U.S. Antitrust Policy

Cite
Department of Justice/Federal Trade Commission, Merger Guidelines

Recommended Distribution
Corporate Development, Policy, Legal, Government Relations

Website
https://www.ftc.gov/system/files/ftc_gov/pdf/P234000-NEW-MERGER-GUIDELINES.pdf

Impact Assessment

- U.S. merger policy now formally reverses longstanding statements that mergers are likely to benefit consumer welfare and increase economic efficiency.
- There is instead a pronounced presumption that organic growth is preferable to M&A, with mergers now facing numerous new hurdles based on direct and indirect effects as well as those deemed to lead to concentration based on new DOJ/FTC analytics.
- Tech-platform companies face particularly significant challenges ahead of horizontal or vertical mergers or even taking a minority position.
- DOJ review of larger bank mergers is likely to be a major obstacle to consolidation unless the banking agencies' pending merger policy takes a more forgiving stand.
- Banks face additional hurdles engaging in fintech "partnerships" and cross-shareholding with nonbanks below Fed "control" thresholds. It will also be more challenging for tech-platform companies and PEs to circumvent BHC requirements and acquire strategic banking positions.

Overview

Building on a request for comment[1] and a formal draft,[2] the Department of Justice (DOJ) and Federal Trade Commission (FTC) have finalized specific revisions to U.S. merger policy that significantly redesign the manner in which M&A transactions will be considered. With this final, formal policy, M&A review may be more predictable, but also still more difficult for mergers and even minority holdings. A range of new analytics will need to be considered to assess transaction feasibility including new factors such as labor-market and employee implications, information power, network effects, and second or even third-order effects on rival firms. These revisions are challenges likely to be particularly acute

[1] See **MERGER10**, *Financial Services Management*, December 21, 2021.

[2] See **MERGER12**, *Financial Services Management*, July 24, 2023.

©2023. Federal Financial Analytics, Inc.

in U.S. financial services where government agencies believe there is undue concentration in banking, payment, private-equity, and other sectors.

Impact

The new approach tracks much of what President Biden laid out in his 2021 executive order on U.S. competition policy[3] and actions since then by the DOJ and FTC. It thus overrides key tenets of the 2010 antitrust standards which generally placed the burden of proof on entities opposing mergers based on the view that these transactions generally improved market efficiency and enhanced innovation. The new policy would – and indeed the agencies already are – alter the merger-approval presumption to favor protests raised either by competing entities or by the results of DOJ or FTC staff assessments that would now also consider many factors – e.g., worker impact – overlooked in previous reviews. The agencies believe that this more sweeping approach addresses a wider – albeit still not necessarily always complete – range of potential M&A harm, thus providing not only a modern framework, but also a more clear and certain one for transaction participants.

That said, the new guidelines are no longer as prescriptive as the proposal, with the agencies reserving the flexibility to address individual transactions in ways that may appear at odds with the guidelines. As agency staff have noted, the economic analysis undermining mergers is uncertain due to the challenges posed by different models and underlying assumptions. Thus, as discussed below, the guidelines are just that – a guide, but not a rule or promise.

A significant change from the proposal is the elimination of specific treatment for vertical mergers. This is based on the view that the harms now identified may occur regardless of a merger's structure, with structural labels creating artificial boundaries that would have undermined the comprehensive nature of the new approach and are ill-designed for modern mergers that can be simultaneously horizontal and vertical.

A fundamental premise of the new policy is that firms seek to maximize their own profit and valuation rather than that of any individual business unit. Thus, many of the defenses – e.g., recognition of reputational risk – against assertions that a merger will not make use of market power will be disregarded if staff find the firm has a record of, the ability to, and/or incentives that encourage anti-competitive behavior. DOJ and FTC decisions may appear or even be subjective because much will depend on how the agencies think a firm's incentives are likely to lead it to behave. It may also be difficult to judge when a firm is increasing likely concentration simply by understanding the market in which it plans to operate because knowing how a competitor sets prices or otherwise behaves could be deemed "coordination" which leads to disapproval. Workers' rights are also a new, high-priority concern, with transactions likely to employ people in the same area or with certain expertise subject to disapproval on grounds that reduced competition could adversely affect the ability of employees to bargain for wages, benefits, working conditions, and other key concerns.

[3] See *Client Report* **MERGER6**, July 9, 2021.

©2023. Federal Financial Analytics, Inc.

As discussed below, these new guidelines focus in several areas on technology platform companies and intermediaries. However, the criteria applied to them apply to all firms, and thus directly affect the financial-services sector. For example, the new policy will scrutinize transactions that do not result in a controlling interest, judging this not only by traditional measures of minority investments, but also by the potential for direct or indirect control.

In addition to these standards, bank mergers come under DOJ policy enunciated by way of a June 2023 speech by Assistant Attorney General Kanter which anticipated the new DOJ/FTC over-arching guidelines. However, Mr. Kanter also indicated that "broader" questions remain under the purview of the banking agencies. Despite much discussion about the need to update merger policy in areas such as financial stability and resolvability, the draft merger policy outlined in a 2022 request for views from the FDIC remains the only expression of banking-agency policy.

In its 2020 standards defining control and thus when FRB approval is required,[4] the Fed made it significantly easier for banks to take positions in other financial companies or even commercial ventures without triggering the need for prior approval. Conversely, nonbank financial companies and even commercial entities are able to take small positions, enter into "partnerships," or otherwise engage with banks without triggering FRB review that might require BHC status. Now, even transactions that escape Fed notice could be reviewed before or after acquisition by the DOJ or FTC, creating both an additional impediment to transaction consummation as well as post-acquisition business risk.

It will also be considerably more difficult for nonbanks and especially tech platforms to acquire small stakes in banks in ways that further blur the barriers between banking and commerce in these companies. It is also likely that PE efforts to acquire direct or indirect stakes in failing banks will not only face continuing banking-agency obstacles, but also significant challenges from the DOJ.

What's Next

This policy was released on December 18. It is immediately effective.

Analysis

These guidelines are not mutually exclusive nor do they preclude the agencies from objecting to transactions on other grounds, with each transaction assessed based on applicable facts and circumstances such as the relevant industry's structure. Nothing addresses possible remedies. The guidelines stipulate that:

[4] See **TAKEOVER10**, *Financial Services Management*, February 14, 2020.

© 2023 Federal Financial Analytics, Inc. All rights reserved.

- Mergers raise a presumption of illegality when they significantly increase concentration in a highly concentrated market. Market shares are considered under an analytical framework detailed in the guidelines based generally on whether the HHI in a market exceeds 1800 and the share increase is 100 or more. Market shares greater than thirty percent along with an HHI jump over 100 are also problematic, but the final guidelines no longer make these a hard ceiling.
- Mergers can violate the law when they eliminate substantial competition between firms regardless of whether transaction parties now engage in different businesses. Qualitative factors such as shared strategic deliberations or changes to the likelihood of customer substitution are used here.
- Mergers can violate the law when they increase the risk of coordination. The agencies will infer, subject to rebuttable evidence, that a merger allowing coordination among remaining firms may substantially lessen competition. Coordination may occur in prices, geographies, wages, customers, or other attributes. Coordination may also occur regardless of the absence of collusion. Where a market is not highly concentrated, the agencies investigate whether facts suggest a greater risk of coordination than market structure alone would indicate. Long-term structural barriers to coordination are said to have faded in the face of technological advances, making the agencies particularly wary of coordination risk.
- Mergers can violate the law when they eliminate a new entrant or the potential of a new entrant in a concentrated market without regard to whether the new entrant has in fact entered the acquirer's market prior to the merger attempt. In contrast, organic growth into new markets is found generally to increase competition, but plans to enter a market organically in which a firm subsequently seeks to acquire or stifle a new entrant would suggest the likelihood of a monopolistic result. Mergers of two potential entrants are also problematic.
- Mergers can violate the law when they create a firm that may limit access to products or services or competitively-sensitive information regardless of whether this involves a traditional vertical relationship such as that of a producer and supplier or whether a particular product or service is being used by the rival. The guidelines also detail the four factors used to ascertain this, discounting counter-assertions (e.g., reputational harm) in the absence of empirical or verifiable assertions. Mergers that give the resulting firm visibility into remaining rivals are also problematic.
- Mergers can violate the law when they entrench or extend a dominant position leading to durable market power even were a merger to provide initial benefits to some market participants (e.g., consumers). The guidelines also lay out how the agencies will determine the potential for entrenched power (e.g., via network effects, acquisition of a nascent competitor).
- When an industry undergoes a trend toward consolidation, the agencies consider whether a transaction increases the risk a merger may substantially lessen competition or tend to create a monopoly. Trends will be assessed horizontally and vertically.
- When a merger is part of a series of multiple acquisitions, the agencies may examine the whole series. This is an effort to suppress private-equity

©2023. Federal Financial Analytics, Inc.

"roll-ups," but could apply to banks or other financial companies conducting repeated mergers

- When a merger involves a multi-sided platform, the agencies examine competition between platforms, on a platform, or that which might displace a platform. Multi-sided platforms are found to have characteristics that may exacerbate competition problems based on the multi-sided platform's distinctive characteristics.
- When a merger involves competing buyers, the agencies examine whether it may substantially lessen competition for workers, creators, suppliers, or other providers.
- When an acquisition involves partial ownership or minority interests, the agencies examine its impact on competition. This is particularly apposite for big-tech platform companies, giving the agencies additional flexibility to go beyond the guidelines described above to tackle network effects and potential conflicts of interest that heighten market power
- When an acquisition involves partial ownership or minority interests, the agencies examine its impact on competition due to acquired rights or other powers that undermine competition regardless of whether the position results from cross- or common-ownership.

The guidelines also detail the types of rebuttal and defense evidence the agencies will find credible, noting for example how antitrust considerations will proceed for failing companies. Notably, the consequences of failure will not necessarily outweigh the agencies' antitrust concerns.

Federal Financial Analytics, Inc.
2101 L Street, N.W., Suite 300, Washington, D.C. 20037
Phone: (202) 589-0880
E-mail: info@fedfin.com Website: www.fedfin.com

© 2023 Federal Financial Analytics, Inc. All rights reserved.