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Insights

BACK TO THE FUTURE: ANTITRUST AGENCIES ANNOUNCE NEW DRAFT MERGER GUIDELINES

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On July 19, 2023, the Federal Trade Commission and Department of Justice, Antitrust Division (together, the "Agencies") announced new draft Merger Guidelines ("Draft Guidelines"), which detail the analysis the Agencies will perform in reviewing a proposed transaction. The Agencies are accepting comments on the Draft Guidelines until September 18, 2023. Based on past practice, we expect the guidelines would be finalized near the end of 2023.

This is the latest step in an overhaul of the merger review process and comes weeks after the Agencies announced proposed changes to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 pre-merger review process and Form, detailed in our previous insight "U.S. antitrust agencies propose major changes to pre-merger review process".

The most substantial change in the Draft Guidelines is the consolidation of the Agencies' guidance on both horizontal and vertical mergers. Dating back to 1984, the Agencies provided separate guidelines for each. The Draft Guidelines do away with this distinction.

Notably, the Draft Guidelines place a focus on labor competition. While this aligns with the Agencies' stated current enforcement priorities, it is a stark change from a historical perspective. According to the Agencies, the "Draft Guidelines build on this principle and explain that the agencies will evaluate the impact of a merger on labor as a stand-alone basis to challenge a transaction." Whether labor consolidation would constitute "competitive injury" or an efficiency is unclear under the Draft Guidelines.

The Draft Guidelines also provide specific guidance on mergers involving multi-sided platforms. By requiring a multi-prong analysis of competition between and on platforms, the Agencies make a strong effort to avoid the implications of the Supreme Court's decision in *Ohio v. Amex*,[1] under which antitrust harm must be demonstrated on both sides of a two-sided market to be actionable.

Additionally, the Draft Guidelines revise the levels of market concentration that the Agencies view as highly concentrated and likely actionable. The Agencies calculate market concentration using the Herfindahl-Hirschman Index ("HHI"). While the 2010 Horizontal Merger Guidelines considered markets with HHI between 1,500 and 2,500 "moderately concentrated," and HHI above 2,500 "highly

concentrated," the Draft Guidelines call these "permissive thresholds" that were based on "agency practice, rather than on changes in the law." Accordingly, the Draft Guidelines would consider post-merger HHI greater than 1,800 highly concentrated, with little analysis supporting the change.

The Draft Guidelines set forth thirteen core principles:

1. Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets
2. Mergers Should Not Eliminate Substantial Competition between Firms
3. Mergers Should Not Increase the Risk of Coordination
4. Mergers Should Not Eliminate a Potential Entrant in a Concentrated Market
5. Mergers Should Not Substantially Lessen Competition by Creating a Firm That Controls Products or Services That Its Rivals May Use to Compete
6. Vertical Mergers Should Not Create Market Structures That Foreclose Competition
7. Mergers Should Not Entrench or Extend a Dominant Position
8. Mergers Should Not Further a Trend Toward Concentration
9. When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series
10. When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform
11. When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers
12. When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition
13. Mergers Should Not Otherwise Substantially Lessen Competition or Tend to Create a Monopoly

In sum, the Draft Guidelines generally seek to step back from the micro-economic consumer-focused approach that has characterized much of modern antitrust law, and return to a time when merger evaluation was more subjective.[2] Greater subjectivity, in turn, creates greater uncertainty in the results of the analysis. Merging parties will need to pay careful attention to how all this plays out in the courts.

BCLP's Antitrust and Competition team will continue to follow these developments and update clients on the ever-changing landscape merging parties must confront under the current administration.

[1] 138 S. Ct. 2274 (2018).

[2] The return to the past idea is reinforced by the many citations to cases that are more than 40 years old.

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