Antitrust Law Update

July 24, 2023

Antitrust Agencies Release Draft of New Merger Guidelines: Prepare for More Challenges

After a long period of anticipation and conjecture and a robust public comment period, the Federal Trade Commission (FTC) and Antitrust Division of the Department of Justice (DOJ) released a draft update of their Merger Guidelines last week. While not legally binding on businesses and courts, the Guidelines set forth the legal and economic principles that FTC and DOJ claim they use to evaluate the legality of mergers and other consolidations against federal antitrust law. According to the agencies' Fact Sheet published simultaneously with the draft, the Guidelines are meant "to help the public understand how the agencies assess the potential for a merger to harm competition." The Guidelines will go into effect at some point after a 60-day public comment period has passed. While the agencies contend that the proposed Guidelines simply implement Congress' original intent in passing statutory merger standards, in reality the Guidelines (if followed in practice) will increase the likelihood that transactions will be challenged.

The first Merger Guidelines were published in 1968, and the agencies have issued revisions over the past 55 years, with the last major revision made in 2010. Businesses and the agencies have relied on the 2010 Guidelines during merger investigations until very recently, when the agencies assumed the view that the 2010 Guidelines "adopted more permissive thresholds" for market concentration than required by courts and endorsed by the 1982 version of the Guidelines, which the agencies say courts "routinely cited." Although the Guidelines are not law (which is set forth by statute and interpreted by the courts), they often shape how courts analyze the competitive effects of transactions.

In all, there are 13 core principles listed in the new Guidelines:

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.

The new Guidelines are largely consistent with public pronouncements made by the FTC and DOJ in the Biden administration, and the agencies are already raising and considering many of the issues set forth in the draft during merger investigations. As expected, based on FTC and DOJ officials' prior comments, the Guidelines focus not just on market concentration generally, but also some additional – and somewhat novel – areas. For example, under the new Guidelines, FTC and DOJ "will evaluate the impact of a merger on labor as a stand-alone basis to challenge a transaction." This is consistent with the Biden administration's repeated message about policing employment markets using the antitrust laws, including its cooperation with labor agencies, its pursuit of cases challenging "no poach" agreements as antitrust violations, and the recent announcement of changes to the Hart-Scott-Rodino form that will require parties to submit significantly more information as part of the premerger process, including employee classification information that will help the agencies screen for labor market issues.

Companies considering mergers or acquisitions should be aware of the FTC and DOJ's new approach that is reflected in the proposed Guidelines, as they codify a more skeptical view of mergers generally and further demonstrate the agencies' aggressive stance on mergers under the Biden administration. Parties should expect longer and more in-depth investigations, and perhaps more litigation as well.

FOR MORE INFORMATION

For more information, please contact:

Mark R. Butscha, Jr.
216.566.5897
Mark.Butscha@ThompsonHine.com

Caitlin R. Thomas
216.566.5797
Caitlin.Thomas@ThompsonHine.com

Thomas F. Zych
216.566.5605
Tom.Zych@ThompsonHine.com