NEW YORK CITY BAR

REPORT ON DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION DRAFT MERGER GUIDELINES BY THE ANTITRUST & TRADE REGULATION COMMITTEE

DOJ & FTC Draft Merger Guidelines

The Merger Guidelines explain how the Department of Justice and the Federal Trade Commission (the "Agencies") identify potentially illegal mergers. They are designed to help the public, business community, practitioners, and courts understand the factors and frameworks the Agencies consider when investigating mergers.

THESE DRAFT GUIDELINES ARE DISAPPROVED

The New York City Bar Association ("City Bar") does not support the Department of Justice's and Federal Trade Commission's draft Merger Guidelines ("Draft Guidelines"),[1] which set forth 13 guidelines to replace the 2010 Horizontal Merger Guidelines and 2020 Vertical Merger Guidelines. We suggest that better guidance than the Draft Guidelines would be provided by implementing a procedure of issuing closing statements in all merger investigations.

I. THE DRAFT GUIDELINES FAIL TO PROVIDE DESIRED BENEFITS

Guidelines may provide a framework where guiding principles and general policies are outlined to help businesses and their counsel predict whether a transaction will be considered by the Agencies to be a violation of Section 7 of the Clayton Act or otherwise a violation of the antitrust laws. Guidelines can provide a number of benefits, such as greater transparency, predictability, and consistency to the antitrust community (legal practitioners, antitrust economists, scholars, businesses, individuals, and journalists, among others) as to how the Agencies will generally conduct merger investigations and make enforcement decisions. This involves: identifying the central questions that agency staff will ask during a review of a transaction; helping businesses and their legal counsel understand the kinds of evidence that will be the focus of agency attention; and explaining how that evidence will be analyzed. An equally important objective of enforcement guidelines is to ensure that the analytical framework adopted promotes sound antitrust

[1] Press Release, FTC and DOJ Seek Comment on Draft Merger Guidelines (July 19, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines ; *see also* FTC-DOJ Merger Guidelines Draft for Public Comment) (July 19, 2023), https://www.ftc.gov/legal-library/browse/ftc-doj-merger-guidelines-draft-public-comment ; Fact Sheet – 2023 Draft Merger Guidelines for Public Comment, https://www.ftc.gov/system/files/ftc_gov/pdf/Merger-Guidelines-Fact-Sheet-07-17-2023.pdf .

policy. This can be done by connecting the guidelines to economics and other empirical studies.[2] Guidelines have been effective in many antitrust contexts, including, since at least 1982, the merger context.

However, the deviations of the Draft Guidelines from the several Merger Guidelines since 1982, without significant explication of the reasons and need for the changes, or how the changes address the need,[3] do not promote transparency, predictability, and consistency. Moreover, while the Draft Guidelines cite Supreme Court decisions, the paucity of citation to and discussion of more recent judicial precedent raises doubt as to both the soundness of the antitrust policy that appears to underlie the Draft Guidelines,[4] and the likelihood that enforcement actions following applications of the Draft Guidelines will be successful. Similarly, the diminished role of economics relative to earlier Merger Guidelines, overlooking the substantial economics scholarship in recent decades, raises doubt as to the soundness of the Draft Guidelines. The questions that the Draft Guidelines identify as those that staff will ask are ones with primarily subjective answers. The types of evidence that would be given weight, and in what way, are unclear.

The Draft Guidelines do not help businesses and their counsel predict whether a transaction will be considered by the Agencies to be a violation of Section 7 of the Clayton Act or otherwise a violation of the antitrust laws.

A. The Draft Guidelines' View that Market Structure Determines Competitive Conduct is Based on an Approach to Market Definition that Provides Little Guidance

The Draft Guidelines present structural standards in the form of market shares and market concentration for determining when a transaction may be subject to antitrust challenge. In substantial part, they reflect a view that market structure and concentration affect competitive conduct. Necessarily, market structure builds on the concept of relevant market definition. Yet

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[2] See, e.g., the ABA Section of Antitrust Law's Presidential Transition Report: The State of Antitrust Enforcement, January, 2017, at 5, 7-9, 16, 39; The Continuing Pursuit of Better Practices: Federal Trade Commission at 100: Into Our 2nd Century, The Continuing Pursuit of Better Practices, 2009, GWU Legal Studies Research Paper No. 596, GWU Law School Public Law Research Paper No. 596, at xvii, 128-32, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1967708 ; Daniel Francis, NYU School of Law, Revisiting the Merger Guidelines: Protecting an Enforcement Asset, CPI Antitrust Chronicle (Nov. 2022), at 3-7, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4273253 ; Hillary Greene, University of Connecticut School of Law, Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse, William & Mary Law Review, Vol. 48, No. 3, 2006, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1072982 ; Hillary Greene, University of Connecticut School of Law, Agency Character and Character of Agency Guidelines: An Historical and Institutional Perspective, Antitrust Law Journal, Vol. 72, p. 1039, 2005; Posted: 6 May 2008 Last revised: 15 Aug 2011, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1128263 ; DOJ/FTC Draft 2020 Vertical Merger Guidelines Comment of the Global Antitrust Institute, Antonin Scalia Law School, George Mason University, at 2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3534352 .

[3] See, e.g., Draft Guideline 1, which reverts to the HHI standards of the 1982 Merger Guidelines without citing any judicial precedent or presenting any reasoning or need for this reversion.

[4] See, e.g., the recent comment by the court casting doubt on a party's reliance on precedents from the 1960s without discussion of more recent developments, in *Whalen v. Albertsons Cos. Inc.*, 3:23-cv-00459 (Chhabria, J.) (N.D. Ca., July 27, 2023).

market definition under the Draft Guidelines, in contrast to earlier Merger Guidelines, is a qualitative determination, individualized, fact-specific, and sometimes nebulous, likely to yield a multitude of different results depending on factors that cannot all be foreseen. This approach does not lend itself to usable, generalizable guidelines.

The Draft Guidelines provide that mergers should not (1) significantly increase market concentration,[5] (2) increase the risk of tacit coordination,[6] (3) eliminate a potential entrant in a concentrated market,[7] or (4) vertically foreclose a market share of 50%.[8] Combinations that create a market share of 30% will be scrutinized.[9] Draft Guideline 7 provides that a 30% market share threshold would be used in assessing dominant position and entrenchment. The Draft Guidelines rely throughout on the Herfindahl-Hirschman Index – which is calculated from market shares. For instance, under the Draft Guidelines a steadily increasing HHI from 1000 toward 1800 can show a trend toward market concentration.[10] But without defining a relevant market and assessing the shares of market participants both pre- and post-transaction, HHI and these other benchmarks cannot be calculated. For that reason, it is imperative that the Draft Guidelines provide clear and generalizable statements on how the Agencies will define relevant markets, consistent with existing case law.

The City Bar applauds the Draft Guidelines' descriptions of the multitude of ways in which a relevant market can be defined for purposes of merger analysis, recognizing the reality that defining relevant markets can, depending on the facts presented, in the end require a multitude of specific factual inputs and no one size fits all. What is missing, however, is any overarching general principle that can, at least as a prima facie matter, be used as a starting point. The Draft Guidelines thus fail to provide a level of consistency and predictability, which should be a basic function of guidelines.

Helpfully, the Draft Guidelines continue to support the familiar Brown Shoe factors: (1) industry or public recognition of a market as a separate economic entity; (2) the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, specialized vendors; and (3) reasonable interchangeability of use or cross-elasticity of demand between a product and its substitutes. But they then depart from the "practical indicia" with which practitioners and courts have the most familiarity and propose a host of other criteria the Agencies may (or may not) consider in defining narrower or broader markets than one would define by relying on the Brown Shoe factors or hypothetical monopolist (SSNIP) test. For example, the Draft Guidelines: (1) revive the concept of defining submarkets within broader relevant markets ;[11] (2) assert that there can be multiple overlapping markets, e.g., for individual types of goods within a broader market;[12] (3) allow for narrower relevant markets "even if

[5] Draft Guideline 1.
[6] Draft Guideline 3.
[7] Draft Guideline 4.
[8] Draft Guideline 6.
[9] Draft Guideline 1.
[10] Draft Guideline 8.
[11] Draft Guideline at 29-30.
[12] Draft Guideline at 29 n.86.

competitive constraints from significant substitutes are outside the group;"[13] (4) introduce wages and benefits as appropriate factors to consider;[14] (5) specify that potential entrants matter, both actual and perceived;[15] (6) arguably diminish the importance of the SSNIP test as merely one factor among many;[16] (7) counsel away from requiring that a relevant market be defined with precise metes and bounds; (8) cast doubt on what substitutes are most relevant by noting that some substitutes may be closer, and others more distant, requiring the exercise of some economics judgment and line drawing considering product features such as size, quality, distances, customer segment, and prices; (9) suggesting that there can be "cluster markets" of non-substitutable products if they are generally sold together;[17] and (10) indicating that the Agencies may not believe it is even possible to define one true relevant market in connection with a given set of products (e.g., "There can be many places to draw that line and properly define a relevant market."[18]).

Due to this unfocused approach, applying the Draft Guidelines to define a relevant market would require exhaustive evidence gathering. The sources of pertinent evidence are multitudinous and can be laborious to obtain. Per the Draft Guidelines, they include regular course of business documents and testimony from the merging parties; and plans to coordinate with other firms, raise prices, reduce output, reduce product quality or variety, lower wages, cut benefits, exit a market, cancel plans to enter a market, withdraw products or delay their introduction, or curtail R & D.[19] Further evidence may be obtained from direct and indirect customers, workers, suppliers, distributors, consultants, and industry analysts.[20] Moreover, the effects of consummated mergers may be probative.[21] In addition, the Agencies will take econometric analysis and economic modeling into account, as well as the financial terms of the deal.[22]

Appendix 2 of the Draft Guidelines, in turn, sets forth many factors to consider in evaluating competition between firms, including several types of documents internal to the parties, economic recapture rates, and critical loss analysis.

However relevant, or irrelevant, the foregoing may be to market definition, the detailed nature of the inquiries inherently does not lend itself to generalized guidelines that provide useful direction. Vague standards create uncertainty that could deter potentially procompetitive venture capital investment and economic growth. And, at minimum, the Draft Guidelines seem to require parties to (and opponents of) a transaction to expend significant resources collecting and analyzing myriad data, documents, and information, because no interested entity will know which of the previously discussed factors the Agencies will view as determinative in deciding the appropriate market definition in a given case/transaction.

[13] Draft Guideline at 29.
[14] Draft Guideline at 8.
[15] Draft Guideline 4.
[16] Draft Guideline at 30, Part D.
[17] Draft Guidelines App. 3.B.
[18] Draft Guidelines at 29.
[19] Draft Guidelines App. 1 at 1.
[20] Id.
[21] Id.
[22] Draft Guidelines App. 1 at 2.

B. The Draft Guidelines Take Insufficient Notice of Recent Judicial Precedent

The Draft Guidelines apparently reflect the Agencies' views about what the law should be, as revealed in their exercises of prosecutorial discretion over the past two and one-half year endeavoring to make new case law or revive precedents that courts have not recently applied. Because the Draft Guidelines do not always reflect the current state of the law, they will be difficult to use as a guide when parties are contemplating a merger. This in turn could deter procompetitive or competitively neutral transactions.

For example, in at least one instance, the Draft Guidelines rely on judicial statements that are not law. Guideline 4 asserts that "[t]he antitrust laws reflect a preference for internal growth over acquisition." The only citation for this proposition is to a concurring opinion by one Supreme Court Justice.[23] This is not the law, and an application of this approach to enforcement under Section 7 of the Clayton Act could be anti-competitive. M&A activity is often procompetitive and part of a virtuous cycle that supports innovation and growth in the economy.

In many industries, entrepreneurs form new companies, and angel investors provide support at the beginning. As their business grows, the new enterprises may receive one or two rounds of equity investment from venture capitalists ("VCs"). To justify their risk-taking and obtain a return on their highly speculative investments the VCs need an exit. Further, as the new company grows it may need more expertise, technology, and additional capital. This can entail a partial or complete sale of stock in the company to another entity, perhaps a mid-sized company in its sector or a related sector. If the company continues to grow, it may find that it needs national or global distribution, leading to sale to a multi-national.

In the City Bar's view, transactions should be evaluated on their individual merits. If an acquisition would eliminate substantial competition or tend to create a monopoly in a relevant market, then it may need to be enjoined. But many acquisitions are part of a procompetitive economic growth process. There is no general proposition in antitrust law that favors internal growth to the exclusion of acquisition.

II. CLOSING STATEMENTS INSTEAD OF GUIDELINES

As noted, the Draft Guidelines appear to be aspirational in nature; they do not always reflect current law and results.[24] They reflect standards that the Agencies may wish as a matter of policy to advance, and aspire to develop as case (and perhaps statutory) law, in enforcing Section 7. Guidelines that do not reflect actual results or binding law are very difficult to apply and risk deterring potentially beneficial transactions or imposing unnecessary process and litigation costs and delays. This is an inappropriate and ineffective use of guidelines.

Given the Draft Guidelines' deficiencies, the City Bar suggests that the Draft Guidelines not be adopted. Instead, whether or not the Draft Guidelines are issued, the City Bar suggests that,

[23] Draft Guidelines n.34.
[24] See, e.g, n.23 and accompanying text above.

for transactions that the Agencies investigate, they publish closing statements setting forth what was done, why, and the outcome.

Transparent case closing statements could help the parties and the antitrust bar to trace the law as it is applied and developed, providing insight into the law and policy as actually applied. Closing statements would reflect why a case was brought or why an investigation was closed without a challenge, and the result of the agency's action whether that be abandonment of the deal, settlement, or court decision. Parties could be better guided in this manner, by the law as it develops, when they are deciding whether to enter into a deal, and, if so, how to structure it to be in compliance with law. This transparency could help the antitrust bar and businesses to understand and anticipate how the law is developing, and could assist both the Agencies and the parties to avoid pursuing transactions where the law or arguments for the extension of the law will not support their position.

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