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Axinn Antitrust Insight: New Proposed Merger Guidelines Reflect DOJ and FTC's Anti-merger Policy, Signal Continued Aggressive Enforcement

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PRACTICE AREAS

Antitrust

The U.S. Department of Justice, Antitrust Division (DOJ), and the Federal Trade Commission (FTC) (and together, the "Agencies") have released long-anticipated draft merger guidelines (the "2023 Draft Guidelines") that articulate the Agencies' policies in reviewing proposed mergers. The 2023 Draft Guidelines adopt an approach that is generally skeptical – even hostile – to mergers. Coupled with the recent announcement of proposed massive changes to the HSR Form, the 2023 Draft Guidelines augur longer, more involved merger reviews, and appear aimed at discouraging merger activity. This is not surprising in light of the Agencies' rhetoric and enforcement activity during the Biden Administration.

The 2023 Draft Guidelines lay out 13 high-level principles, citing the text of the antitrust laws as well as Supreme Court cases interpreting those laws, and rely much less on economic tests compared to prior Guidelines. Tellingly, a majority of the citations are to cases that pre-date the shift in U.S. antitrust jurisprudence in the 1970s with Supreme Court decisions in cases like *General Dynamics* and *Sylvania*. See *United States v. Gen. Dynamics Corp*., 415 U.S. 486 (1974); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). In particular, the Agencies not only underscore the so-called "structural presumption" (as discussed below under Guideline 1) – aiming to make it easier to block mergers on the basis of market shares alone – they also express deep skepticism toward "rebuttal" evidence often cited by merging parties, and accepted by courts for decades, showing that market shares do not accurately reflect the merger's impact on competition. Under modern antitrust precedent and economic thinking, this evidence – relating, for example, to the declining position of one of the merging firms, entry and repositioning, and procompetitive efficiencies – is critical to the proper assessment of a merger's competitive effects.

Superficially, the top-level principles (such as, "Mergers should not eliminate substantial competition between firms") appear conventional and largely consistent with prior Guidelines. The Agencies' further articulation of these principles, however, represents a significant break with recent past practice. In addition, the 2023 Draft Guidelines provide fewer specific guideposts and illustrative examples to help companies and practitioners predict enforcement outcomes.

There is significant reason to doubt that the Agencies' policies – reflected in the 2023 Draft Guidelines – will be embraced by the courts, especially today's Supreme Court. But the Agencies have been pursuing investigations and litigation advancing these principles throughout the Biden Administration, making the 2023 Draft Guidelines an important document for understanding the Agencies' priorities and likely investigative paths.

The 13 Guidelines are listed here, together with our reactions to the impact of each:

- *Guideline 1: Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets.*
  - What it means: The Agencies are laser focused on market shares as a standard for judging which mergers to investigate and challenge. The Agencies double down on a market share-based "structural presumption" that mergers leading to a 30%+ combined post-merger market share are presumptively illegal under the Supreme Court's *United States v. Philadelphia National Bank* decision, 374 U.S. 321 (1963) – with less emphasis on the holistic, economics-driven assessment of competitive effects reflected in the 2010 Guidelines and modern antitrust precedent. Market shares have typically played a key role in assessing mergers and the Agencies have long invoked the structural presumption in litigation, but the 2023 Draft Guidelines make clear that the Agencies will focus, even at the investigation phase, on mergers resulting in market shares lower than those that have been challenged successfully in recent decades. In particular, the Agencies have lowered the threshold for determining when a merger results in a "highly concentrated market" to the level from the Guidelines issued in the 1980s and 1990s.
- *Guideline 2: Mergers Should Not Eliminate Substantial Competition between Firms.*
  - What it means: The Agencies view the elimination of current competition between merging companies as a reason to challenge a merger, without the necessity of establishing

through economic analysis that it will actually impact consumers. Historically, economic analysis has played a prominent role in the Agencies' internal analysis and in merger challenges in court. The 2023 Draft Guidelines relegate economic analysis to the Appendix as something that the Agencies may "sometimes" do.

- *Guideline 3: Mergers Should Not Increase the Risk of Coordination.*
  - What it means: On its face this section is generally consistent with the prior Guidelines, but other changes to the standards for establishing the likelihood of entry by new rivals in response to a merger mean that the Agencies will presume more mergers to be unlawful based on overall concentration levels.
- *Guideline 4: Mergers Should Not Eliminate a Potential Entrant in a Concentrated Market.*
  - What it means: The 2023 Draft Guidelines go into greater detail on potential competition theories than the prior Guidelines and aim to lower the burden of proof on the Agencies to establish competitive harm under these theories. The 2023 Draft Guidelines adopt a pro-enforcement framework that (i) makes it easier for the Agencies to claim that the acquired potential entrant "had a reasonable probability of entering the relevant market," including through evidence that "the company *considered* organic entry as an alternative to merging," and (ii) purports to flip the burden onto the parties and "presume[s]" that the deconcentration resulting from entry "would be competitively significant, unless there is substantial direct evidence that the competitive effect would be *de minimis*."
- *Guideline 5: Mergers Should Not Substantially Lessen Competition by Creating a Firm That Controls Products or Services That Its Rivals May Use to Compete.*
  - What it means: Together with Guideline 6 and consistent with the Agencies' (so far unsuccessful) vertical merger challenges under both the Biden and Trump Administrations, this Guideline signals the Agencies' increasingly aggressive enforcement posture against vertical deals. In staking out this view, the Agencies assert they are unlikely to credit a range of evidence that merging

parties (and courts) frequently consider in assessing the likelihood of foreclosure post-merger, including the lack of internal documents suggesting the parties' plans to engage in a foreclosure strategy, "speculative claims about reputational harms," "claims or commitments to protect or otherwise avoid harming their rivals that do not align with the firm's incentives," or "the claimed intent of the merging companies or their executives." This position stands in stark contrast with several court decisions relying on such evidence to find no likely harm to competition in vertical merger cases (most recently, in Judge Corley's opinion in *Microsoft/Activision*).

- *Guideline 6: Vertical Mergers Should Not Create Market Structures That Foreclose Competition.*
    - <u>What it means</u>: Here, the Agencies introduce a structural presumption against vertical mergers, claiming that the merged firm's 50%+ share in a market to which its rivals need access "*alone* is a sufficient basis to conclude that the effect of the merger may be to substantially lessen competition." The Agencies also provide a range of "plus factors" they may use to find a vertical merger unlawful where the structural presumption is not met, including a "trend toward further vertical integration." On their face, both approaches appear to discard the Agencies' burden to demonstrate likely anticompetitive effects – a position which runs counter to recent court decisions and will continue to be tested by merging parties in litigated deals going forward.
- *Guideline 7: Mergers Should Not Entrench or Extend a Dominant Position.*
    - <u>What it means</u>: Relying on the 1967 Supreme Court case *FTC v. Procter & Gamble Co.*, the Agencies introduce into the 2023 Draft Guidelines a European-style concept of "dominance" and seek to reinvigorate decades-old theories that would impose increased scrutiny on acquisitions by "dominant firms" that the Agencies assert "would either entrench that [dominant] position or extend it into additional markets." 386 U.S. 568 (1967). These conglomerate merger theories have been discredited across several prior administrations as bad economics and bad policy and are

likely to encounter a cold reception from the courts under modern antitrust precedent.

- *Guideline 8: Mergers Should Not Further a Trend Toward Concentration.*
  - What it means: The Agencies plan to subject both horizontal and vertical mergers to increased scrutiny if they "further a trend toward concentration." According to the 2023 Draft Guidelines, this will be determined by assessing "whether the merger would occur in a market or industry sector where there is a significant tendency toward concentration" and "whether the merger would increase the existing level of concentration or the pace of that trend." This appears to reflect the Biden Administration's policy position that increased concentration, standing alone, can be an antitrust problem, even where it does not lead to any demonstrable anticompetitive effects.
- *Guideline 9: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.*
  - What it means: The Agencies intend to scrutinize the merging firms' prior acquisition history, including "any overall strategic approach to serial acquisitions," to determine whether "an anticompetitive pattern or strategy of multiple small acquisitions in the same or related business lines" is unlawful "*even if no single acquisition on its own would risk substantially lessening competition or tending to create a monopoly.*" This approach – with no facial requirement that the Agencies prove likely anticompetitive effects resulting from any particular transaction – is consistent with the Biden Administration's overall anti-merger posture and likely will increase uncertainty and costs for acquisitive firms (including private equity) even in deals that do not raise competitive concerns.
- *Guideline 10: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform.*
  - What it means: The Agencies outline various factors suggesting increased scrutiny of mergers involving "multi-sided platform" firms, which the Agencies assert "can give

rise to competitive problems, even when a firm merging with the platform has a relationship to the platform that is not strictly horizontal or vertical." For example, the Agencies may seek to block mergers by "dominant platforms" attempting to "systematically acquir[e] platforms while they are in their infancy" and mergers by platforms that may create "conflicts of interest" where the merged firm has "the incentive to give its own products and services an advantage against other competitors competing on the platform." The Agencies' efforts here will likely be at odds with the Supreme Court's decision in *American Express v. Ohio* laying out the application of antitrust in multi-sided markets. 138 S. Ct. 2274 (2018).

- *Guideline 11: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers.*
    - What it means: Consistent with the Agencies' recent practice and public statements, the Agencies intend to continue their close scrutiny of mergers for potential effects on labor-market competition. The Agencies claim that labor markets "frequently have characteristics that can exacerbate the competitive effects of a merger between competing employers" and that "labor markets are often relatively narrow" – both of which are sweeping assertions that will continue to be challenged by merging parties in investigations and tested in court.

- *Guideline 12: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition.*
    - What it means: While this Guideline is similar in a number of ways to the 2010 Guidelines, it also appears to reflect a continuation of the Agencies' current position that private equity investments should be subject to increased antitrust scrutiny.

- *Guideline 13: Mergers Should Not Otherwise Substantially Lessen Competition or Tend to Create a Monopoly.*

- What it means: While the first 12 Guidelines provide an expansive range of principles for the Agencies to challenge mergers they deem unlawful, the Agencies are clear these are not "exhaustive" and reserve the right to rely on other sources of evidence and take action based on "the facts and the law in each case.

The Agencies are accepting public comments through September 18, 2023. Link to 2023 Draft Guidelines: https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf

If you have any questions about the draft Guidelines, are interested in potentially submitting comments, or would like to discuss any other issue raised in this Insight, please contact James Hunsberger, or any of Axinn's antitrust partners.