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DOJ and FTC Release New Merger Guidelines

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The U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) released the 2023 Merger Guidelines on December 18, 2023. Following a 60-day public comment period that solicited over 30,000 comments from a variety of stakeholders, the finalized guidelines take a somewhat softer approach than the draft guidelines released in July – for instance, with respect to certain presumptions. Still, the updated Guidelines continue to steadfastly reinforce the Biden administration's stated commitment to increased scrutiny of mergers and stricter enforcement of antitrust laws.

In a statement made after the publication of the guidelines, Attorney General Merrick B. Garland remarked: "These finalized guidelines provide transparency into how the Justice Department is protecting the American people from the ways in which unlawful, anticompetitive practices manifest themselves in our modern economy." The new guidelines articulate an expansive view of antitrust law, represent a skepticism of the ability of business and the market economy to benefit consumers and drive efficiency and foretell a continuation of aggressive merger review and greater challenges for transacting companies.

The finalized guidelines contain only 11 guidelines versus the 13 guidelines initially proposed in the draft version. The Guidelines are:

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.
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 – also implicating labor markets for the first time in merger guidelines.
11. When an acquisition involves partial ownership or minority interests, the agencies examine its impact on competition.

Several small but significant changes were made from the draft guidelines. Draft guidelines 5 and 6, which focused on vertical mergers, were combined in the final version. The resulting Guideline 5 maintains the same framework for analysis of market structure when reviewing a vertical merger, such as presuming illegality for vertical mergers where the merged firm potentially could foreclose a competitor's access to over 50% of the market for any input. Draft guideline 8, now Guideline 7, was modified to include stronger language indicating that the Agencies will scrutinize mergers that occur not only in industries that are undergoing a consolidation, but also in industries that are trending towards concentration. Additionally, draft guideline 13, which contained a broad statement that mergers should not otherwise substantially lessen competition or tend to create a monopoly, was removed from the finalized guidelines. The DOJ and FTC instead added phrasing noting that the Agencies are not constrained to the Guidelines and may apply the "full range of precedent" available to them in each enforcement action.

The Guidelines also lower the threshold for a transaction to raise presumptive competition concerns and include a 30% market share presumption for illegality. The presumption is now raised when a market has a Herfindahl-Hirschman Index (HHI), which measures market concentration levels, above 1,800 (down from above 2,500 in the previous guidelines), and the transaction increases the HHI by over 100 (down from an increase of 200). There is a presumption of competition concerns when the HHI in the overall market increases by more than 100 and the merging parties' combined market share is over 30% following a transaction.

Private equity transactions are also impacted by the Guidelines. The Agencies explain that partial or minority acquisitions present significant competitive concerns under the Guidelines. Guideline 11 explains that a party may be able to influence a target firm even without gaining majority control. The Agencies specifically identify the ability of minority owners to appoint board members, influence budgets and select managers as areas of potential improper influence. According to the Guideline, minority acquisitions may also reduce the incentive to compete and provide access to non-public, competitively sensitive information from the target firm. According to the finalized guidelines, "cross-ownership can reduce competition by softening firms' incentives to compete, even absent any specific anticompetitive act or intent." Additionally, under Guideline 8, the Agencies note that when a merger is part of a series or pattern of acquisitions, they may consider the acquisitions' effect on competition as a whole, rather than individually.

While the Guidelines are not binding on the courts, they have historically served as persuasive authority for courts reviewing antitrust enforcement actions. However, it is important to note that the DOJ and FTC have repeatedly pursued failed merger challenges based on these same principles under current leadership. The Guidelines are the most significant revisions to antitrust enforcement policy in recent memory, but it remains to be seen what weight the courts will ultimately give them.

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