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DOJ and FTC Will Review and May Update Merger Guidelines

- In response to President Biden's Executive Order on "Promoting Competition in the American Economy," the DOJ and FTC announced that the agencies will review their jointly-issued Horizontal and Vertical Merger Guidelines.
- The two sets of guidelines are intended to explain the agencies' analytical approach to mergers and are relied on by dealmakers and their advisors, and frequently cited by courts.
- While the potential consequences of any changes will not be known until revised guidelines are published, parties contemplating M&A transactions should be mindful of the evolving antitrust enforcement landscape when evaluating and structuring deals and when drafting deal documents.
- To the extent the agencies adopt a more aggressive stance in revised merger guidelines, there may be an increased number of merger challenges. And, while they would not be binding on courts, the revised guidelines could influence court decisions in particular cases and affect the development of merger law more generally.

Today, President Biden signed a wide-ranging Executive Order on "Promoting Competition in the American Economy" which, among other things, encourages "the Attorney General and the Chair of the FTC . . . to review the horizontal and vertical merger guidelines and consider whether to revise those guidelines" in order "to address the consolidation of industry in many markets across the economy."

In response, the Acting Assistant Attorney General for the Antitrust Division of the Department of Justice (DOJ) and the Chair of the Federal Trade Commission (FTC) issued a [statement](#) announcing that the agencies will undertake a review of their jointly-issued merger guidelines "with the goal of updating them to reflect a rigorous analytical approach consistent with applicable law." The statement says that: "We must ensure that the merger guidelines reflect current economic realities and empirical learning and that they guide enforcers to review mergers with the skepticism the law demands. The current guidelines deserve a hard look to determine whether they are overly permissive."

The current [Horizontal Merger Guidelines](#) (HMG) were issued jointly by the DOJ and FTC in August 2010 with the intended purpose of "assist[ing] the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies' enforcement decisions." As the issuing agencies anticipated, the HMG have been cited repeatedly by courts in adjudicating lawsuits challenging mergers. Indeed, the HMG state that they "may . . . assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws in the horizontal merger context." The HMG are based on decades of economic learning and agency practice with respect to the analysis of horizontal mergers. The 2010 HMG replaced an earlier set of guidelines adopted by the agencies in [1992](#) and updated in [1997](#). The DOJ first issued horizontal merger guidelines in [1968](#).

The current [Vertical Merger Guidelines](#) were issued by the DOJ and FTC just over a year ago, also with the intent to provide analytical transparency to businesses and their advisors and assistance to courts ruling on vertical merger challenges. These

guidelines replaced an earlier set of [Non-Horizontal Merger Guidelines](#) issued by the DOJ in 1984. When the agencies issued the current vertical guidelines, FTC Commissioners [Chopra](#) and [Slaughter](#) dissented.

The re-examination of the two sets of merger guidelines has the potential to have a significant impact on merger enforcement and may portend the emergence of agency merger challenges to deals that would not have been challenged in the past, potentially based on novel theories of competitive harm. To the extent the agencies adopt a more aggressive stance in revised merger guidelines that reflects increased skepticism of mergers, the revised guidelines will likely result in an increased number of merger challenges. In addition, although merger guidelines are not binding on the federal courts, it is often the case that courts hearing merger challenges cite the guidelines as persuasive authority under the view that they reflect the expertise of the agencies tasked by Congress with merger reviews. As a result, the revised guidelines ultimately may influence court decisions in particular cases and affect the development of merger law more generally.

Therefore, businesses and their advisors face the potential for increased regulatory uncertainty for some deals. To be sure, the agencies would ultimately have to persuade a court to agree with any departure from merger analysis precedent in the face of a challenge. Nevertheless, even where deals are ultimately permitted to proceed, judicial proceedings can introduce significant delays to deal timelines while courts adjudicate disputes. Parties contemplating M&A transactions should be mindful of the potential consequences of the evolving antitrust enforcement landscape when evaluating and structuring deals and when drafting deal documents.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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