WINSTON & STRAWN LLP

BLOG

A Glimpse into Antitrust Merger Review's New Frontier

JULY 25, 2023

After a series of withdrawals of key antitrust policy statements and guidance documents and announcing an intention to make changes to the merger guidelines, the Federal Trade Commission and Department of Justice (the "Agencies") have released new proposed Merger Guidelines. In a significant departure from the past, the proposed merger guidelines (the "Proposed Guidelines") apply to both horizontal and vertical mergers. Although these Proposed Guidelines appear to mark a significant shift from the 2010 merger guidelines, they also effectively formalize the practices followed by the antitrust agencies under the Biden administration, including a previous announcement from the FTC that it would focus on new theories of harm as we discussed here. The Proposed Guidelines provide a more comprehensive examination of potential theories of harm considered by the Agencies rather than focusing on the process for how the Agencies analyze a merger as past iterations have done. The Proposed Guidelines are structured around 13 principles (the "13 Guidelines") that the Agencies will use to determine whether a transaction is anticompetitive. The Proposed Guidelines then discuss at greater length the framework for analyzing a merger with respect to each of the 13 Guidelines.

The Proposed Guidelines also signal a notable change in regulatory philosophy, with an approach and language that appear to be aimed more at non-lawyers. Indeed, in its own press release touting the Proposed Guidelines, the White House highlighted the Proposed Guidelines' use of "simple and straightforward language" that would be accessible to readers who are not "antitrust practitioners."

The Proposed Guidelines also exhibit aspirations of bringing the law back to the 1950s and '60s, citing precedent from that era. This deviation from more recent standards and consumer welfare-based approaches may have far-reaching implications. Although these cases are still legal precedent, they generally are not consistent with how lower courts have analyzed merger challenges for the last 40 years. For example, the Agencies cite *United States v. Philadelphia National Bank*, 374 U.S. 321, 371 (1963), for the proposition that "possible economies [from a merger] cannot be used as a defense to illegality," but more recent lower court decisions have shown that "while the Supreme Court has traditionally frowned on the use of efficiencies to rebut a prima face case, more recent Circuit Court law has departed from the historic rule," and indeed the "FTC itself moved away from the old Supreme Court cases and recognized that efficiencies may well be a factor to be considered." *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 61–62 (D.D.C. 1998).

KEY TAKEAWAYS FROM THE PROPOSED GUIDELINES

- Perhaps the most significant change comes in the form of a significantly lower “structural presumption” of harm, backed by a market share threshold. A market share of 30% or more held by the acquiring firm can now trigger a presumption that the transaction is anticompetitive, even when acquiring a small firm with minimal market share. The Agencies also returned to a pre-2010 threshold for market shares and concentration that indicates that the Agencies will view as presumptively unlawful a transaction that results in a post-merger Hefindahl-Hirschman Index (HHI)[1] of 1,800 and an increase in HHI of 100 or more (see chart below).

	HIGHLY CONCENTRATED MARKETS THAT ARE PRESUMPTIVELY UNLAWFUL		
	Pre-2010	2010 Guidelines	Proposed Guidelines
Post-Merger HHI and Change in HHI Index	HHI of 1,800 and merger-related change in HHI of 100 or more	HHI of 2,500 or more and merger-related change in HHI of 200 or more	HHI of 1,800 and merger-related change in HHI of 100 or more
Market Share of Combined Firm	No specific presumption regarding level at which the merged firm’s share is presumptively unlawful	No specific presumption regarding level at which the merged firm’s share is presumptively unlawful	Combined share of 30% or more (even if share of one firm is *de minimis*) and merger-related change in HHI of 100 or more

- Moreover, the Proposed Guidelines introduce a focus on monopsony power, with particular attention to labor markets.
  - The Agencies now emphasize evaluating how a proposed merger might impact not only consumers but also workers, reflecting a commitment to safeguarding labor interests.
- Industries such as private equity, known for their “roll-up” strategies, might find themselves under closer scrutiny with the Proposed Guidelines.
  - This is because the Agencies will now analyze a whole series of acquisitions as a merger. As such, the Agencies may challenge smaller transactions that they may not have otherwise challenged if they follow a

series of other smaller transactions that the Agencies view as presenting an antitrust issue in the aggregate.

- Technology companies accused of "killer acquisitions" may also receive closer agency scrutiny under the Proposed Guidelines.

Winston & Strawn attorneys are at the forefront of understanding and interpreting these transformative merger Proposed Guidelines. We are well prepared to help your business navigate the evolving landscape and seize opportunities for growth while ensuring compliance with the new regulations. The Proposed Guidelines are open for public comment until September 18, 2023.

As businesses and legal experts digest the implications of the new merger guidelines, it is essential to recognize that courts do not automatically find them persuasive, and they are not binding. While these guidelines reflect current agency practices under the Biden administration, they lack the force of law and may not hold sway in court proceedings. Additionally, recent history highlights that courts have rejected a substantial portion of the Biden administration's merger challenges, underscoring the potential challenges in enforcing these new guidelines.

Moreover, the FTC's withdrawal of the Trump administration's Vertical Merger Guidelines on a party-line vote, shortly after their issuance, raises questions about the durability of the current guidelines and other related policies. Like their predecessors, the newly issued guidelines and statements, such as the Section 5 policy, might face a similar fate should a Republican administration take power in the future. This prospect adds an element of uncertainty for businesses seeking to understand the long-term implications of these guidelines and their impact on mergers and acquisitions. As the landscape continues to evolve, businesses will need to navigate any additional guidelines with a keen eye on both their immediate and potential future implications.

In our more comprehensive blog post, we delve into the intricacies of the Proposed Guidelines, their historical context, and implications for businesses.

---

[1] The Agencies and courts have historically used HHI to measure the change in concentration in a market. The higher the HHI index, the more concentrated the market. Similarly, the larger the change in HHI because of the merger, the more likely it is to cause anticompetitive harm.

5 Min Read

Authors

Richard Falek

Kevin B. Goldstein

Conor Reidy

Nasir Hussain

Nathan Garg

Related Topics

Antitrust Intelligence | M&A | FTC | Department of Justice (DOJ)

Related Capabilities

Antitrust/Competition | Mergers & Acquisitions | Private Equity

Related Regions

North America

Related Professionals

Richard Falek

Kevin B. Goldstein

Conor Reidy

Nasir Hussain

Nathan Garg

This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.

© 2024 Winston & Strawn LLP.