DOJ and FTC Issue Final Merger Guidelines

Federal Antitrust Agencies Soften Their New Guidelines At The Margins But Largely Maintain An Aggressive Approach To Merger Review

The U.S. Department of Justice and Federal Trade Commission have released their much-anticipated final merger guidelines. The latest guidelines supplant both the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines, though the latter had already been withdrawn by the FTC and dismissed by the DOJ. The agencies released proposed guidelines in July 2023 and sought public comment. After receiving thousands of comments, the agencies made modest changes and issued a final version on December 18, 2023. Despite the revisions and an apparent attempt by the agencies to address some of the most significant criticisms of the proposed guidelines, the final version maintains an approach to enforcement that is more skeptical of mergers and more willing to employ nontraditional legal theories.

Below we outline key takeaways for dealmakers, notable aspects of the final guidelines that have not changed from the proposed guidelines, and notable changes from the proposed guidelines.

Key Takeaways For Dealmakers

- Political statement toned down. The proposed guidelines from July were criticized as being in large part a political statement that the current leadership at the antitrust agencies was hostile to M&A. The agencies appeared to respond to that view by moderating the tone of the final guidelines and adding additional context in various places. That said, the agencies still appear motivated by a deep skepticism about M&A. July's proposed guidelines included a telling anti-deal statement asserting that the antitrust laws reflect a preference for internal growth over acquisitions. While that sentence has been deleted from the final guidelines, dealmakers would do well to assume the agencies have retained that view.

- Lifespan of the new guidelines may not be long. The proposed guidelines faced significant backlash from the Bar and former enforcers from both Democratic and Republican administrations. While it remains to be seen whether the final guidelines will obtain broad consensus that supported earlier iterations of merger guidelines, if this version does not, it may well be altered or replaced by future agency leaders. Even if these guidelines remain formally in effect, the extent to which future agency leaders apply them to any particular merger will likely be unclear.

- Unlikely to help the agencies in court. The guidelines read in part like a legal brief and include citations to cases the agencies believe are helpful to their cause, while omitting unhelpful cases. But despite the selective citations and new guidelines, the antitrust laws remain the same. Moreover, evidence about the competitive impact of a merger is likely to be as successful in court tomorrow as it was yesterday. Companies willing to endure the time and expense of litigating against the antitrust agencies should therefore continue to find success if the evidence supports them.

- Unlikely to deter large strategic transactions, but may deter some smaller, less concerning deals. The skepticism of transactions represented in the guidelines may deter some smaller transactions as companies decline to pay the perceived antitrust regulatory "tax." Large strategic transactions, however, are less likely to be deterred, as those transactions tend to be highly valuable to the parties, the parties tend to have consulted antitrust counsel early, and the parties may be willing to litigate.

What Has Not Changed From the Proposed Guidelines

- New structural presumption thresholds for horizontal mergers. Left unchanged in the final guidelines are the revised market share and Herfindahl-Hirschman Index ("HHI") thresholds at which the agencies say they will presume a horizontal merger will substantially lessen competition. As with the proposed guidelines, a merger resulting in a post-merger market HHI greater than 1,800 and a change in HHI greater than 100 will establish the presumption. The agencies state they will also presume illegality if the merged firm's combined share is greater than 30% and the change in HHI is greater than 100.

- Emphasis on legal precedent over broad principles. The proposed guidelines were criticized for sounding more like a legal brief than a statement of principles about competition. Through some last-minute citations to the recent Fifth Circuit decision in *FTC v. Illumina*, the final guidelines further cement that view. The guidelines threaten their own relevance and future persuasiveness with courts by citing precedent when they believe it favorable, as with *llumina*, but omitting precedent when unfavorable, as with the 2022 D.D.C. decision in *United States v. UnitedHealth Group*. The guidelines also gloss over aspects of the cases they cite that are unfavorable.

- "Trend" concerns remain. The final guidelines continue to identify a "trend toward concentration" as a factor that heightens the risk that a merger may substantially lessen competition, even if such a trend by itself may not render any merger in the same market inherently unlawful. As illustrated by the Supreme Court's now-infamous 1966 decision in *United States v. Von's Grocery* (which the final guidelines notably do not cite), this "trend" principle could potentially be used to condemn even mergers that have no impact on competition whatsoever.

- Attention to “dominance” concerns remain. The proposed guidelines received significant attention for adopting a theory previously used in other jurisdictions, including the European Union, that a merger could be unlawful if it entrenches or extends one of the firm’s dominant positions in a relevant market. That theory remains in the final guidelines (Guideline 6), and it still appears to apply broadly to any firm deemed “dominant” even when it acquires a firm with which it had no prior horizontal or vertical relationship. This guideline could be used to advance novel theories against a merger that generates no increase in horizontal concentration and no traditional vertical foreclosure concerns. The guidelines suggest that a dominant firm could use a merger to increase entry barriers or eliminate a nascent competitive threat in ways that violate the Clayton Act despite the lack of a traditional horizontal or vertical theory of harm.

- Continued focus on multi-sided platforms. The final guidelines highlight the agencies’ continued focus on platform competition, as illustrated elsewhere by the FTC’s recent enforcement action against Amazon, among others. Although the platform guideline (Guideline 9) remains largely unchanged in the final version, the agencies did soften the language describing conflicts of interest that may arise when platform operators are also platform participants. Where the proposed guidelines stated definitively that a platform operator “has” a conflict of interest when it is also a platform participant, the final guidelines acknowledge that this situation “may” create a conflict of interest.

- Coordination in modern markets. The proposed guidelines updated the discussion of anticompetitive coordination from the 2010 Horizontal Merger Guidelines, and the final version maintains a perspective on coordination that acknowledges the easy access to information that modern technology can provide to competitors. For example, the guidelines acknowledge that “pricing algorithms, programmatic pricing software,” and other comparable tools have “reduced many traditional barriers or obstacles to observing the behavior of rivals in a market.” The prevalence of this technology in a particular market may lead the agencies to think more seriously about whether a merger may increase the likelihood of anticompetitive coordination.

Key Changes From The Proposed Guidelines

- Elimination of bright-line “foreclosure” threshold for vertical mergers. The agencies had proposed concluding that mergers between firms at different levels of a supply chain would substantially lessen competition if one of the firms controls 50% or more of a relevant market—without any other evidence that the combined company would seek to disadvantage its rivals. That one-size-fits-all approach was heavily criticized; in the final guidelines, the agencies softened the assumption and demoted it to a footnote, saying that they will “generally infer, in the absence of countervailing evidence,” that a firm with more than 50% share has the ability to foreclose, not that such a position is evidence enough on its own that foreclosure is possible.

- Acknowledgement that mergers are not always anticompetitive. The agencies were criticized for not sufficiently describing the role that countervailing evidence plays in their merger analyses. The sparing treatment of such evidence has contributed to the impression that the new guidelines were designed primarily as advocacy to further the agencies’ positions when they challenge mergers in court. The final guidelines do not dispel that impression, but they make a few changes to more expressly acknowledge that evidence of anticompetitive effects can be rebutted with contrary evidence. In particular, the final guidelines make clear that the structural presumption for horizontal mergers “can be rebutted or disproved,” and they acknowledge that a theory of entrenchment can be rebutted by evidence that a merger would lead to cost savings or higher quality. The final guidelines also implicitly acknowledge that the law does not necessarily prefer organic growth over growth by acquisition by deleting a statement to the contrary that had been included in the proposed guidelines.

- No clear test for establishing a firm's "dominant" position. As noted above, the guidelines include a new focus on mergers used to entrench/extend dominant positions. However, the proposed guidelines stated that a merging firm would be found to have a dominant position in a relevant market if it possessed a market share of at least 30%. That threshold is gone from the final guidelines, leaving behind a more flexible test whereby dominance can be established by "direct evidence or market shares showing durable market power." The agencies further sought to soften the explanation of this theory by acknowledging that they will "distinguish anticompetitive entrenchment from growth or development as a consequence of increased competitive capabilities or incentives." Although this language is vague, it signals that the agencies may be open to arguments that bolt-on acquisitions in adjacent markets, even by large firms, are not anticompetitive.

- Sharpened focus on partial and common ownership. The agencies' focus on acquisitions by private equity firms, including as part of so-called "roll up" strategies, has been further sharpened in the final guidelines. In the revised Guideline 11, the agencies make clear that common ownership of competing firms, even if through partial ownership of minority interests, can lessen competition be "softening firms' incentives to compete, even absent any specific anticompetitive act or intent." That language was absent from the proposed guidelines; its addition suggests that the agencies will likely continue to target certain acquisition strategies by even passive investors, and even without any specific strategy or plan by those investors to impact competition.