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Legal Sidebar

Antitrust Agencies Release Draft Merger Guidelines and Propose HSR Rule Changes

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On July 19, 2023, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) (the Agencies) jointly released draft Merger Guidelines (Draft Guidelines) for public comment. If adopted, the Draft Guidelines will update the factors and frameworks the Agencies intend to consider when investigating mergers and deciding whether to challenge particular mergers as antitrust violations. The Agencies signaled their intent to "modernize" the Merger Guidelines in January 2022, when they issued a joint request for public comments "to inform potential revisions." According to the Agencies, the new revisions "reflect significant advancements in the law and fundamental changes in our economy."

The Draft Guidelines arrive on the heels of a proposed rulemaking the FTC published on June 29, 2023, that "would . . . redesign . . . the premerger notification process" required by the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act). Together, the new rules and Guidelines would subject merging firms to additional disclosure requirements while also providing new guidance about the types of mergers the Agencies are likely to investigate and challenge.

This Legal Sidebar provides an overview of the legal and regulatory landscape that applies to merger enforcement, the recent proposed changes to the Merger Guidelines and HSR Act regulations, and some considerations for Congress.

The Legal and Regulatory Landscape

Section 7 of the Clayton Antitrust Act prohibits mergers or acquisitions that "may . . . substantially . . . lessen competition, or . . . tend to create a monopoly." The DOJ and FTC have largely overlapping jurisdiction to enforce this prohibition and are the agencies primarily responsible for merger enforcement, although a handful of other agencies also play a role in certain highly regulated industries (such as the Surface Transportation Board's review of railroad mergers and the Federal Communications Commission's review of telecom mergers).

Congress intended the Clayton Act's prohibition of anticompetitive mergers "to arrest the creation of trusts, conspiracies, and monopolies in their incipiency, and before consummation." To facilitate review of mergers that have not yet been consummated, the HSR Act imposes premerger notification requirements on parties who are planning transactions that exceed prescribed thresholds. The required

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notification must be submitted to both the DOJ and FTC. The Agencies then review the submission to determine whether further investigation is warranted and which agency will conduct any investigation. If an investigation raises concerns that the proposed merger violates the Clayton Act, the reviewing agency may seek to block it. Both the DOJ and FTC have authority to request that a federal court preliminarily enjoin a proposed merger, and the Agencies can also challenge a transaction that has already closed.

In their capacity as antitrust regulators, the Agencies have sometimes distinguished between horizontal mergers and vertical mergers. Horizontal mergers are combinations of rivals that compete to offer the same good or service. They have traditionally been viewed as posing a more direct threat to competition than vertical mergers, which are combinations of firms at different stages of a supply chain. When reviewing horizontal mergers, regulators have typically been most concerned about the likelihood of collusive or parallel pricing or the creation of a firm with unilateral pricing power. To evaluate vertical mergers, regulators have assessed the new firm's potential to foreclose rivals, raise barriers to entry, or enable collusion.

History of Merger Guidelines

In 1968, the DOJ issued Merger Guidelines "to acquaint the business community, the legal profession, and other interested groups and individuals with the standards" it was using to evaluate mergers subject to Section 7 of the Clayton Act. The DOJ updated the Guidelines in 1982 and 1984. Each of these iterations of the Guidelines addressed both horizontal and vertical mergers. In 1992, the FTC and DOJ jointly produced an update of the Guidelines "concerning horizontal acquisitions and mergers," which the Agencies further updated in 1997 and 2010. The Agencies jointly issued Merger Guidelines for vertical mergers in 2020, but they were short lived. The FTC voted to withdraw its approval of the 2020 vertical Merger Guidelines on September 15, 2021.

These Merger Guidelines do not bind courts or the Agencies, and the new proposed revisions would not alter the Guidelines' lack of legal force. The draft released by the Agencies on July 19, 2023, provides that the Guidelines "create no independent rights or obligations and do not limit the discretion of the Agencies or their staff in any way."

The Merger Guidelines can, however, influence actors involved in mergers and merger enforcement. For example, some courts have treated the Guidelines as persuasive authority. Because they publicize "the factors and frameworks the Agencies consider when investigating mergers," the Merger Guidelines also serve as a potentially useful signal to firms assessing whether regulators are likely to scrutinize a contemplated merger.

Draft Merger Guidelines

Overview

The Draft Guidelines would, if adopted, "consolidate, revise, and replace" the prior Guidelines. The DOJ and FTC explain that they wrote the Draft Guidelines to accurately reflect the Clayton Act and judicial precedent interpreting the Act, as well as "modern market realities," and also to provide increased transparency and clarity on how the Agencies evaluate mergers.

At the core of the Draft Guidelines are eight "frameworks" that the Agencies intend to apply to assess the risk of a merger. These frameworks (categorized as Guidelines 1-8) identify "discrete facts" that, if present, would suggest to the Agencies that a merger is "so inherently likely" to substantially lessen competition that it should be blocked, unless there is clear evidence rebutting the presumed anticompetitive effects. Specifically, Guidelines 1-8 say that "mergers should not"

1. significantly increase concentration in highly concentrated markets;
2. eliminate substantial competition between firms;
3. increase the risk of coordination;
4. eliminate a potential entrant in a concentrated market;
5. substantially lessen competition by creating a firm that controls products or services that its rivals may use to compete;
6. in vertical mergers, create market structures that foreclose competition;
7. entrench or extend a dominant position; or
8. further a trend toward concentration.

The Draft Guidelines also articulate four principles (categorized as Guidelines 9-12) that explain how the Agencies will address common issues that arise when the Agencies apply the eight frameworks listed above. Guidelines 9-12 explain that the Agencies will

9. when a merger is part of a series of multiple acquisitions, examine the whole series of transactions;
10. when a merger involves a multi-sided platform, examine competition between platforms, on a platform, or to displace a platform;
11. when a merger involves competing buyers, examine whether it may substantially lessen competition for workers or other sellers; and
12. examine whether an acquisition of partial ownership or minority interests impacts competition.

The Draft Guidelines provide commentary on how the frameworks and principles articulated in Guidelines 1-12 might be applied in practice, and they cite judicial precedent to support the propositions articulated in those Guidelines. The Draft Guidelines explain that these court decisions are cited for their legal propositions, but not necessarily for their factual analysis. The Draft Guidelines also emphasize that that the considerations outlined in Guidelines 1-12 are "not exhaustive" of the ways a merger may be problematic, and a catch-all Guideline 13 states that "mergers should not otherwise substantially lessen competition or tend to create a monopoly."

The Draft Guidelines and accompanying appendices also provide guidance on how the Agencies define the relevant product and geographical markets, examine rebuttal evidence, consider different sources of evidence, assess competition between firms, and calculate market shares and measure market concentration.

Comparison with Prior Guidelines

Many of the considerations articulated in the Draft Guidelines are not new. For example, both the 2010 Guidelines and the Draft Guidelines emphasize the relevance of market shares and market concentration, recognize that mergers may lessen competition by eliminating a "maverick" firm, and cite the same three principal factors for analyzing partial acquisitions. At the same time, the Draft Guidelines diverge or add to prior Guidelines in several ways. While not an exhaustive list, some key changes include the following:

- **Eliminating the dichotomy between horizontal and vertical mergers.** Unlike prior Guidelines, which distinguished between horizontal or vertical mergers, the Draft Guidelines would provide a single set of principles that apply to all mergers. In the words of one FTC commissioner, it became "increasingly evident" that the "artificially

constructed" categories of vertical and horizontal mergers did not fully capture the complex relationships between merging parties. This commissioner stated that few transactions today are purely horizontal or vertical, with many involving "adjacent markets, or other patterns that cannot be cabined into narrow geometric relationships."

- **Guidance on multi-sided platforms.** The Draft Guidelines, for the first time, provide guidance on how the Agencies will assess acquisitions involving multi-sided platforms. As explained in the Draft Guidelines, multi-sided platforms provide different products or services to two or more different groups. Under the Draft Guidelines, the Agencies would consider mergers not only affecting competition between platforms but also affecting competition on a platform (for instance, competition in the market for a product sold on a platform) or affecting competition from companies that would replace a platform or reduce dependence on a platform.
- **Focus on competition in labor markets.** As another FTC commissioner pointed out in a statement accompanying the Draft Guidelines, while the prior version of the Guidelines talked about monopsony power (i.e., buyer power), they "have never expressly addressed the power to buy *labor*." The Draft Guidelines, however, expressly recognize labor markets as "important buyer markets" that present the same types of concerns as other markets. According to the Draft Guidelines, reduced competition for labor may lead to lower wages, slow wage growth, worse benefits or working conditions, or "other degradations of work place quality." The Agencies, therefore, will assess the extent to which a merger "may substantially lessen competition for workers."
- **Lower threshold for the structural presumption.** Under the "structural presumption," articulated in Guideline 1 of the Draft Guidelines, a merger that would significantly increase concentration in a highly concentrated market is presumed to substantially lessen competition. While the structural presumption is not new, the Draft Guidelines would lessen the threshold for when this presumption is triggered. The Agencies, under the 2010 Guidelines and the Draft Guidelines, generally use the same method to calculate market concentration: the Herfindahl-Hirschman Index (HHI), which is measured by the "sum of the squares of the [the participants'] market shares." Under the 2010 Guidelines, the presumption applied when a transaction resulted in an HHI above 2,500 points and a change in HHI greater than 200 points. In contrast, the Draft Guidelines would apply the presumption when a transaction results in an HHI above 1,900 points and a change in HHI greater than 100 points.

Early Commentary on the Draft Guidelines

Each of the three current FTC commissioners issued statements in support of the Draft Guidelines the day they were released. The White House issued its own statement that the revisions are intended to make the Merger Guidelines easier to understand and incorporate the best available economic thinking and evidence. The Chair of the FTC and the Assistant Attorney General for the DOJ's Antitrust Division also made media appearances and published an opinion piece in the *Wall Street Journal* following the release of the Draft Guidelines. Both officials reiterated the Agencies' view that the proposed revisions reflect existing law.

Some commentators, however, have described the changes as "turn[ing] back the clock." For about forty years, the Agencies' Merger Guidelines have expressly identified a "unifying theme," which a former Deputy Assistant Attorney General for Economics at the DOJ summarized as "preventing mergers that harm customers due to enhanced market power." In 1982, when the Guidelines introduced this market power theme, commentators noted the increased emphasis on "mergers that are 'inefficient' because they tend to produce lower output and higher prices relative to costs." That emphasis, commentators have

argued, itself reflected a pivot from the view of the Clayton Act that prevailed in the 1950s and 1960s, when Section 7 was understood as a means of "preserving a dynamic process of rivalry."

The new Draft Guidelines, with their focus on preserving deconcentrated market structures, could be understood to revive concepts associated with the earlier view of the Clayton Act. Commentators who disagree with the changes in the Draft Guidelines argue that this revival does not account for intervening economic and legal developments or the consumer welfare standard—and could therefore undermine the Agencies' credibility with courts. Commentators who support the changes contend that the revisions are a "return to the law," backed up by recent scholarship rebutting the views about mergers that took hold in the 1980s.

Proposed HSR Changes

The FTC issued a notice of proposed rulemaking involving changes to the HSR Act rules and premerger notification form on June 27, 2023, with the concurrence of the Assistant Attorney General of the DOJ's Antitrust Division. Under the HSR Act, parties to qualifying transactions must file the premerger notification form with the Agencies. The proposed changes would require these filers to provide more information than under the current rules.

According to the FTC, this increased information would enable the Agencies to "more effectively and efficiently screen transactions for potential competition issues." In a statement, the current FTC commissioners framed the proposal as the first "top-to-bottom review" of the form since the HSR Act was passed 45 years ago. The deadline for public comments on the proposed changes is currently September 27, 2023.

The newly proposed mandatory disclosures include material regarding the structure and rationale of the proposed transaction, details regarding past acquisitions by the parties, information regarding the parties' employees, and draft transaction documents. The proposal also includes changes designed to fulfill the requirement of the Merger Filing Fee Modernization Act of 2022 for HSR Act filers to disclose any subsidies received from foreign entities of concern.

The FTC estimates that the average number of hours required to prepare an HSR Act filing would grow from 37 to 144 under the proposal. This increased burden on filing parties in both cost and time, along with the potential for scrutiny from the Agencies based on newly required information, may discourage some parties from pursuing transactions subject to HSR Act notification.

The proposed changes would not alter which transactions trigger HSR Act notification requirements. Those thresholds are updated annually based on a statutory formula.

Considerations for Congress

As a nonbinding guidance document, the Draft Guidelines would not change the legal standard for mergers. Ultimately, it is for courts to determine whether a particular merger violates Section 7 of the Clayton Act. Nevertheless, the Draft Guidelines are significant, particularly because they elucidate when the Agencies may challenge a particular merger, which information may then influence decisions by firms whether to forego, alter, or abandon deals.

To the extent Congress wants to change or reinforce the way the Agencies analyze and challenge mergers, or the way courts consider those challenges, one option would be to amend Section 7 of the Clayton Act. Several bills introduced in the 117th Congress—such as the Prohibiting Anticompetitive Mergers Act of 2022 (S. 3847/H.R. 7101), the Trust-Busting for the Twenty-First Century Act (S. 1074), and the Competition and Antitrust Law Enforcement Reform Act of 2021 (S. 225)—would have changed Section

7's "substantially . . . lessen competition" standard. For example, S. 225 would have prohibited acquisitions that "create an appreciable risk of materially lessening competition," and S. 1074 would have prohibited firms with market capitalizations exceeding $100 billion from engaging in mergers whose effect "may be to lessen competition in any way." As discussed in this CRS report, some bills in the 117th Congress, such as the Platform Competition and Opportunity Act (S. 3197/H.R. 3826), would have specifically restricted mergers involving large online platforms.

Congress could also amend the HSR Act to alter the premerger notification scheme. Congress could modify the thresholds defining which transactions trigger HSR Act reporting requirements or alter the information that required filers must provide, as the Merger Filing Fee Modernization Act of 2022 did for foreign subsidies. Statutory or regulatory changes to the HSR Act filing requirements may also impact any legislative proposals that refer to those requirements in defining separate reporting obligations, such as the Healthcare Ownership Transparency Act (H.R. 1754).

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