitors in labor markets.
- “Killer acquisitions” that eliminate nascent competitors or recent entrants.
- Deals with no vertical or horizontal overlap that entrench a dominant position (at least 30% market share).
- Serial or “roll-up” transactions that independently might not raise concerns, but viewed in aggregate, lessen competition.
- Partial or minority acquisitions that raise concerns of potential misuse of competitively sensitive information and interlocking directorates.

Even after they are finalized, the Draft Guidelines are not binding on courts who historically view the agencies’ guidelines only as persuasive authority. Considering the DOJ and FTC’s numerous recent failed merger challenges based on many of these same principles, it is to be seen how much weight, if any, courts will attach to the Draft Guidelines.

Coupled with the FTC’s proposed revisions to the HSR reporting rules announced on June 29th, we are witnessing one of the most significant formal revisions to antitrust enforcement policy in a generation. Proskauer’s Antitrust Practice Group has extensive experience navigating changing compliance and enforcement landscapes and stands ready to support our clients’ business objectives to successful completion in any regulatory environment. Please contact us with any questions, as we are happy to assist your understanding of the Draft Guidelines and their implications.

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