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FTC and DOJ Solidify Expanded Merger Enforcement in Finalized Merger Guidelines

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On December 18, 2023, the Federal Trade Commission ("FTC") and the Department of Justice Antitrust Division ("DOJ") released final revisions to the Merger Guidelines (the "2023 Merger Guidelines") that frame the agencies' approach to evaluating mergers and acquisitions under the antitrust laws. While these guidelines contain significant updating from the draft guidelines released on July 19, 2023, the overall direction is largely the same. Specifically, the final guidelines spell increased burdens for merging parties and expanded lines of inquiry that the agencies will pursue during the HSR review process. Tellingly, they were accompanied by calls from both DOJ and FTC for continued aggressive enforcement of the antitrust laws against mergers and acquisitions.

Limited Changes From the Draft Guidelines to the Final Guidelines

While there are significant changes to the text of the final 2023 Merger Guidelines since the draft last summer, the impact of those edits is unlikely to have a significant impact on enforcement. In several places, the updates involve clarifying wording, adding recent case citations, and replacing more definitive language with language that would allow more fact-specific inquiry. As one example, the draft guidelines stated a presumption of anticompetitive effects in vertical markets where one party has a 50% share upstream or downstream, but the final document omits this bright line in favor of a factual evaluation. While this loosens the language, it is unlikely to change the agencies' approach and may even suggest expanded enforcement since the language is more ambiguous. Other thresholds were also softened, such as the 30% share test for a "dominant position," which was replaced with a call for similar fact-intensive inquiry.

One other change appears in Guideline 7, where the agencies expanded their treatment of deals where there is a perceived "trend toward consolidation." While this concept was present in the draft guidelines, various additional examples were added to clarify potential concerns. For instance, Guideline 7 describes the prospect that a deal could contribute to an "arms race for bargaining leverage," whereby consolidation is incentivized in upstream and downstream markets as firms jockey for negotiating positions. Guideline 7 also notes that where multiple deals are occurring in the same industry, they may be evaluated together as part of a "combined trend toward concentration."

Major Changes From Past Iterations of Merger Guidelines

In many other ways, the final guidelines maintain the changes in enforcement philosophy that were set out in the draft guidelines last summer. Some of the most salient changes are the following:

Structural Presumption Threshold. The structural presumption threshold has historically been based on the Herfindahl-Hirschman Index, a tool for measuring industry concentration and the change in concentration from the merger. The 2023 Merger Guidelines revise the threshold for determining that a market is "highly concentrated" from 2,500 to 1,800. And, they declare that a transaction resulting in a change in the HHI Index of 100 points or more is presumptively anticompetitive, whereas previously the threshold had been 200. To add some context, consider the following hypothetical market:

Competitor	Market Share	HHI Calculation
Alpha	30%	900
Beta	20%	400
Gamma	20%	400
Delta	10%	100
Epsilon	10%	100
Zeta	5%	25
Eta	5%	25
TOTAL HHI VALUE		**1,950**

This hypothetical 7-competitor market would be "highly concentrated" under the 2023 Merger Guidelines, since the HHI is above 1,800. Moreover, a merger between Epsilon and Zeta, which would yield a combined share of 15%, would be presumptively anticompetitive (i.e. a change in HHI of 100), despite the combined firm being the fourth-largest competitor in the market even post-transaction.

Entrenchment or Extension of Dominance. The 2023 Merger Guidelines resurrect a theory of anticompetitive harm largely seen in cases in the 1960s and 1970s—entrenchment or extension of a dominant position. While the European Commission has investigated and enforced on this basis, the U.S. agencies have rarely done so in the last 40+ years. Entrenchment or extension of dominance can arise in a number of different contexts, but the unifying theme is that for many companies, getting bigger is presumptively problematic.

Focus on Labor and Input Markets. While antitrust enforcement has historically focused on harm to purchasers of a merged firm's products, the 2023 Merger Guidelines emphasize the importance of avoiding harm to the merged company's employees and suppliers. Among other things, the guidelines note that the FTC and DOJ will "examine merging firms' power to cut or freeze wages, slow wage growth, exercise increased leverage in negotiations with workers, or generally degrade benefits and working conditions without prompting workers to quit." And, notably, the agencies emphasize that any potential concerns about labor or supplier markets must be analyzed independently of any other aspect of the deal.

No Efficiencies Defense. Since the 1997 Horizontal Merger Guidelines, the Agencies have embraced a recognition that efficiencies—cost savings gained from the transaction—may support allowing a transaction. The basic premise was that if a transaction could generate substantial savings, those should be balanced against potential concerns about loss of competition. The 2023 Merger Guidelines explicitly reject this potential. So, for example, a transaction that results in a reduction in employers for a particular field (i.e., a loss of labor market competition) could not be justified on the basis that it would substantially-reduce output costs or prices.

Takeaways for Dealmaking

The FTC and DOJ have already been applying many of the theories found in the 2023 Merger Guidelines in pending reviews. For the foreseeable future, the antitrust environment will be one of hostility from the DOJ and FTC, and that appears likely to increase in 2024. The best path forward for dealmakers is to plan for some potential timing uncertainty in deal documents, develop a clearance strategy, and evaluate potential litigation/settlement scenarios in advance where agency concerns are anticipated.

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