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Newly Finalized FTC/DOJ Merger Guidelines Are Likely to Increase Antitrust Scrutiny of M&A Deals

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Earlier this week, the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") released the long-awaited 2023 Merger Guidelines. The final guidelines are the result of nearly two years of behind-the-scenes drafting, numerous public listening sessions and workshops, and the receipt of some 35,000 public comments.

The new guidelines are likely to increase antitrust scrutiny of M&A deal of all kinds, reflecting the Biden Administration's view that "decades of industry consolidation have often led to excessive market concentration" across many sectors of the economy, including health care, agriculture and labor markets, among others. The final guidelines adopt new theories of harm and tighter standards for reviewing transactions. In July of this year, the agencies released draft merger guidelines.

Broader Presumptions of Illegality Based on Market Share and Concentration

The new guidelines significantly tighten the structural presumptions of illegality that have become the cornerstone of horizontal merger enforcement in recent decades. In a typical horizontal merger challenge, the FTC or DOJ will ask a court to block a transaction on the grounds that the deal will cause market concentration levels to exceed certain thresholds at which point the transaction is presumed illegal.

- **New Market-Share-Based Thresholds for Presumptive Illegality**: The new guidelines presume that a deal is anticompetitive if it results in a post-transaction ***market share greater than 30%*** together with an increase of 100 or more in the so-called Herfindahl-Hirschman

Index ("HHI"), a measure of market concentration commonly used by antitrust enforcers and the courts.
    - ***For example, a merger between competitors with just 29% and 2% market shares respectively would be presumed unlawful under this strict standard***. Under the previous 2010 guidelines, such a transaction would be presumed lawful.
- **Tighter Market-Concentration-Based Thresholds for Presumptive Illegality**: The agencies significantly lowered the threshold for finding a transaction anticompetitive based on market concentration. Under previous guidelines, mergers were presumed unlawful only if they resulted in an HHI greater than 2,500 with an increase of 200. But under the new guidelines, a presumption of illegality only requires an HHI of 1,800 or more and an increase of 100.

Scrutiny of "Roll Up" Strategies by Health System and PE Firms

The Biden Administration has recently expressed concern about the use "roll up" acquisition strategies, where a buyer accumulates market share through a series of relatively small acquisitions over time. According to a White House fact sheet issued on December 7, 2023, such strategies are sometimes used by PE firms and health systems, and can "lead to the consolidation of a market and contribute to worse patient outcomes while increasing taxpayer costs."

The new merger guidelines address this concern by noting that "when an acquisition is part of a series of multiple acquisitions, the agencies may examine the ***whole series***." In addition, the agencies may consider whether a series of acquisitions reflects a "cumulative strategy" of "pursuing consolidation through acquisition" that may violate the antitrust laws.

A Focus on Labor Market Effects

In recent merger challenges, DOJ and FTC have sought to block transactions on the grounds that they will reduce demand for workers, creators, or service providers in a labor market, thereby suppressing wages and other forms of compensation. The final merger guidelines reflect this concern: "Where a merger between employers may substantially lessen competition for workers, that reduction in labor market competition may lower wages or slow wage growth, worsen benefits or working conditions, or result in other degradations of workplace quality."

In addition, the final guidelines note that a reduction in competition in a labor market cannot be offset by benefits in a separate downstream product market: "Because the Clayton Act prohibits mergers that may substantially lessen competition or tend to create a monopoly in any line of commerce and in any section of the country, a merger's harm to competition among buyers is not saved by benefits to competition among sellers.

Scrutiny of Minority Acquisitions

The final guidelines state that the acquisition minority ownership can cause harm to competition that may violate the antitrust laws. For example, "[a]cquisitions of partial ownership or other minority interests may give the investor rights in the target firm, such as rights to appoint board members, observe board meetings, influence the firm's ability to raise capital, impact operational decisions, or access competitively sensitive information."

Continued Scrutiny of Acquisitions of Potential Competitors, Including

“Perceived” Potential Competitors

The agencies remain concerned about acquisitions of potential competitors, particularly in markets that are already concentrated. Under the new guidelines, the agencies will assess (1) whether one or both of the merging companies had a “reasonable probability of entering the relevant market,” and (2) whether such entry offered a “substantial likelihood of ultimately producing deconcentration of the market or other significant procompetitive effects.”

In a departure from prior guidance, the new guidelines recognize that a competitor may be “perceived” as a potential entrant—even if that competitor has no actual plans to compete—and thereby “prompt current market participants to make investments, expand output, raise wages, increase product.” In such situations, the agencies will assess whether the acquisition of a “perceived” potential entrant “can substantially lessen competition by eliminating or relieving competitive pressure.”

Takeaways for Health Care and PE Firms

The new guidelines may have significant impact on health care transactions, where markets may be limited to narrow geographic areas based on patients’ willingness to travel for health care services. Indeed, even small health care providers can have a significant share of a narrowly-drawn geographic market. The new structural presumptions—especially the presumption that purports to preclude any transaction resulting in shares above 30%—could have a chilling effect on health care transactions if applied as written in the guidelines.

The guidelines also reflect ongoing concern about “roll up” acquisitions by PE firms and health care companies. Given the agencies’ recent proposal to require the submission of more information about smaller transactions in HSR filings, companies can expect greater scrutiny of “roll up” strategies.

The new merger guidelines are not law. Rather, they are intended to provide guidance on “how the agencies undertake merger analysis before deciding whether or not to challenge an acquisition.” It will ultimately be the job of the courts to determine whether these stricter standards for reviewing M&A transactions are incorporated in the antitrust case law.

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