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WASHINGTON POLICY STRATEGY

Potomac Perspective

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Last week, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) proposed new merger guidelines which, if finalized, would increase the government's scrutiny of mergers. The proposal would lower the threshold for presuming a merger to be illegal, put a new focus of roll-up strategies, target private equity (although not by name), and introduce the impact on labor markets as a factor to be considered in vetting mergers. We take a quick look at a complex and controversial proposal which will go through a public vetting process and could be finalized before the 2024 elections. After enactment, it's very likely to be challenged in the courts.

Last week, the DOJ and the Federal Trade Commission FTC proposed new merger guidelines. **The proposed guidelines would replace the existing guidelines for vertical and horizontal mergers. Some of the guidelines reflect the existing practices. However, parts of the proposal include new approaches to merger reviews, increasing scrutiny of mergers, which could cause firms to rethink their merger strategies.** It will also likely be challenged in court where the two agencies have had, at best, a mixed record of success. The following is an overview of some key takeaways, a look at the process and timing to finalize the proposal, and a list of the 13 individual guidelines.

KEY CHANGES IN MERGER RULES

- **Lower HHI presumptions** – The guidelines would presume that a merger is illegal if the transaction would result in a post-merger Herfindahl-Hirschman Index (HHI) (used to measure market concentration) greater than 1,800 (compared to 2,500 under the 2010 Horizontal Merger Guidelines) and a change in HHI of more than 100 points (previously 200).
- **Labor considerations** – A merger's impact on labor markets could be reason enough to challenge a deal.
- **Serial acquisitions** – The proposed guidelines include a new focus on firms engaged in serial acquisitions. This would apply to all sectors, but technology and health care could be among the industries impacted by this part of the proposal.
- **Private Equity not mentioned but could be targeted** – The proposed guidelines do not explicitly mention "private equity" but a proposed guideline on partial acquisitions and minority interests that could impact an acquired firm's incentive to compete is clearly directed at Private Equity.

NEXT STEPS

The proposed guidelines are subject to a public comment period that will last 60 days. Following that period, the DOJ and FTC will review the comments and then draft a final rule. Although there will likely be numerous public comments, many of which will be complex and technical, **the DOJ and FTC will seek to finalize the new guidelines before the 2024 election. The final guidelines could therefore be issued in the next 12-16 months.**

Once finalized, the guidelines could be challenged in court. **Recently, the DOJ and FTC have challenged several mergers and lost in court. To the extent that the proposed guidelines propose new or novel theories of antitrust law, it is likely that future challenges by the government to some merger proposals will be litigated in court.**

PROPOSED NEW GUIDELINES INCLUDE 13 INDIVIDUAL GUIDELINES:

1. Mergers should not significantly increase concentration in highly concentrated markets;
2. Mergers should not eliminate substantial competition between firms;
3. Mergers should not increase the risk of coordination;
4. Mergers should not eliminate a potential entrant in a concentrated market;
5. Mergers should not substantially lessen competition by creating a firm that controls products or services that its rivals may use to compete;
6. Vertical mergers should not create market structures that foreclose competition;
7. Mergers should not entrench or extend a dominant position;
8. Mergers should not further a trend toward concentration;
9. When a merger is part of a series of multiple acquisitions, the agencies may examine the whole series;
10. When a merger involves a multi-sided platform, the agencies examine competition between platforms, on a platform, or to displace a platform;
11. When a merger involves competing buyers, the agencies examine whether it may substantially lessen competition for workers or other sellers;
12. When an acquisition involves partial ownership or minority interests, the agencies examine its impact on competition; and
13. Mergers should not otherwise substantially lessen competition or tend to create a monopoly.

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