GIBSON DUNN

December 21, 2023

U.S. Antitrust Agencies Release Revised 2023 Merger Guidelines Designed to Increase Scrutiny of Deals

The Guidelines include some shifts from prior Agency guidance, although in practice they reflect many developments already seen at the Agencies under the Biden Administration's leadership.

On December 18, 2023, the U.S. Federal Trade Commission (FTC) and Department of Justice (DOJ) (collectively, the Agencies) jointly released the final version of the 2023 Merger Guidelines following a public comment period on an earlier draft version released in July 2023. The Guidelines reflect the Biden Administration's competition policy and provide guidance on the Agencies' enforcement priorities. The Guidelines are now effective, and although they include some shifts from prior Agency guidance, in practice the Guidelines reflect many developments already seen at the Agencies under the Biden Administration's leadership.

The final revised Guidelines include several notable changes from the July draft, including:

- An expanded discussion of a transaction's potential to harm competition by eliminating potential entrants or nascent competitive threats, making clear that the Agencies view their burden to prove the loss of potential competition is materially lower than that of parties to prove that third-party potential entrants will preserve competition;

- A modified discussion of vertical merger enforcement that softens the prior draft's presumption of harm, but expands the discussion of potential foreclosure risks associated with vertical deals; and

- A reframing of "trends toward consolidation" as a framework for analyzing mergers in the broader context of developments in their industry rather than as an independent theory of harm.

Overall, the final Guidelines continue to reflect the Agencies' increased skepticism of merger and acquisition activity, especially in concentrated markets, and attempt to revive seldom-used and novel theories of competitive harm, including some based on case law from many decades ago. While they reflect current enforcement guidance, the new Guidelines are not binding on the federal courts, and it remains to be seen whether courts in the future will find them persuasive as courts have done with the 2010 Merger Guidelines. Likewise, if there is an Administration change in 2025, we expect that there will be a significant, if not wholesale, "dialing back" of these revised Guidelines.

1. **Potential Future Competition**

The final Guidelines signal Agency intent to challenge more acquisitions where no immediate competitive overlaps exist between the merging parties under the theory that parties may nevertheless be potential future competitors or important partial constraints as part of a broader "ecosystem" of competitive industry participants. While courts have historically required the Agencies to show, at least by reasonable probability (noticeably greater than 50%), that merging

parties will be future competitors,[1] the 2023 Guidelines generally articulate a lower burden for the Agencies to show harm to future competition.

The theme of preventing mergers from eliminating potential and nascent competitive threats reaches across multiple sections of the final Guidelines. In addressing vertical mergers, the Guidelines focus on mergers' potential to prevent the entry of competitors in the relevant markets under investigation as well as related markets. And in addressing horizontal mergers, the Guidelines carefully distinguish between harm to competition from a merger's elimination of a potential entrant and rebuttal claims by merging parties that likely or potential entry of new competitors will offset competitive effects. Notably, the Guidelines articulate two different standards for establishing the likelihood of potential entry: a lower standard for Agency claims that effects on a merging party's potential entry can harm competition because the Agencies "seek to prevent threats at their incipiency," and a higher standard for merging parties to show that potential entry by a third party can offset competitive harms because potential entrants only offer an attenuated effect on competition compared to active participants. It remains to be seen how courts will address the inconsistency in standards (and the Guidelines cite no case law to support the bifurcated proposition).

The final Guidelines also add new language addressing the effects of "ecosystem" competition in mergers where one or both parties offer a "wide array of products or services." The Guidelines state that large incumbent firms who acquire small niche players offering non-competing services to the acquirer may nevertheless harm competition by reducing the "ecosystem" of services and products offered by multiple competitors that in concert may constrain larger incumbent firms. The final Guidelines single out markets undergoing "technological transitions" where new technological developments can create competitive threats to incumbent firms. Under this framework, the Agencies may recontextualize smaller acquired parties as "nascent threats" who offer "partial constraints" to large incumbent acquirers.

2. **Vertical Mergers**

The final Guidelines' treatment of vertical mergers is markedly different from the July 2023 draft, reducing the draft version's focus on categorical presumptions but expanding the discussion of potential harms.

While the draft Guidelines articulated a presumption of illegality when a merged firm has a "foreclosure share" above 50 percent, the final version notes in a footnote that this threshold is sufficient for a general inference of harm "in the absence of countervailing evidence." In most regards, however, the Guidelines expand categories of potential harms resulting from vertical consolidation. For example, the Guidelines contain an expanded discussion of foreclosure concerns stemming from a vertical merger, including foreclosure of "routes to market," referring to limiting market participants' means of access to trading partners, distribution channels, or customers. The final Guidelines also expand on vertical mergers' potential creation of barriers to entry by requiring potential entrants to invest in related products as well as the relevant product at issue in an investigation. Finally, the Guidelines expound on foreclosure incentives, articulating a low Agency burden of proof that the existence of close competition between merging parties alone signifies an incentive to foreclose rivals through direct or indirect downstream means.

3. **Trends Toward Consolidation**

The final Guidelines significantly alter and expand Guideline 7 (formerly Guideline 8 in the draft Guidelines) regarding industry trends towards consolidation. The draft Guidelines appeared to articulate an independent theory of harm that mergers could lessen competition by "contribut[ing] to a trend towards consolidation," relying on language from the Supreme Court in *General Dynamics* "allow[ing] the Government to rest its case on a showing of even small increases of market share or market concentration in those industries or markets where concentration is already great or has been recently increasing."[2]

By contrast, the final Guidelines now note that a trend towards consolidation is a "highly relevant factor" that may "heighten the competition concerns identified in Guidelines 1-6." Rather than serve as an independent theory of harm on which the Agencies may challenge a merger, however, the Guidelines now articulate that mergers will be reviewed in the context of other industry consolidation activity, and the Agencies will analyze proposed transactions' potential effect on potential future consolidation activity. The Guidelines discuss an "arms race" concern that consolidation can create leverage against participants in upstream, downstream, or other related markets that encourage further consolidation and generally reduce competition. Vertical mergers, while generally considered inherently procompetitive by courts due to synergies such as elimination of double-marginalization, are particularly susceptible to scrutiny where other market participants may move to vertically integrate to achieve similar efficiencies. Additionally, the Guidelines note that multiple mergers by different players in the same industry may be examined in context of one another, though the Guidelines do not expound further on how this may affect concentration calculations and to what extent trends towards consolidation could serve as a factor in enforcement action claims. The final Guidelines make clear, however, that merging parties must remain cognizant of wider industry merger and acquisition trends in analyzing risk of investigation in planned transactions.

Conclusions and Takeaways

The 2023 Merger Guidelines provide a window into the expanded and more aggressive antitrust enforcement characterizing Agency review of mergers under the Biden Administration.[3] Importantly, as noted, the Guidelines neither reflect nor create binding authority on merging parties. Rather, the Guidelines provide guidance on how and under what circumstances the Agencies will consider enforcement actions and the theories under which they may bring such actions. Actions brought under the enforcement policies articulated and expanded upon in the final Guidelines are subject to review by federal courts, assuming the parties decide to litigate. To prevail on the novel and expanded theories of harm in the Guidelines, the Agencies will ultimately need to persuade federal courts that these theories are supported by legal precedent. Nevertheless, merging parties should expect aggressive enforcement action by the Agencies that seek abandonment of mergers through lengthy investigations, procedural delay, and more frequent court challenges.

Firms considering transactions should continue to proactively consult with antitrust counsel early in the transaction consideration process to identify and mitigate risk. Gibson Dunn attorneys are closely monitoring these developments and are available to discuss these issues as applied to your particular business.

[1] *See, e.g., FTC v. Meta Platforms Inc.*, ___ F.3d __, 2023 WL 2346238, at *22 (N.D. Cal. 2023) (requiring a probability of entry "noticeably greater than fifty percent"). Other courts have imposed an even stricter standard, requiring the government to establish the likelihood of future entry with "clear proof." *FTC v. Atl. Richfield Co.*, 549 F.2d 289, 295 (4th Cir. 1977).

[2] *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

[3] *See* Gibson Dunn Client Alerts: U.S. Antitrust Agencies Release Updated Merger Guidelines (July 20, 2023); DOJ Signals Increased Scrutiny on Information Sharing (Feb. 10, 2023); FTC Proposes Rule to Ban Non-Compete Clauses (Jan. 5, 2023); FTC Announces Broader Vision of Its Section 5 Authority to Address Unfair Methods of Competition (Nov. 14, 2023); DOJ Antitrust Secures Conviction for Criminal Monopolization (Nov. 9, 2022); DOJ Antitrust Division Head Promises Litigation to Break Up Director Interlocks (May 2, 2022).

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the issues discussed in this update. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Antitrust and Competition, Mergers and Acquisitions, or Private Equity practice groups, or the following practice leaders:

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