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Department of Justice and Federal Trade Commission Issue Draft Merger Guidelines

New Guidance Departs Starkly From Policies That Have Guided Antitrust Clearance and Enforcement Since 1982

SUMMARY

Earlier today, the Department of Justice (“DoJ”) and Federal Trade Commission (“FTC”) issued Draft Merger Guidelines (available [here](#)) that veer markedly from the guidelines that have informed merger-enforcement policies of prior administrations of both parties for the past 40 years.¹ The Draft Merger Guidelines state that, under a variety of circumstances, the DoJ and FTC may challenge transactions that would not have been challenged under the guidelines that have existed since 1982.

The skepticism about mergers reflected in the Draft Merger Guidelines is in keeping with public statements of the Biden administration’s appointees, who have been sharply critical of prior enforcement efforts.² Although guidelines are not law but rather statements of enforcement intention which are not entitled to judicial deference, prior versions of the guidelines have nevertheless played a significant role in shaping antitrust law because courts have found their analytical frameworks to be persuasive.

It is uncertain whether and to what extent courts will similarly embrace the new framework advanced in the Draft Merger Guidelines, which deviate in important respects from established law. The Draft Merger Guidelines instead harken back to 1950s and 60s Supreme Court precedent, disregarding material developments from district courts, appellate courts, and the Supreme Court itself over the intervening decades. The long-term effect on non-U.S. enforcers and state attorneys general, many of which have modelled their own policies on prior versions of the U.S. guidelines, also remains to be seen.

Although the Draft Merger Guidelines do not change the underlying law, businesses planning merger activity must evaluate their positions and potential transactions carefully in view of the announced changes in the clearance and enforcement environment. Given their potential to influence non-U.S. antitrust authorities, even businesses without a U.S. nexus should review the Draft Merger Guidelines and their potential relevance to their, and their competitors’, individual circumstances and potential transactions.

BACKGROUND

Section 7 of the Clayton Act makes illegal mergers whose “effect ... may be substantially to lessen competition, or to tend to create a monopoly.”³ In view of the uncertainty as to how that general proscription would apply to a particular transaction, the DoJ issued its first set of merger guidelines in 1968 “outlining its standards for determining whether to oppose corporate acquisitions or mergers under Section 7” and “to insure that the business community, the legal profession and other interested persons are informed of the Department’s policy of enforcing Section 7.”⁴ The 1968 guidelines addressed horizontal, vertical, and conglomerate mergers.⁵ The DoJ issued updated guidelines in 1982 (dealing with horizontal and vertical mergers),⁶ 1984 (dealing with horizontal and vertical mergers),⁷ 1992 (dealing with horizontal mergers),⁸ 1997 (dealing with the efficiencies of horizontal mergers),⁹ 2010 (dealing with horizontal mergers),¹⁰ and 2020 (dealing with vertical mergers).¹¹ The FTC joined DoJ in 1992, 1997, 2010, and 2020, and then withdrew its endorsement of the 2020 vertical merger guidelines in 2021.¹² In issuing guidance from time to time, the DoJ and FTC have traditionally noted the importance of transparently explaining how they intend to exercise their discretion in evaluating and possibly challenging merger transactions; the 2010 guidelines, for instance, explain that they “intended to assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies’ enforcement decisions.”¹³

In July 2021, President Biden issued an executive order that “encouraged” the Attorney General and the Chair of the Federal Trade Commission “to review the horizontal and vertical merger guidelines and consider whether to revise those guidelines.”¹⁴ In his signing ceremony remarks, President Biden signaled a major shift from the framework established in the 1982 merger guidelines, offering that “[f]orty years ago, we chose the wrong path, in my view, following the misguided philosophy of people like Robert Bork, and pulled back on enforcing laws to promote competition.”¹⁵ In January 2021, the DoJ and FTC issued a detailed Request for Information on Merger Enforcement (“RFI”) that also signaled potential fundamental change, featuring leading questions such as “Does the guidelines’ framework suggest limiting enforcement to a subset of the mergers that are illegal under controlling case law?”¹⁶

The Draft Merger Guidelines differ in both style and substance from prior versions of the guidelines. In 1982, the guidelines announced a “unifying theme” that “mergers should not be permitted to create or enhance ‘market power’ or to facilitate its exercise,” a theme repeated with only minor modification in 1984, 1992, 1997, and 2010. The Draft Merger Guidelines break from that tradition and unified focus, instead announcing 13 separate “Guidelines” that “are not mutually exclusive.”¹⁷ Also in contrast to prior versions of the guidelines—none of which contained any citations to judicial decisions—the Draft Merger Guidelines contain 111 citations, about 75% of which are to decisions more than 40 years old. Many of the Supreme Court’s more recent pronouncements about the purpose of the antitrust laws are excluded from mention.

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The detailed substantive views explained in the Draft Merger Guidelines differ markedly from the views set forth in prior guidelines and case law. Significant changes are summarized briefly below:

- ***Dominance.*** The concept of a “dominant position” is well established in European competition law, both in merger control and behavioral competition law, which prohibits certain types of conduct by so-called “dominant” firms. Notwithstanding the absence of a similar prohibition against the creation or exercise of dominance under U.S. laws, the Draft Merger Guidelines state that the DoJ and FTC will closely evaluate mergers involving “dominant” firms possessing “at least 30 percent market share” and consider whether the merger would “entrench or extend” a firm’s dominant position.¹⁸ Several hypotheticals are offered as the foundation of this concern, including the possibility that “would-be rivals” might be deprived of attractive opportunities and the possibility that the merged firm might engage in “tying, bundling, conditioning, or otherwise linking sales of two products.” Relatedly, the Draft Merger Guidelines raise the issue of a firm’s “serial acquisitions,” no one of which “on its own would risk substantially lessening competition.”¹⁹
- ***Vertical mergers.*** The Draft Merger Guidelines include an extensive discussion of vertical mergers. The Draft Merger Guidelines state a 50% share in a relevant market “alone is a sufficient basis to conclude that the effect of the merger may be to substantially lessen competition” if the merged firm “could foreclose rivals’ access” to a product.²⁰
- ***Decrease in post-merger concentration levels warranting an inference of competitive harm.*** In the 2010 Horizontal Merger Guidelines issued during the Obama administration, the DoJ and FTC increased the level of post-merger industry concentration triggering a presumption of competitive harm to a post-merger Herfindahl-Hirschman Index (“HHI”) of 2,500 points. In its press release announcing the release of the 2010 guidelines, the DoJ explained that the 2010 guidelines “derive[d] from the agencies’ collective experience in assessing thousands of transactions.”²¹ The Draft Merger Guidelines revert to lower levels of industry concentration warranting a presumption of harm (in particular, a post-merger HHI of 1,800 points), citing “risks of competitive harm” from mergers involving those lower concentration levels.²² The DoJ and FTC cite no court decisions since 2010 blocking a merger with a post-merger HHI under 2,500 points.
- ***Technology platforms.*** The Draft Merger Guidelines provide new frameworks for assessing the competitive effects of mergers involving “platforms.”²³ Because these concerns are in keeping with the DoJ’s and FTC’s active, and novel, litigations against Meta and Google, the outcome of those litigations are likely to inform the ongoing relevance of the proposed new framework.
- ***Efficiencies.*** Since the 1997 revisions to the merger guidelines issued during the Clinton Administration, the DoJ and FTC have stated that they “will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market.”²⁴ That statement does not appear in the Draft Merger Guidelines. Although the Draft Merger Guidelines do contain a discussion of efficiencies, the relevant discussion is preceded by the statement that “The Supreme Court has held that ‘possible economies [from a merger] cannot be used as a defense to illegality.’”²⁵ Whether this means that the DoJ and FTC will seek to block efficient mergers that help consumers is uncertain.
- ***Bank mergers.*** In connection with the issuance of the 2010 guidelines, the DoJ included in its press release a footnote explaining that “The Bank Merger Competitive Review guidelines, which the federal banking agencies and the Department of Justice developed in 1995 to facilitate the competitive review of bank mergers, remain unchanged.”²⁶ A similar statement is not part of the DoJ’s press release announcing the Draft Merger Guidelines, leaving continuing uncertainty as to how the DoJ will evaluate bank mergers. The link to the DoJ’s Bank Merger Competitive Review guidelines on the DoJ website (available [here](#)) does not currently indicate any change in the status of that document, on which the DoJ asked for public comment in 2020 and 2021.²⁷

The DoJ and FTC have requested public comment on the Draft Merger Guidelines by September 18.

ANALYSIS

The Draft Merger Guidelines reflect the DoJ's and FTC's intention to reshape merger law and practice substantially. The lower concentration thresholds and addition of new theories for challenging transactions by allegedly "dominant" firms, in particular, suggest a significant departure from prior agency practice that is likely to delay transactions that would not previously have been subject to in-depth scrutiny. In view of prior statements from administration officials, this change is not particularly surprising. For example, in addition to the general guidance that President Biden offered in 2021, the DoJ and FTC previewed many of their fundamental disagreements with the existing guidelines in their January 2021 RFI.

Whether and to what extent courts will rely on the Draft Merger Guidelines when applying the antitrust laws in future litigation is uncertain. Guided by the analytical rigor of prior guidelines, courts have embraced the consensus framework of the guidelines that existed under the Reagan, Bush, Clinton, Bush, Obama, and Trump administrations. In light of their break from many settled practices, the DoJ and FTC may have an uphill battle convincing courts to disregard precedents that are based on their prior guidelines, especially in light of court rulings rejecting recent DoJ and FTC challenges.²⁸ Nevertheless, it is worth noting that, at least until there is judicial clarification, the Draft Merger Guidelines have the potential to chill procompetitive merger activity by delaying the antitrust-review process or leading to more litigation.

On a practical level, the Draft Merger Guidelines highlight the need to plan the antitrust approach to mergers and acquisitions carefully. The wide range of concerns identified in the Draft Merger Guidelines should inform transacting parties' consideration of a range of provisions in merger agreements, including those involving reverse break fees, risk allocation through "efforts" clauses, timing, and operational covenants, particularly insofar as the Draft Merger Guidelines signal the possibility of DoJ and FTC scrutiny of transactions that would not have raised concern under prior versions of the guidelines. For example, serial acquirers that are allegedly "dominant" may face challenges to transactions that in themselves do not present obvious concerns. The Draft Merger Guidelines also reinforce the need to prepare for litigation to the extent that they preview the likelihood of increased litigation challenges to proposed mergers.

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ENDNOTES

- 1 See U.S. Dep't of Justice & Fed. Trade Comm'n, Draft Merger Guidelines (July 19, 2023) ("Draft Merger Guidelines").
- 2 See, e.g., Fed. Trade Comm'n, *Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines*, Comm. File No. P810034 (Sept. 15, 2021).
- 3 15 U.S.C. § 18.
- 4 See U.S. Dep't of Justice, *1968 Merger Guidelines*, available at <https://www.justice.gov/archives/atr/1968-merger-guidelines>.
- 5 *Id.*
- 6 See U.S. Dep't of Justice, *1982 Merger Guidelines*, available at <https://www.justice.gov/archives/atr/1982-merger-guidelines>.
- 7 See U.S. Dep't of Justice, *1984 Merger Guidelines*, available at <https://www.justice.gov/archives/atr/1984-merger-guidelines>.
- 8 See U.S. Dep't of Justice & Fed. Trade Comm'n, *1992 Merger Guidelines*, available at <https://www.justice.gov/archives/atr/1992-merger-guidelines>.
- 9 See U.S. Dep't of Justice & Fed. Trade Comm'n, *1997 Merger Guidelines*, available at <https://www.justice.gov/archives/atr/1997-merger-guidelines>.
- 10 See U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (Aug. 19, 2010) ("2010 Horizontal Merger Guidelines"), available at <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>.
- 11 See U.S. Dep't of Justice & Fed. Trade Comm'n, *Vertical Merger Guidelines* (June 30, 2020), available at https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.
- 12 See Fed. Trade Comm'n, *Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary* (Sept. 15, 2021), available at <https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary>.
- 13 See 2010 Horizontal Merger Guidelines, *supra*, at 1.
- 14 See Executive Order on Promoting Competition in the American Economy § 5(c) (July 9, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.
- 15 *Remarks by President Biden at Signing of An Executive Order on Promoting Competition in the American Economy* (July 9, 2021).
- 16 See Fed. Trade Comm'n, *Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers* at 3 (Jan. 18, 2022), available at <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers>; see also Request for Information on Merger Enforcement, FTC-2022-0003, Regulations.gov.
- 17 Draft Merger Guidelines, *supra*, at 2.
- 18 Draft Merger Guidelines, *supra*, at 6-7.
- 19 Draft Merger Guidelines, *supra*, at 22.
- 20 Draft Merger Guidelines, *supra*, at 17-18.
- 21 U.S. Dep't of Justice, *Press Release: Department of Justice and Federal Trade Commission Issue Revised Horizontal Merger Guidelines* (Aug. 19, 2010) ("2010 Press Release"), available at

ENDNOTES (CONTINUED)

- <https://www.justice.gov/opa/pr/department-justice-and-federal-trade-commission-issue-revised-horizontal-merger-guidelines>.
- 22 See Draft Merger Guidelines, *supra*, at 6-7.
- 23 Draft Merger Guidelines, *supra*, at 23-25.
- 24 2010 Horizontal Merger Guidelines, *supra*, at 30.
- 25 Draft Merger Guidelines, *supra*, at 33 (citing *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 371 (1963)).
- 26 2010 Press Release, *supra*.
- 27 See U.S. Dep't of Justice, *Antitrust Division Banking Guidelines Review: Public Comment Topics & Issues Guide* (Dec. 17, 2021), available at <https://www.justice.gov/atr/antitrust-division-banking-guidelines-review-public-comments-topics-issues-guide>; U.S. Dep't of Justice, *Antitrust Division Seeks Public Comments on Updating Bank Merger Review Analysis* (Sept. 1, 2020), available at <https://www.justice.gov/opa/pr/antitrust-division-seeks-public-comments-updating-bank-merger-review-analysis>.
- 28 See, e.g., *Fed. Trade Comm'n v. Microsoft Corp. et al.*, No. 23-cv-02880 (N.D. Cal. July 10, 2023) (rejecting FTC attempt to enjoin merger); *United States v. UnitedHealth Grp. Inc.*, ___ F. Supp. 3d ___, ___, 2022 WL 4365867, at *7 (D.D.C. 2022) (rejecting DOJ attempt to enjoin merger).

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