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U.S. Federal Trade Commission and Department of Justice Antitrust Division Finalize Joint Merger Guidelines

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The U.S. Federal Trade Commission and Department of Justice Antitrust Division (the "agencies") recently released the final version of their joint 2023 Merger Guidelines following a public comment period on a draft released in July 2023 (discussed in our prior alert). During the comment period, the agencies received more than 30,000 comments from the public and held three workshops led by antitrust attorneys, economists, academics, and policymakers.

The Guidelines contain 11 principles that describe how the agencies may analyze a merger's potential to harm competition.[1] Although certain aspects of the final Guidelines are notably toned down compared to the draft, overall they continue to reflect the agencies' current, aggressive approach to merger review and expansion on traditional theories of harm, even doubling down on untraditional theories that have failed in court. In that sense, the Guidelines reinforce our belief that merger investigations will continue in their frequency and length, and that challenges—including ones brought under non-horizontal theories—will continue through the remainder of the Biden Administration.

This alert summarizes key substantive changes to the draft Guidelines as well as the likely impact of the final Guidelines on merger review going forward.

Key Takeaways

- **Presumptions and Rebuttal.** Under the final Guidelines, mergers that significantly increase concentration in a "highly concentrated" market are *presumed* illegal, a meaningful change from the draft's suggestion that they are *per se* illegal. The final Guidelines also clarify that a "significant" increase in concentration "may" substantially lessen competition, a more neutral stance than the draft's admonition that "even a relatively small" increase in concentration "is likely to" harm competition. In addition, the final Guidelines clarify that a presumption of illegality may be rebutted or disproved and introduce a sliding scale with higher concentration levels requiring stronger rebuttal evidence.

[1] The draft Guidelines contained 13 Guidelines. Two previously-separate guidelines that addressed vertical mergers were combined into one (now Guideline 5), and the catchall guideline (Draft Guideline 13) was removed and replaced with a catchall statement that the Guidelines are not exhaustive.

However, the final Guidelines cement the draft's lower threshold for triggering a presumption of illegality, justifying it as supported by unspecified "experience and evidence" since 2010. Considering that the agencies justified the upward shift in concentration thresholds in 2010 by pointing to agency experience and the evolution in the economic analysis of mergers, this change can be seen as part of the broader effort to return to a more structural approach to merger analysis. Under the new Guidelines, a merger is presumed illegal if it would result in either:

1. A highly concentrated market – defined as an HHI[2] of 1800 or higher (compared to the 2010 Guidelines' designation of HHIs between 1500 and 2500 as only "moderately concentrated") – and an HHI increase of more than 100 points (compared to 200 in the 2010 Guidelines); or
2. A greater than 30% market share for the combined firm and an HHI increase of more than 100 points.

In addition, the agencies could measure market concentration based on the number of "significant" competitors, particularly when there is a gap in market share between larger competitors or smaller rivals. The low concentration thresholds, especially when coupled with a flexible approach to market definition that permits excluding "significant substitutes" from a narrow group of products, signal that the agencies may pursue mergers of firms with even modest shares as presumptively illegal.[3]

- **Potential Competition.** The Guidelines underscore the agencies' intent to continue pursuing the potential competition theory of harm, despite the FTC's recent loss in *Meta/Within*.[4] Consistent with the agencies' recent challenges of so-called "killer acquisitions," the Guidelines condemn the acquisition of a "nascent threat" by a "dominant firm", and articulate the agencies' conviction that both the potential and perceived potential competition theories of harm are meaningful.

  Notably, the final Guidelines suggest different standards with respect to the likelihood of entry – a lower standard for the agencies to show harm to competition and a higher standard for merging parties to rebut a demonstrated risk that competition may be harmed. The Guidelines note that the agencies' lower standard is appropriate because of their role in seeking to "prevent threats at their incipiency." No case law is cited in support of the inconsistency, and it will remain to be seen how it may be resolved in an actual litigated case.

- **Vertical Mergers**. The final Guidelines significantly restyled the sections on vertical mergers, but largely maintain the ability and incentive to foreclose rivals framework. Notably, however, the final Guidelines attempt to lower the bar for scrutiny of vertical transactions by targeting mergers that "may limit access" to products or services that rivals use to compete instead of the draft Guidelines'

[2] HHI refers to the Herfindahl-Hirschman Index, which is a formula used to measure the level of concentration in a given market. A market's HHI is calculated by summing the squares of the market shares of all market participants. For example, the HHI for a market with five equal-sized firms is 2,000 ($5 \times 20^2 = 2{,}000$).

[3] To illustrate what this means in practice, a merger combining the fifth- and sixth largest firms in a six-firm market would be presumed unlawful if the merging firms controlled only 10% and 5% market share, respectively. For example, in a market with six competitors with respective shares of 22%, 21%, 21%, 21%, 10%, and 5%. In this scenario, the premerger HHI would be 1,932 (considered highly concentrated under the Draft Guidelines), and the post merger HHI would be 2,032, an increase of 100, resulting in a presumption that the merger is unlawful.

[4] *Fed. Trade Comm'n v. Meta Platforms Inc.*, 5:22-cv-04325-EJD (N.D. Cal. Nov. 2, 2022). Weil Gotshal was counsel to Meta Platforms, Inc. in its acquisition of Within Unlimited.

focus on mergers that would "control" such products or services. Further, the final Guidelines depart from the traditional focus on harm to competition and expand vertical analysis to harm to dependent rivals. A merger's effect on competition in the relevant market is just one of four factors the agencies will examine to assess a merger's ability and incentive to limit access to dependent rivals.[5]

Conclusion

Although "final," the Guidelines are not legally binding on merging parties, the courts, or even the agencies, and they can be withdrawn and rewritten by future administrations. Courts have looked to prior iterations of merger guidelines to inform legal analysis in the past. It remains to be seen how courts will apply these new Guidelines in light of the expanded theories of harm, including some that were recently unsuccessful in court, notably *Meta/Within* (potential competition theory) and *Microsoft/Activision*.[6] However, the final Guidelines' toned down approach to certain aspects of the draft and citation to more recent case law such as *Illumina/Grail* may lend to their persuasiveness.

The Guidelines reaffirm the agencies' merger enforcement philosophies that antitrust practitioners and merging parties have experienced throughout the Biden Administration. We expect the agencies to continue conducting extended reviews and challenging mergers on new and traditional theories to the extent their resources allow.

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If you have questions concerning the contents of this issue, or would like more information about Weil's Antitrust practice group, please speak to your regular contact at Weil or to an author listed below:

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[5] Other factors include the availability of substitutes, the competitive significance of the related product, and competition between the merged firm and dependent firms.

[6] *Fed. Trade Comm'n v. Meta Platforms Inc.*, *supra*; *Fed. Trade Comm'n v. Microsoft Corp.*, 23-cv-02880-JSC (N.D. Cal. Jul. 10, 2023). Weil Gotshal is counsel to Microsoft in its acquisition of Activision.