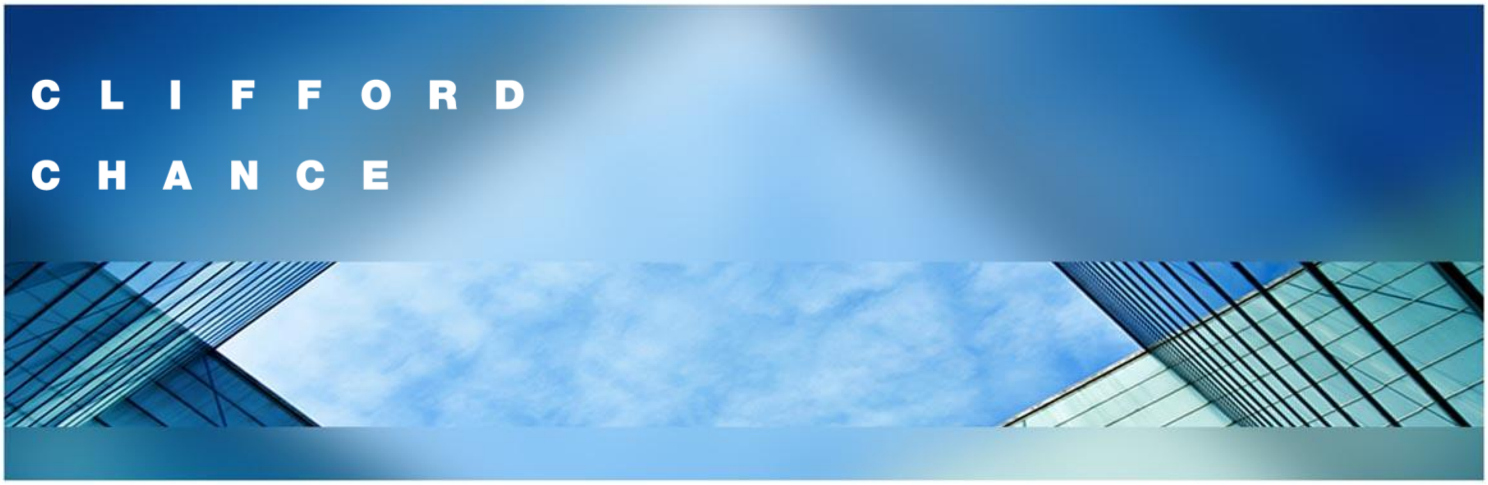

THE FTC AND DOJ PROPOSE NEW MERGER GUIDELINES

On July 19, 2023, the Antitrust Division of the U.S. Department of Justice ("**DOJ**") and the Federal Trade Commission ("**FTC**") (collectively, the "**Agencies**") published a draft of new Merger Guidelines (the "**Guidelines**"). As expected, the 51-page document dramatically overhauls the prior merger guidelines and advances the Agencies' aggressive enforcement agenda. Notable changes are that the Agencies: (1) warn that any merger that significantly increases market concentration and creates a firm with a share over 30 percent presents "an impermissible threat of undue concentration"; (2) emphasize that the agencies will review transactions for possible anticompetitive effects in labor markets; (3) revive the entrenchment theory of competitive harm from *FTC v. Procter & Gamble Co.* (1967); (4) enhance scrutiny of serial acquisitions and partial ownership; and (5) include a catch-all section stating that the Agencies may pursue cases that fall outside their articulated theories of harm.

The Guidelines are built around 13 "core" guidelines, discussed below. Although these guidelines reveal how the Agencies will analyze and investigate mergers, courts have no obligation to follow them. Indeed, many of the guidelines likely will face an uphill battle in the courts.

SUMMARY OF THE THIRTEEN PROPOSED CORE GUIDELINES

Guideline 1: Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets. To assess market concentration, the Agencies will review the number and relative size of firms, the pre-merger market shares within a relevant market, and whether the merger would lead to or increase undue concentration. The Agencies may also look at the market share of the merged firm, with a presumption that a 30 percent market share and a change in HHI greater than 100 "presents an impermissible threat of undue concentration." The Agencies returned to the 1982 Guidelines HHI measure of 1,800 to define a highly concentrated market (the prior threshold under the 2010 Horizontal Merger Guidelines was 2,500).

Guideline 2: Mergers Should Not Eliminate Substantial Competition between Firms. The Agencies may determine that a merger of two firms competing in the same market can be evidence that the merger may substantially lessen competition. Competition involves lowering prices, new or improved products and services, and higher wages. A significant amount of competition could be seen when the merging firms affect the other's behavior or sales.

In identifying substantial competition, the Agencies will look to, among other aspects: (1) strategic deliberations or decisions that may show a firm monitoring the other's regular course of business; (2) prior merger, entry, and exit events that show the substantiality of direct competition between the merging firms; (3) customer substitution and their willingness to switch between different firms' products; (4) the impact of competitive actions on rivals where the impact will likely be greater when customers consider their products to be closer substitutes; and (5) the impact of eliminating competition between the firms, looking at price, quality, wages, or other dimensions of competition.

Guideline 3: Mergers Should Not Increase the Risk of Coordination. To assess the extent of explicit or implicit coordination, the Agencies will presume that markets are susceptible to coordination if: (1) they are highly concentrated; (2) there were prior actual or attempted efforts to coordinate in the market; and (3) a maverick is eliminated.

The Agencies may also look to secondary factors for susceptibility to coordination including markets: (1) with an HHI above 1,000; (2) with high transparency; (3) where aggressive competitor responses diminish the prospective competitive reward; (4) with participants with closely aligned incentives; and (5) where coordination is more profitable.

Guideline 4: Mergers Should Not Eliminate a Potential Entrant in a Concentrated Market. Mergers can harm competition by eliminating actual potential competition and perceived potential competition. The more concentrated the market, the greater the magnitude of harm to competition from any lost potential entry and the greater the tendency to create a monopoly.

Guideline 5: Mergers Should Not Substantially Lessen Competition by Creating a Firm That Controls Products or Services That Its Rivals May Use to Compete. The Agencies outline situations where a merged firm would have the ability and incentive to foreclose a necessary input to its rivals, limit or degrade rivals' access, or worsen the terms of access to a related product. The Agencies further note that access to rivals' competitively sensitive information may substantially lessen competition if the rivals need to access or purchase a related product controlled by the merged firm.

Guideline 6: Vertical Mergers Should Not Create Market Structures That Foreclose Competition. The Agencies have added a presumption of anticompetitiveness where a foreclosure market share is at or above 50 percent. If below 50 percent, relevant evidence includes: (1) market concentration; (2) a market trend toward vertical integration; (3) the nature and purpose of the merger; and (4) increased entry barriers.

Guideline 7: Mergers Should Not Entrench or Extend a Dominant Position. The Agencies will evaluate whether a merger involving an already dominant firm may substantially reduce the competitive structure of the industry and whether the merger may entrench or extend that dominant position into new markets. The Agencies will investigate whether the merger likely would: (1) increase entry barriers; (2) increase switching costs; (3) interfere with use of competitive alternatives; (4) deprive rivals of scale economies or network effects; and (4) eliminate a nascent competitive threat. The Agencies will also analyze effects in related markets and consider whether tying, bundling, conditioning, or "other linkage of two products" may tend to extend the firm's dominant position.

Guideline 8: Mergers Should Not Further a Trend Toward Concentration. The Agencies will look to whether the market or industry sector has experienced a steady increase in HHI or exit of significant players, and whether the merger would increase the pace of concentration.

Guideline 9: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series. The Agencies may evaluate the merger against industry trends or evaluate the overall pattern or strategy of serial acquisitions by the acquiring firm. This analysis will include examining the merged firm's history and current or future strategies and incentives.

Guideline 10: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition *Between* Platforms, *on* a Platform, or to *Displace* a Platform. The Agencies state that a conflict of interest may arise when a platform operator also participates on the platform. The Agencies will seek to prohibit a merger that harms competition within a relevant market for any product or service offered on a platform to any group of participants. When platform owners are dominant, the Agencies will seek to prevent even relatively small accretions of power.

Guideline 11: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers. The Agencies equate labor markets to buyer markets, stating that certain mergers may lead to undue concentration, accelerate a trend towards undue concentration, or entrench or extend the position of a dominant buyer. The Agencies will consider whether the merger will result in lower wages, slow wage growth, worsen benefits or working conditions, or degraded workplace quality.

Guideline 12: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition. The Agencies will focus on whether partial ownership: (1) gives a firm the ability to influence the competitive conduct of the target firm (e.g., voting interests and board member appointments); (2) reduces the incentive of the acquiring firm to compete, or (3) gives the acquiring firm access to non-public, competitively sensitive information from the target firm even absent any ability to influence its conduct.

Guideline 13: Mergers Should Not Otherwise Substantially Lessen Competition or Tend to Create a Monopoly. Because the Guidelines are not exhaustive, the Agencies may consider other ways in which a merger substantially lessens competition or tends to create a monopoly.

NEXT STEPS

The Agencies have invited interested parties to comment on the draft Guidelines by September 18, 2023. Please contact us regarding any questions or if we can assist with submission of comments regarding the Guidelines.

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