On Monday December 18, the Federal Trade Commission (“FTC”) and the Department of Justice (“DOJ”) released the final version of their Merger Guidelines (“Guidelines”), capping a nearly two-year effort to implement a policy capturing the Biden Administration’s aggressive enforcement stance in merger reviews. The Guidelines are intended to provide transparency into how the agencies evaluate whether a merger or acquisition may lessen competition in violation of the Clayton Act. After the agencies released the draft merger guidelines in July (“Draft Guidelines”), the agencies received over 3,000 public comments, many of them criticizing the Draft Guidelines for being too aggressive and departing too radically from controlling case law and practice. The final Guidelines reflect the agencies’ consideration of the comments received.

While the final Guidelines largely maintain the same aggressive positions of the draft, they introduce more nuanced language that signals more openness to rebuttal evidence than the Draft Guidelines. The most apparent change is an across-the-board shift away from a flat prohibition on certain effects and toward a more traditional warning about the possible consequences when those effects are present. This is an important change to the draft language, which had come under fire for appearing to set forth several rules of per se illegality. For example, in Guideline 2, the draft language stated that “mergers should not eliminate substantial competition between firms,” (emphasis added), signaling the possibility that the agencies would challenge any merger between rivals even when remaining competitors would discipline any post-merger attempt to raise prices or reduce output or quality. In contrast, the final language states that “mergers can violate the law when they eliminate substantial competition between firms” (emphasis added), affirming what has always been the case.

Other changes similarly addressed critiques received during the comment period. For example, the final Guidelines eliminated a draft guideline separately addressing vertical merger concerns. They also eliminated a “catch-all” guideline that condemned mergers that “otherwise” substantially lessened competition (Draft Guideline 13), a provision heavily criticized for eliminating all predictability in enforcement, which is the primary reason for publishing guidelines at all.

Even with the final Guidelines’ changes from the draft, the Guidelines represent a much more aggressive enforcement approach over the 2010 Guidelines. For example, the 2023 Guidelines significantly lower the concentration threshold at which competitive harm from a merger is presumed, setting the bar for presumptive illegality at a level of concentration and market share that the 2010 Guidelines considered only potentially problematic. In addition, the final Guidelines adopt an expansive definition of actionable competitive harm that encompasses not only price increases or...
quality or output decreases, but any “worsening of the terms along any dimension of competition,” such as quality, service, capacity investment, product choice or features, or innovative effort. Although these are well-recognized facets of competition, the Guidelines use them, for the first time, to define who is a market participant. This potentially excludes from the market any firms that may not detect and respond to an incumbent’s small but significant reduction in, for example, its confidential capital budget or its R&D budget (which is most likely all other firms). The incorporation of such hard-to-measure standards effectively gives the agencies carte blanche to define the competitor field in the way most advantageous to a challenge by excluding significant competitors from the relevant market simply because they do not have the ability to detect and respond to these changes. Although agency practice may not exploit this ability in all cases, the chief economists for both agencies affirmed on December 19th that the intent is to “facilitate the application of these principles in a wide range of circumstances.”

The aggressive policies reflected in the Guidelines will be tested in court, and they face an uncertain prospect of success. It is happening already. The final Guidelines doubled down on the draft’s condemnation of mergers that eliminate potential or nascent competitors, and established a higher bar for rebuttals based on likely competitive entry than the agency would need to establish the required threat of competitive harm. Yet this was the theory on which the FTC brought and lost its challenges to Meta’s acquisition of Within Unlimited and Microsoft’s acquisition of Activision Blizzard (appeal pending before the Ninth Circuit). If there develops a significant divide between the Guidelines and court decisions, the utility of the Guidelines will diminish.

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