Federal Antitrust Agencies Propose New Guidelines for Review of M&A Transactions

Corporate News: A Legal Update

By Katherine Hampel on August 3, 2023

The Federal Trade Commission and Department of Justice recently proposed drafts of new Merger Guidelines for their review and approval of mergers and acquisitions, with the intent of responding to the realities of the modern economy.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 grants these federal agencies authority to investigate and review mergers that exceed certain thresholds, including $111.4 million for the size of the transaction, for potential violations of antitrust law. The guidelines reflect the agencies' updated approach to enforcing the law, while the law itself has not changed.

The agencies have periodically updated the guidelines to reflect changes in the law and market. Notably, these are the first merger guidelines to cite case precedents. The guidelines draw extensively on Supreme Court and appellate cases to ensure they are rooted in the law.

The draft Merger Guidelines are built around 13 core principles that reflect the most common issues that arose in previous merger review.

Of note, the impact of mergers on workers is included as consideration in a transaction review for the first time in these guidelines. The guidelines also emphasize the agencies' review of merger transactions in the context of broader market trends, rather than assessing each merger and its impact in isolation. This can impact "roll-ups" by private-equity firms and others that make "multiple small acquisitions in the same or related business lines..., even if no single acquisition on its own would risk substantially lessening competition...."

The draft guidelines are also giving special attention to platform competition and the growing importance of platform markets. Multi-sided platform economics, demonstrated by firms that facilitate economic activity between other parties, are growing through the rise of digital services, such as social media and app-based end-user service companies. The guidelines specifically point to the distinctive considerations that arise when these types of platform are party to a merger.

Mergers have typically been distinguished as being either "horizontal" or "vertical". Horizontal mergers occur between companies that operate in the same industry, directly competing for the same consumers. Vertical mergers occur where one company supplies inputs for another. The draft guidelines recognize the reality that many companies produce multiple lines of products, each with different characteristics and functions, that may blur the line between horizontal and vertical mergers. Instead of distinguishing the type of merger prior to its analysis, the guidelines instead begin with the question of how the merger may risk lessening competition in the market that the companies are in – a question that applies to both vertical and horizontal mergers.

The draft Merger Guidelines introduce several new presumptions that certain proposed mergers are harmful to competition, which would lead to an extended review of these transactions. For example, these presumptions arise when:

- A combined firm in a horizontal merger will have (i) more than 30% market share and a increase of more than 100 in its Hirfindahl-Hirshman Index (i.e., the applicable measure) or (ii) an HHI of more than 1,800;
- A horizontal merger will eliminate potential entrant in a "concentrated" market (i.e., with an HHI of 1,000 or more); or
- A vertical merger will result in the merged firm controlling more than 50% of a related market.

The draft Merger Guidelines are currently under a 60-day comment period, which closes on September 18, 2023. At that time, the agencies will receive the comments received and finalize new guidelines for their evaluation of the legality of the proposed mergers coming before their review.

Federal Antitrust Agencies Propose New Guidelines for Review of M&A Transactions