The Informed Board
Summer 2023

What the New Federal Merger Guidelines Mean for Companies Pursuing Deals

- Proposed revisions to the DOJ's and FTC's merger guidelines would lower the threshold at which deals are considered presumptively anticompetitive, potentially increasing the number of deals regulators will challenge or subject to in-depth scrutiny.
- The new guidelines would support challenges to deals that would not raise concerns under established antitrust precedent.
- The DOJ and FTC have lost all but one of the court cases where they have sought to block mergers based on the approach in the guidelines, but the decision to issue the new guidelines signals that the agencies will continue to vigorously contest many mergers in novel ways.

In July, the Federal Trade Commission (FTC) and Antitrust Division of the Department of Justice (DOJ) released a draft of proposed new merger guidelines, 18 months after FTC Chair Lina Khan and Assistant Attorney General Jonathan Kanter announced plans to "modernize" the agencies' approach to merger enforcement.

While the new guidelines are not surprising to antitrust specialists — they formalize an approach that has been pressed from the outset of the Biden administration — in important ways they constitute a stark departure from the agencies' approach to antitrust enforcement over the past 40 years. They also make it clear that under this administration the agencies will continue to take an aggressive approach to merger reviews, despite losing all but one of their merger challenges to date.

Two aspects of the new guidelines mark particularly sharp changes from past practices, and should be understood by companies when considering transactions.

Mergers Would Be Treated as Presumptively Anticompetitive at Lower Thresholds

The new guidelines would revise accepted economic measures of competitive impact, substantially lowering the economic thresholds at which the agencies would deem a merger to be presumptively anti-competitive. The likely result: More mergers may be challenged than in the past, or at least subjected to extended scrutiny.

- Two key thresholds of market concentration used in evaluating the impact of a proposed combination would be lowered:

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a technical measure of overall post-merger market concentration (the Herfindahl-Hirschman Index) and the combined company's market share. Any merger creating a firm with more than a 30% market share in any relevant market would now be presumed to violate the Clayton Antitrust Act, even if one party contributes only a de minimis market share or the relevant market is otherwise fragmented, factors that historically likely would have mitigated any concerns about the competitive impact of the deal. For example, in the past, a 30% market share alone typically would not have been considered a threat to competition absent additional factors, such as the rest of the market being controlled by relatively few firms.

- Acquisitions by firms with a "dominant position" in any relevant market — defined as a 30% share — would be subject to heightened scrutiny to see if the acquisition will entrench that dominance or extend it into additional markets. However, nearly all courts have required much larger market shares (typically greater than 50%) to find that a company is dominant.

Deals That Would Be Uncontroversial Under Past Practices Could Be Challenged

Other changes would broaden the types of transactions that would be subject to close scrutiny and potentially challenges in court based on theories that are not supported by legal precedent.

- Transactions that could enable a firm "dominant" in one market to entrench or extend its position in other markets would be prohibited, even if one of the merging firms has no presence in those other markets and the transaction therefore does not reduce competition in those markets.

- A firm could be charged with violating the Clayton Act if it engages in an "anticompetitive pattern" of multiple small acquisitions, even if no individual acquisition would violate the antitrust laws. Relevant evidence here could include the acquirer's past M&A practices, including unconsummated deals in other markets or industries, and future potential acquisition strategies by the acquiring firm or others in the industry. Those considerations introduce subjective and/or speculative elements of intent into the analysis, making it harder for companies to anticipate how a deal will be greeted by regulators. Some commentators believe this provision is aimed at private equity firms.

- The guidelines assume that mergers may substantially lessen competition for buyers of labor, resulting in lower wages or slower wage growth, reduced benefits or working conditions, and/or other degradations of workplace quality. Merger enforcement historically has not focused on these types of concerns.

- Under the new guidelines, mergers can raise competitive concerns even if they do not neatly fit either the horizontal or vertical merger paradigm. The guidelines call out the risk from mergers that give an acquiring firm control over access to any product, service or customers that its rivals use to compete, as well as mergers involving multisided digital platforms that act as intermediaries — including those involving the same company both operating and participating in a platform.

– The guidelines urge an approach that allows the agencies to define the relevant market narrowly, which makes it more likely the agencies will find there to be an anticompetitive impact. The revisions also allow the agencies to ignore the impact of "significant substitutes" that fall outside the market definition used by the agencies.

The Revised Guidelines May Result in More Contested Deals but May Not Ultimately Alter the Legal Landscape

– The guidelines are subject to 60 days of public comment before they can be finalized. But, even if adopted by the agencies, they are not binding on courts and may not be persuasive given their departure from widely accepted principles of merger analysis. Specifically, the guidelines ignore many of the guiding economic principles underpinning decades of modern merger enforcement and are largely untethered from recent case law.

– The agencies' track record is poor when they have attempted to employ the principles reflected in the guidelines to block deals: The government has lost all but one of those merger challenges in federal court under Chair Khan and Assistant Attorney General Kanter.

– Despite those setbacks, the revised guidelines makes it clear that both agencies will continue to pursue aggressive — and to some degree, unpredictable — merger enforcement practices, particularly in industries that have been in the crosshairs of recent enforcement activity such as tech, health care and private equity.

– The guidelines also should be considered alongside the agencies' recent proposed changes to the merger notification requirements under the Hart-Scott-Rodino Act. If adopted, those would force companies to provide substantially more information and documents in the early stage of the merger review process. And that potentially could allow the agencies more opportunity to assess broader theories of harm under the guidelines.

For companies contemplating a merger, these recent agency proposals reinforce the importance of a well-considered strategy for weathering the antitrust review process.

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