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FTC and DoJ Issue New Merger Guidelines

On December 18, 2023, the U.S. Federal Trade Commission ("FTC") and Department of Justice ("DoJ") issued their long-awaited final Merger Guidelines, to be used by the FTC and DoJ to evaluate proposed mergers under the federal antitrust laws, notably Sections 1 and 2 of the Sherman Antitrust Act and Section 7 of the Clayton Act, which prohibits mergers and acquisitions whose effect "may be substantially to lessen competition, or tend to create a monopoly." The 11 guidelines can be found **Here**.

We reported on July 19, 2023 on the issuance of the proposed guidelines for public comment. The new guidelines have been scaled back in aggressiveness following public comment from the 13 proposed guidelines issued last July. We have also reported on the series of initiatives under FTC chair Lina M. Khan and DoJ Antitrust Chief Jonathan Kanter to shift from a decades-long generally tolerant, restrained merger review policy deemed by them to have allowed many potentially anticompetitive deals to proceed to a more restrictive, activist posture. See, *"FTC Rescinds 2020 Vertical Merger Guidelines...,"* Sept. 29, 2021; *"FTC Reinstitutes Restrictive 'Prior Approval' Merger Control Review Policy,"* Oct. 26, 2021; and *"FTC* *and DoJ Launch Effort to Restrict Anticompetitive Mergers,"* Jan. 24, 2022, all available at **Kurtin PLLC Mergers & Acquisitions**). The scaling back of the new Merger Guidelines from those proposed last July represents, to some extent and after several court reversals, a modest scaling back of Khan and Kanter's ambitions to reform merger review and clearance law and regulation.

The new Merger Guidelines provide, as compared to last July's proposed guidelines:

- **Guideline 1: Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market** (compare proposed guideline no. 1 "Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets").
- **Guideline 2: Mergers Can Violate the Law When They Eliminate Substantial Competition Between Firms** (compare proposed guideline no. 2 "Mergers Should Not Eliminate Substantial Competition Between Firms").
- **Guideline 3: Mergers Can Violate the Law When They Increase the Risk of Coordination** (compare proposed guideline no. 3 "Mergers Should Not Increase the Risk of Coordination").
- **Guideline 4: Mergers Can Violate the Law When They Eliminate a Potential Entrant in a Concentrated Market** (compare proposed guideline no. 4 "Mergers Should Not Eliminate a Potential Entrant in a Concentrated Market").
- **Guideline 5: Mergers Can Violate the Law When They Create a Firm That May Limit Access to Products or Services That its Rivals use to Compete** (compare proposed guideline no. 5 "Mergers Should Not Substantially Lessen Competition by Creating a Firm that Controls Products or Services that Its Rivals May Use to Compete").
- **Guideline 6: Mergers Can Violate the Law When They Entrench or Extend a Dominant Position** (compare proposed guideline no. 7 "Mergers Should Not Entrench or Extend a Dominant Position").

- **Guideline 7: When an Industry Undergoes a Trend Toward Consolidation, the Agencies [meaning the FTC and DoJ] Consider Whether It Increases the Risk a Merger May Substantially Lessen Competition or Tend to Create a Monopoly.** (No direct proposed guideline comparison).
- **Guideline 8: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series** (compare proposed guideline no. 9 "When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series").
- **Guideline 9: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform** (unchanged from proposed guideline no. 10).
- **Guideline 10: When a Merger Involves Competing Buyers, the Agencies Examine Whether it May Substantially Lessen Competition for Workers, Creators, Suppliers, or Other Providers** (compare proposed guideline no. 11 "*When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers").*
- **Guideline 11: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition** (unchanged from proposed guideline no. 12).

There has been some consolidation of the guidelines since last July's proposals, and gone in particular is proposed guideline no. 13 *"Mergers Should Not Substantially Lessen Competition or Tend to Create a Monopoly"* (which was explicitly intended to provide a "residual" basis for blocking a merger for which none of the preceding 12 guidelines clearly applied and basically a restating of Clayton Act Section 7). Most noticeable, however, is the apparent recasting of the guidelines from *a priori* presumptions of illegality in given market situations to an individual analysis (with the exception of Guideline no. 1). The "Mergers can violate the law" formula of Guidelines nos. 2 - 6, to which the later guidelines refer back in the FTC/DoJ publication linked above, suggests less of a presumption of illegality than the July

2023 proposed guidelines did.

Underlying the new guidelines is a revision of the index that the FTC and DoJ use to assess market concentration, the Herfindahl-Hirschman Index ("HHI"). The HHI is defined as the sum of the squares of the market shares of competitors the Agencies are assessing in merger review. A small HHI means many small firms in a market with corresponding low market concentration; the HHI tops out at 10,000 for a market with a single firm, a monopoly. A market with an HHI greater than 1,800 is deemed highly concentrated. A merger that creates or further consolidates a highly concentrated market, one with an HHI greater than 1,800 and that increases the market's HHI by more than 100 is presumed to substantially lessen competition or tend to create a monopoly, i.e., be in violation of Section 7 of the Clayton Act. The Agencies can also assess the post-transaction market share of the merged firm: a merger that creates a firm with a greater than 30% market share and that involves an increase in HHI of more than 100 points is also presumed to reduce competition or tend to create a monopoly. The Agencies may alternatively simply look at the actual number of competitors in a given market.

The 1,800 HHI threshold itself reflects an arcane policy decision by the FTC and DoJ. The 1,800 threshold was the original "highly concentrated" benchmark of the HHI in the first merger guidelines issued in 1982. That benchmark was in place until 2010, when it was raised, with the effect allowing greater market concentration without triggering the HHI threshold. In returning to the original 1,800 HHI threshold, the Agencies are signalling that the lower threshold for presuming a market to be highly concentrated is the correct one, potentially justifying intervention in transactions that would have passed muster under the higher recent HHI benchmarks.

While it is too early to predict exactly how the Merger Guidelines will be used by the FTC and DoJ in evaluating proposed M&A transactions (as well as other agencies that have concurrent jurisdiction in the industries they regulate, such as the Federal Communications Commission in telecommunications and broadcasting mergers), the overall thrust of the changes to the Merger Guidelines as published compared to the July 2023 proposed guidelines appears to be to reduce or eliminate presumptions of illegality in favor of a more case-by-case analysis as to whether a given proposed transaction might violate the Sherman Act, Clayton Act and other applicable antitrust laws, with recognition in the Guidelines themselves that any given proposed transaction's proponents may be able to rebut regulators' objections. Dealmakers should be encouraged by the changes in the public comment period, but wary. New sheriffs are still in town, and they still have an interventionist, activist merger review bias.

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