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U.S. ANTITRUST AGENCIES CONSIDER SWEEPING CHANGES TO HORIZONTAL AND VERTICAL MERGER GUIDELINES

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On January 18, 2022, the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") jointly announced a wide-ranging request for public comment aimed at updating the horizontal and vertical merger guidelines. Although agency guidelines do not have the force of law, they explain the analytical framework the agencies use to evaluate transactions, and provide guidance that helps the private bar counsel the business community about which transactions are likely to receive agency attention. The DOJ/FTC request for information ("RFI") only asks questions, but the questions themselves, as well as the statements of agency leadership, signal that the new guidelines will be more pro-enforcement, feature lower thresholds for challenging deals, include more presumptions based on market structure, and address a broader set of competitive harms, including an increased focus on innovation and quality. The new guidelines also are likely to expand discussion of monopsony (buyer power) and labor markets and minimize the extent to which claimed efficiencies are credited during reviews of horizontal and vertical transactions.

Over the last few decades, many courts have cited the guidelines, in part because those guidelines were built upon accepted developments in legal and economic analysis and case law. If the new guidelines stray too far beyond commonly accepted legal and economic theory, courts will be less likely to rely on them and they may not survive the next administration.

How Did We Get Here?

The first U.S. merger guidelines were issued in 1968 and addressed both horizontal mergers and vertical mergers. In antitrust parlance, horizontal transactions involve current and future competitors and vertical transactions involve combinations at different levels of the supply chain, for example,

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a manufacturer acquiring its distributor. The DOJ revised the guidelines in 1982 and 1984. The FTC then joined DOJ in subsequent revisions in 1992, 1997, and 2010.

Although the early guidelines addressed vertical transactions, the clear focus was on deals between competitors. Vertical transactions attracted greater attention in 1984 when the DOJ adopted the "Non-Horizontal Merger Guidelines." The FTC did not join this effort. In the decades that followed, although both the DOJ and the FTC investigated and remedied vertical merger investigations through settlement, court challenges were exceedingly rare. In the modern era, there has been just one fully litigated vertical transaction—the DOJ's 2017 failed challenge to AT&T's acquisition of Time Warner Inc. The FTC's ongoing challenge of Illumina's acquisition of Grail merger marks that agency's first litigation against a vertical transaction since the late 1970s—a case the agency lost.[1]

In the wake of the DOJ's loss in *AT&T/Time Warner*, the agencies adopted the first joint vertical merger guidelines in 2020, albeit along a party-line vote at the FTC that prompted strong dissents.[2] One of the dissenters described the vertical guidelines as "appear[ing] to put a thumb on the scale in favor of vertical mergers."[3] In 2021, with a new Democratic majority, the FTC withdrew its support of the vertical guidelines.[4] So far, the DOJ has not followed suit, but Jonathan Kanter, Assistant Attorney General for Antitrust, has said he shares the FTC's concerns that the guidelines "overstate the potential efficiencies of vertical mergers and fail to identify important relevant theories of harm."[5]

Why Are the DOJ/FTC Updating the Guidelines?

Revising the merger guidelines offers a way for agency leadership to steer enforcement decisions and potentially legal precedent as well. As noted above, the vertical merger guidelines were jointly adopted by both agencies in 2020. The horizontal merger guidelines, by contrast, were last updated in 2010, and before that in 1997 and 1992. Although repealing and updating the vertical guidelines after less than two years raises questions about the staying power of agency pronouncements, it has been almost 12 years since the last update of the horizontal merger guidelines.

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In any event, we are seeing the maxim play out that elections have consequences. It is no secret that the Biden/Harris administration has made increased antitrust enforcement a top priority. In July 2021, President Biden announced an executive order to encourage all components of the federal government to consider competition in their decision making, with particular emphasis on effects on labor and on transportation, agriculture, and financial services sectors. The President also urged the DOJ and the FTC to update their merger guidelines. On January 24, 2022, the President met with the White House Competition Council (whose members include officials from the cabinet and independent agencies) to discuss actions they are taking to boost competition. The readout from the meeting states that "[a]gencies with merger oversight authority have ramped up their efforts to challenge or block mergers that are bad for the American economy and for families' pocketbooks."[6] Those types of actions to set a new course for antitrust enforcement are not unprecedented. The Obama administration repealed the Bush administration's monopolization guidance, and the Trump administration repealed the Obama administration's guidance on merger remedies.

For their part, FTC Chair Lina Khan and AAG Kanter have emphasized that, while periodic reviews of the guidelines are prudent, the current review is especially important. They note the historic levels of deal-making—$5.8 trillion, the highest ever recorded—along with more than double the number of merger filings received on average in any of the past five years. At the same time, the agency leaders have pointed to major changes in technology that have affected how businesses operate and compete. According to FTC Chair Khan, "[f]or us to accurately detect and analyze potentially illegal transactions in the modern economy, ensuring that our merger guidelines reflect these new realities is critical."[7]

When Will New Guidelines Be Released?

Comments on the RFI are due by March 21, 2022. The agencies have said they plan to release a draft of the updated guidelines and solicit additional comments before finalizing. They hope to issue final guidelines this year. For context, past revisions to the guidelines have taken between roughly six months and one year to complete.

How Do the DOJ/FTC Intend to Update the Guidelines?

The agencies plan to review whether the merger guidelines "(1) reflect current learning about competition based on modern market realities, and (2) faithfully track the statutory text, legislative history, and established case law around merger enforcement."[8] Those conceptual questions and the RFI are extensive, spanning 10 pages across 15 questions, each with multiple sub-parts. The questions suggest that we can expect sweeping revisions on nearly every topic in the existing guidelines along with the addition of several new areas. Rather than address every topic, this article focuses on the six key themes.

1. "Purpose and Scope of Merger Review"

The RFI leads off with several broad questions about the merger statute (Clayton Act Section 7), which prohibits transactions that "may be substantially to lessen competition, or to tend to create a monopoly." The DOJ and the FTC question whether the agencies have placed too much emphasis on the first element (*i.e.*, substantially lessening competition) and not enough attention on the "tend[s] to create a monopoly" language. The RFI also asks basic questions about the levels of proof and certainty required to establish a violation. For example: "What effects should be covered by the term 'lessen competition'?" And: "How should the guidelines analyze whether there is a 'trend toward concentra-

tion in the industry,' and what impact should such a trend have on the analysis of an individual transaction?"

Many of the questions in this section (and others) imply that the agencies believe the antitrust laws are broad enough to encompass a significantly broader interpretation of "competitive harm." Yet any revisions the agencies make to evaluate how to measure or to establish proof of anticompetitive effects must (or should) contend with existing case law. FTC Commissioners Phillips and Wilson share this concern, calling out the RFI citations to legal authority that is "nearly or more than half a century old." They observe that "[c]ourts have decided quite a few antitrust cases in the intervening years, merger and non-merger alike, which further elucidate the Sherman, Clayton, and FTC Acts." If the new guidelines do not sufficiently account for this more recent precedent as well, the agencies risk undermining the level of deference that courts assign to statements of enforcement policy. If the agencies significantly overreach in one or more areas, the courts might well act as an important check.

2. "Unique Characteristics of Digital Markets"

Although the Biden administration has instructed the federal agencies to aggressively enforce the antitrust laws across all industry sectors, it is clear that the technology sector is attracting outsized attention. One need look no further than the agencies' press releases announcing the call for public comment. The documents emphasize repeatedly the need to account for "today's modern markets"; to "accurately reflect modern market realities"; to have tools "fit for purposes in the modern economy"; and to account for "developments" and "trends" in the "modern economy." The RFI specifically calls out the "unique characteristics of digital markets," seeking information on how to account for digital markets that might feature zero-price products, multi-sided markets, and data aggregation. For example: "How should the guidelines address prospective competitive harms in rapidly evolving markets?" And: "How should the guidelines approach market definition in zero-price markets, negative-price markets, or markets without explicit prices?"

This disproportionate focus on "modern markets" giving rise to the RFI raises the question whether the current effort to revise the merger guidelines is necessary (or as necessary) for more traditional, "old tech" markets. The antitrust agencies have investigated companies in these "old tech" markets for many years, often resulting in merging parties agreeing to settlements or instead abandoning transactions in the face of a government investigation, threatened court challenge, or agency victory at trial. Do the antitrust agencies need to significantly move the goal posts with new guidelines, or—consistent with the Biden/Harris administration's policy to increase enforcement—can they simply review at-issue transactions (including prior consummated deals) in these sectors under the existing agency guidance? As for the "high tech" space, until recently officials at both the DOJ and FTC spoke eloquently and consistently about how the existing antitrust laws were more than adequate to address changing market dynamics prompted by innovation and technology improvements. Over the past few years, however, agency officials (and many members of Congress) have said that the current antitrust framework is ill-equipped to address the potential harms to consumers in the technology sector.

3. "Use of Market Definition in Analyzing Competitive Effects"

Historically, the guidelines (and courts) provided a methodology that set forth how the agencies

define relevant product and geographic markets in which harm could occur. Over time, the guidelines deemphasized technical market definition in favor of an approach that considered whether there are anticompetitive effects, regardless of the technical market definition. Courts nevertheless require the agencies to define markets in merger litigation as part of their prima facie case, and the agencies have lost a number of merger challenges by defining implausibly narrow markets.

Among other questions, the RFI asks whether the agencies should abandon formal market definition, whether market definition misses "broader concerns about other aspects of competition" (*e.g.*, loss of innovation, changes to product variety or quality, creation of entry barriers), and how market definition could better account for non-price competition.

4. "Presumptions that Certain Transactions Are Anticompetitive"

The existing horizontal merger guidelines include rebuttable presumptions based on market concentration and changes in market concentration that serve as screens to help the agencies determine when transactions are likely to require scrutiny. The RFI asks whether the guidelines should adjust the concentration thresholds to "improve the efficiency and effectiveness of enforcement" or whether other quantitative or qualitative factors should be used. Examples posited include "the number of significant competitors" or whether a transaction involves a leading, maverick, closest, or nascent competitor. The RFI also questions whether those metrics should be narrowly-tailored to the industry (*e.g.*, technology), market (*e.g.*, labor) or transaction (*e.g.*, horizontal or vertical) involved.

There is a potential inconsistency in the RFI's treatment of market definition and presumptions based on market structure. The RFI suggests that the next guidelines may further deemphasize or even abandon market definition, while increasing the prominence of structural presumptions. However, structural presumptions based on market share, concentration, or the number of competitors necessarily involve a judgment about which sales or competitors count—in other words, who is in the market. Without at least some effort to define a market in a principled, consistent way, it is not clear how the agencies will apply those presumptions.

5. "Threats to Potential and Nascent Competition"

The DOJ and the FTC leadership have prioritized enforcement involving acquisitions of potential or nascent competitors by large competitors, particularly in the technology sector. Indeed, the agencies have challenged a number of transactions involving potential competition or nascent competitors in recent years including STERIS' acquisition of Synergy Health, Illumina's acquisition of PacBio, Visa's acquisition of Plaid, Sabre's acquisition of Farelogix, and the FTC's post-consummation challenge to Facebook's acquisition of Instagram, among others. Despite the focus on this issue at both agencies, their track record is mixed. Although there have been instances in which the threat of litigation prompted merging parties to abandon the transaction, in other cases the agencies lost at trial, *e.g.*, *STERIS/Synergy Health*. Defeats in court create lasting precedent that the agencies will have to overcome in the future. By revising the merger guidelines, the agencies are likely seeking to shape how courts evaluate these nascent competition cases.

The RFI seeks guidance about what standards the agencies ought to apply to potential and nascent competition cases, how the agencies should quantify the importance of a potential competitor, and how the agencies should evaluate the probability that a potential or small competitor will enter, grow,

or succeed. For example: "What degree of probability should serve as sufficient, especially in cases where technology and products evolve rapidly or unpredictably?" And: "Should the sufficient probability vary depending on the degree of market concentration?"

6. "Impact of Monopsony Power, Including in Labor Markets"

A monopsony is the inverse of monopoly. A monopolist is a single seller of goods or services, whereas a monopsonist is a single buyer of goods or services. Monopsony has long been a consideration in antitrust merger reviews, but historically it has been more of a theoretical than practical concern for enforcers. Analytically, those transactions are evaluated in much the same way as mergers between competing sellers, as described in the existing horizontal merger guidelines. A critical difference is that mergers among competing buyers do not necessarily result in direct anticompetitive effects for customers or consumers. Indeed, many merging parties tout the same reductions in costs from suppliers as an efficiency that will ultimately benefit consumers. Due in part to that complexity, over the past few decades, antitrust authorities have focused their resources on transactions that have a more direct nexus to potentially anticompetitive downstream effects, such as higher prices, on customers.

That approach changed with the Biden administration. In November 2021, the DOJ filed a complaint in federal court seeking to block Penguin Random House LLC's $2.175 billion acquisition of Simon & Schuster, two of the so-called "Big Five" book publishing companies.[9] The DOJ's complaint claims that the transaction will harm not downstream consumers, but instead harm authors who seek to have their books published and how much those authors are paid for their works. The DOJ alleges that the transaction should be blocked because it will significantly reduce bidding competition for authors' works.

The RFI asks how, if at all, the guidelines should differ in their treatment of monopoly and monopsony power; how the guidelines should treat a transaction that leads to monopsony power "but does not substantially lessen competition in an output market"; and how to analyze different types of potential effects in upstream and labor markets. With limited exception, the questions focus on labor markets. The current merger guidelines already highlight the need for agencies to consider monopsony power when analyzing a transaction, but there is no direct mention of monopsony power and its effects on labor markets. The notion that transactions can significantly harm labor markets is a growing focus at both agencies and it was highlighted in President Biden's executive order. Regardless of what language ends up in the new guidelines, this subject is already a live issue in deals. For example, as part of its effort to "streamline" the Second Request process, the FTC announced in September 2021 that it may consider "how a proposed merger will affect labor markets."[10] The RFI's focus on this subject suggests that potential effects on labor markets will become a more mainstream part of agency analysis.

What Is the Significance of the DOJ/FTC Announcement for My Deal?

In the near term, the existing horizontal merger guidelines remain in place and DOJ/FTC staff will continue to rely on that guidance to analyze deals until new guidelines are released. And yes, it is not a matter of whether, but when, updated guidelines are released.[11] In the interim, in addition to traditional theories of merger harms, merging parties should expect the DOJ and the FTC to investigate labor markets, monopsony, innovation, nascent competition, and other hot topics. However, the

absence of clear guidance about how staff should evaluate those issues may lead, in some cases, to lengthier, more opaque investigations.

Longer term, although the next version of the guidelines is likely to tip further in favor of the enforcers than prior versions, new guidelines should at the very least provide some transparency to merging parties about what new analytical framework the agencies will apply to deals. Regardless of what guidelines are ultimately released, the agencies are already focusing on issues such as digital markets, serial acquisitions, nascent or potential competition, monopsony, and labor markets. More transparency about how the agencies analyze those issues should help merging parties evaluate whether their transaction is likely to face an extended investigation. In addition, in the few cases that are litigated every year, new guidelines should provide some guidance to help hold the agencies accountable for proving the theories of harm and evidentiary standards they set for themselves.

By their nature, agency-issued merger guidelines tend to support the agency's enforcement agenda; they are not a neutral statement of the law. However, it is also fair to say that the 2010 horizontal merger guidelines have been cited as persuasive by a number of courts because those guidelines, for the most part, were the product of a consensus approach, built upon decades of economic learning, court decisions, and agency practice.[12] If the new guidelines stray too far from that type of consensus approach and commonly accepted theories of economics and law, merging parties will be more likely to challenge agency decisions in court, and courts will be less likely to embrace the guidelines than in the past. Depending on the specific case and issues, a pro-enforcement agency agenda could meet resistance as it encounters defenses by merging parties based on practical business facts, inconsistent precedents in the courts, political opposition from legislators responding to business constituents, limited agency resources, and the established views among agency lawyers and economists.

Some commentators fear that the agencies are likely to draft new guidelines to support the administration's desire for more aggressive enforcement on a wider range of issues than the U.S. has seen in 40 years. Although the agencies can of course change their guidelines to match policy objectives, any overreach—to the extent it occurs as some commentators fear—is likely to be reined in by the courts. In addition, if the new guidelines stray too far from a consensus approach, recent history suggests that they will have a short shelf life and not survive the next change in administration.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

ENDNOTES:

[1]*Fruehauf Corp. v. F. T. C.*, 603 F.2d 345, 1979-2 Trade Cas. (CCH) ¶ 62733 (2d Cir. 1979) (holding that Commission failed to show probable competitive effects).

[2]*See* Craig Waldman and Michael A. Gleason, A Dealmaker's Guide to the Final DOJ/FTC Vertical Merger Guidelines, 24 The M&A Lawyer 9 (July/Aug. 2020), https://www.jonesday.com/-/media/files/publications/2020/08/a-dealmakers-guide-to-the-final-ftc-doj-guidelines/a-dealmakers-guide-to-the-final-dojftc-vertical-merger-guidelines-aug-2020.pdf.

[3]Dissenting Statement of Commissioner Slaughter, In re FTC-DOJ Vertical Merger Guidelines, Commission File No. P810034 (June 30, 2020), *available at* https://www.ftc.gov/system/files/documents/public_statements/1577499/vmgslaughterdissent.pdf.

[4]*See* Ryan C. Thomas, Aimee E. DeFilippo, &

Lauren Miller Forbes, What a Difference a Year Makes: FTC Withdraws Vertical Merger Guidelines, 25 The M&A Lawyer 10 (Oct. 2021), https://www.jonesday.com/-/media/files/publications/2021/11/what-a-difference-a-year-makes-ftc-withdraws-vertical-merger-guidelines/files/what-a-difference-a-year-makes-ftc-withdraws-verti/fileattachment/what-a-difference-a-year-makes-ftc-withdraws-vert.pdf.

[5]"Assistant Attorney General Jonathan Kanter Delivers Remarks on Modernizing Merger Guidelines," (Jan. 2022), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-modernizing-merger-guidelines.

[6]White House, Readout of the Second Meeting of the White House Competition Council (Jan. 24, 2022), *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/24/readout-of-the-second-meeting-of-the-white-house-competition-council/.

[7]Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement, Docket No. FTC No. FTC-2022-003 (Jan. 18, 2022), *available at* https://www.ftc.gov/system/files/documents/public_statements/1599783/statement_of_chair_lina_m_khan_regarding_the_request_for_information_on_merger_enforcement_final.pdf.

[8]U.S. Dept. of Justice and Fed. Trade Comm'n., "Request for Information on Merger Enforcement," at 1 (Jan. 2022), *available at* https://www.justice.gov/opa/press-release/file/1463566/download.

[9]Ryan C. Thomas, Tom York, Buyers Beware: DOJ Challenge to Book Publishers Merger Highlights Monopsony Concerns in M&A, 25 The M&A Lawyer 10 (Dec. 2021).

[10]Holly Vedova, FTC Bureau of Competition, Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave (Sept. 28, 2021), *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/making-second-request-process-both-more-streamlined.

[11]For the FTC, which currently has two Democratic and two Republican commissioners, this statement assumes that Congress will vote to approve the Biden administration's nomination of a fifth, Democratic commissioner.

[12]This should not be read to suggest that the merger guidelines are without fault—there are indeed a number of sections that merit improvement. And, of course, as economic learning and business practices evolve, the guidelines may become outdated.

IMPLICATIONS OF THE COURT OF CHANCERY'S DECISION THAT DE-SPAC MERGERS WILL BE REVIEWED UNDER THE ENTIRE FAIRNESS STANDARD: *AMO v. MULTIPLAN*

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Amo v. MultiPlan[1] is the first Delaware decision to address fiduciary duties and related principles in the context of a SPAC (special purpose acquisition company). The Court of Chancery described its analysis as an application of "well-worn fiduciary principles" to the "novel issues presented" by SPACs. Importantly, as many of the issues raised in the opinion, and many of the rulings by the court, relate to conflicts that are inherent in the SPAC structure (rather than facts and circumstances specific to the transaction at issue in *MultiPlan*), the decision may have broad application to chal-