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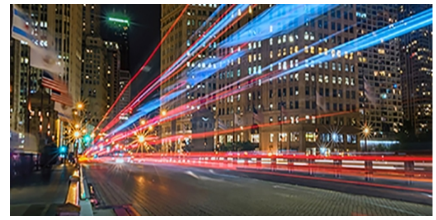

News & Types: Client Advisories

2023 Merger Guidelines

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By: Riebana E. Sachs

Practices: Corporate, Finance & Acquisitions

In December 2023, the Federal Trade Commission and the Justice Department (the "Agencies") issued the 2023 Merger Guidelines (the "Guidelines"). In recent years, the Agencies have broadened their view of how transactions might harm competition, especially in regard to vertical mergers. The new Guidelines identify the current procedures and enforcement practices the Agencies most often use to review mergers to identify possible violations of antitrust laws and supersede both the Horizontal Merger Guidelines (updated in 2010) and the Vertical Merger Guidelines (updated in 2020 and withdrawn in 2021). While these Guidelines are not legally binding, courts reviewing merger challenges have historically relied on them as persuasive authority.

The following is a list of key highlights found in the Guidelines:

- **Guidance on "Market Concentration."** Generally, the Agencies presume that a merger between competitors that significantly increases concentration and creates or further consolidates a highly concentrated market may substantially lessen competition. Compared to the previous 2010 Guidelines, the new guidance on market concentration: (1) lowers the threshold for the presumption to apply; and (2) adds a market share threshold under which a merger resulting in a 30 percent share in a highly concentrated market is presumptively illegal.
- **Coordination.** Markets that are highly concentrated are presumptively susceptible to coordination among competitors. Rivals may work together to reduce competition through collusive agreements or through "tacit coordination" (i.e., through observation and response to rivals). The Agencies consider both primary and secondary factors in determining if a merger may increase the likelihood, stability or effectiveness of coordination.
- **Potential Competition.** There is increased focus on the loss of potential competition in a concentrated market. Agencies will evaluate whether one or both of the merging entities would have entered or expanded into the market in the future.
- **Access to Products or Services.** The Agencies evaluate potential harm to competition that may occur when a merged firm could limit access to a product, service or a route to a market that rivals use to compete, or whether a merged firm may gain access to rivals' sensitive information. This reflects the Agencies' change in attitudes towards vertical mergers, after the FTC withdrew its Vertical Merger Guidelines in 2021.
- **Extension of Dominant Positions.** The Agencies will evaluate whether a merger may entrench or extend an already dominant position. Notably, there is no numerical threshold for market shares that would create a presumption of dominance.

- **Merger as Part of a Series of Multiple Acquisitions.** The Agencies may examine an entire series of transactions by a single firm if a number of small mergers and acquisitions that do not raise concern individually would substantially lessen competition in the aggregate.
- **Platform Markets.** The Agencies continue to focus on platform markets, examining competition (i) between platforms, (ii) on a platform or (iii) to displace a platform. The Agencies argue that mergers involving platforms can threaten competition, even when a platform merges with a firm that is neither a direct competitor nor in a traditional vertical relationship with the platform.
- **Competing Buyers.** The Agencies maintain an interest in the buyer's market, noting that a merger between competing buyers may harm sellers. Particularly, the Agencies will analyze the effects on employers of a merger of buyers of labor, including workers, creators, suppliers and other providers.
- **Rebuttal Evidence.** When the legality of a merger is questioned, Agencies consider three common defenses:
    - **Failing Firm Defense.** The failing firm defense is narrowly tailored and must show the probability of business failure and that the merging party is the only available purchaser.
    - **Entry and Repositioning.** The Agencies will continue to consider whether entry of new competitors would be timely, likely and sufficient to counteract a competitive concern. Unlike the 2010 Guidelines, however, there is no longer a specific timeframe within which new entry is considered timely.
    - **Procompetitive Efficiencies.** In addition to showing that efficiencies are merger-specific, verifiable and not anticompetitive, the new Guidelines require the parties to show that efficiencies will prevent a reduction in competition within a short period of time and specify that the efficiencies must occur within the relevant market.
- **Economic and Evidentiary Tools.** Among other changes, the Guidelines broaden the Hypothetical Monopolist Test ("HMT"). The HMT is a method the Agencies often use to define relevant antitrust markets. Specifically, the HMT asks whether eliminating competition among a group of products likely would lead to a worsening of terms for customers. Under the new Guidelines, these terms include non-price terms, likely reflecting the Agencies' focus on digital platform markets that often involve zero-pricing strategies to users, and on labor markets, where lessened competition may affect terms other than wages. The new Guidelines also lower the typical threshold at which a small but significant increase in price would be considered significant to five percent (previously five to ten percent in the 2010 Guidelines).

It is crucial that companies consider potential antitrust issues when contemplating a merger and consult the Guidelines—not only do courts look to the Guidelines when a merger is challenged, but compliance potentially benefits companies by minimizing the risk of scrutiny by the Agencies. Discerning whether a possible merger is consistent with the Guidelines, however, may be a difficult, fact-specific process. Please contact any member of Masuda Funai's Corporate, Finance & Acquisitions group with any questions.

Masuda Funai is a full-service law firm with offices in Chicago, Detroit, Los Angeles, and Schaumburg.