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Draft DOJ and FTC Merger Guidelines Signal Continued Aggressive Antitrust Enforcement

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Key Takeaways

- On July 19, 2023, the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) (collectively, Agencies) issued Draft Merger Guidelines addressing both horizontal and vertical mergers. The Draft Guidelines replace all prior versions of the Agencies' various merger guidelines.
- The Draft Guidelines reflect a more aggressive approach to merger enforcement than the current version, which was issued in 2010, and align with Biden administration agency leaders' statements regarding expanded merger enforcement.
- The Draft Guidelines outline 13 specific scenarios in which the agencies believe deals may violate the antitrust laws. The list includes several fact patterns corresponding to situations in which courts have rejected agency merger challenges in recent years.
- Among other things, the Draft Guidelines:
  - Significantly lower the threshold for markets categorized as "highly concentrated," returning to standards from the 1980s and 1990s;
  - Introduce a focus on "dominant position" — a historically European concept;
  - Significantly diminish the role of efficiencies; and
  - Emphasize and/or introduce several new concepts and areas of foci, including: private equity entities engaging in "roll-ups" and "tuck-ins;" acquisitions of partial or minority interests; technology platforms; and competitive effects on labor and competitors.

- The Agencies are seeking comments on the Draft Guidelines through **September 18, 2023**. There is currently no timeline for implementation following the public

comment period. We expect the Draft Guidelines will be adopted no sooner than late 2023.

- Even when the final version of the Draft Guidelines issues, they will not be binding on courts, and their persuasive value in federal court litigation remains to be seen.
- The Biden administration has already begun implementing many of these concepts unofficially in its investigations (though to date it has had far less success in litigation matters based on novel theories), and the release of the Draft Guidelines serves the laudable goal of aligning public guidance with actual agency practice.

Background

Since issuance of the DOJ's first such guidelines in 1968, the Agencies have issued several iterations. The Draft Guidelines "consolidate, revise and replace the various versions of Merger Guidelines issued by the Agencies," including the 2020 Vertical Merger Guidelines, which DOJ had not previously withdrawn (unlike the FTC).

The purpose of these Guidelines is "to help the public, business community, practitioners and courts understand the factors and frameworks the Agencies consider when investigating mergers."

Merger Guidelines are nonbinding documents. However, the Agencies have tended to hew closely to the controlling version of the Guidelines in practice. Given the alignment between the Draft Guidelines and recent statements from leadership at the Agencies, this trend is likely to continue in the near future.

The Draft Guidelines

Unlike the last update to the Merger Guidelines (in 2010), this document focuses less on recent developments to the case law and the Agencies' approaches since the last iteration was released. Instead, the Draft Guidelines rely heavily on case law from the 20th century to justify enforcement stances that often go beyond mainstream, contemporary jurisprudence.

While the Draft Guidelines retain many traditional analytical tools, they also introduce several notable changes, including:

- **Highly concentrated markets**. The Draft Guidelines lower significantly the thresholds for what is considered "highly concentrated" markets and "undue concentration," thereby triggering a presumption of illegality. Of note, the Herfindahl-Hirschman Index (HHI) thresholds they adopt are consistent with merger guidelines from the 1980s and 1990s. Despite the lower thresholds, for decades the Agencies have, in practice, focused on challenging mergers meeting higher levels.[1] For horizontal mergers, the Agencies also add a 30% market share presumption for merger illegality; a 1963 case first articulated this presumption prior to the adoption of a law-and-economics approach to antitrust, though the Agencies had not previously included it in their guidelines. And for vertical mergers, the Draft Guidelines establish a new presumption, stating that "[a]t or near a 50% share, market share alone" triggers illegality.
- **Dominant position**. The Draft Guidelines also introduce the relatively novel concept in U.S. antitrust law of a "dominant position" and, along with it, an expanded definition of what might be unlawful. Dominance is defined as "approaching monopoly power," which means (1) there's direct evidence of a firm's power to raise price or reduce quality, or (2) one firm has at least 30% market share. If a merging firm has a dominant position, the Agencies will consider if the merger would entrench or extend that position. Considerations include whether a merger might: increase barriers to entry; increase switching costs; interfere with use of competitive alternatives; deprive rivals of scale economies or network effects; eliminate a nascent competitive threat; or lead the merged firm to leverage its dominant position by tying, bundling or "otherwise linking sales of two products" and thereby excluding rival firms.
- **Efficiencies**. The Draft Guidelines take a significant step back from recent Agency positions and revert to a more skeptical position regarding potential merger benefits. The 2010 Horizontal Merger Guidelines recognized that "a *primary benefit* of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete."[2] The Draft Guidelines, in contrast, rely upon Supreme Court precedent from 1967 stating "possible economies *cannot be used as a defense* to illegality."[3]
- **Private equity concerns**. The Draft Guidelines introduce two novel guidelines aimed squarely at PE operations. One guideline focuses on "roll-ups" and "tuck-ins," explaining that "if an individual transaction is part of a firm's pattern or strategy of multiple acquisitions, the Agencies consider the cumulative effect of the pattern or strategy." Another specifically calls out partial ownership and minority interests, identifying three "principal effects" on which the Agencies will focus: the partial owner (1) obtains the "ability to influence the competitive conduct of the target firm," such as through a voting interest or governance rights like board or manager appointments; (2) "reduc[es] the incentive of the acquiring firm to compete," for

instance, if losing business to the partially acquired rival results in a profit through dividend or other revenue share; and (3) obtains "access to non-public, competitively sensitive information from the target firm."

Impact

Literally all the proposed changes serve to raise the bar for prospective mergers. The Draft Guidelines further propose to broaden the scope of evidence and facts the Agencies might consider in their merger reviews, which could lead to prolonged investigations as the Agencies demand more — and different — categories of information from merging parties.

The Draft Guidelines reflect the priorities of this administration, but how persuasive they might prove in federal court is an open question. Courts have no obligation to apply the Agencies' guidance documents; they may elect to do so if they find the guidelines useful or compelling. In recent years, courts have consistently found aspects of the Agencies' Horizontal Merger Guidelines persuasive, particularly with regard to market definition, in part because these documents demonstrated consistency both across the Agencies' approach over time and with developing case law: updates were introduced to align public guidance with adjustments to the Agencies' and courts' approaches in intervening years. The Draft Guidelines, on the other hand, introduce several novel concepts, many of which have yet to be tried in court, and others of which have met with less than stellar results in recent months. Previous versions were also the product of some level of bipartisanship given that, typically, two members of the FTC were of the minority party and voted for issuance; this 2023 iteration is solely a product of the Democratic Biden administration as there are no Republican members of the FTC at present.

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1. The Draft Guidelines acknowledge that the 2010 guidelines "reflected [] agency practice." U.S. Dep't of Justice & Fed. Trade Comm'n, Draft Merger Guidelines, § II.1 n.29. (2023), https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf. ↩

2. U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines §10 (2010), https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf (emphasis added). ↩

3. Draft Guidelines, § IV.3 (quoting FTC v. Procter & Gamble Co., 386 U.S. 568, 580) (1967) (emphasis added). ↩

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