

Antitrust Agencies Aim to Strengthen Merger Guidelines Amidst Broader Scrutiny of M&A Activity

Update

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On January 18, 2022, the Federal Trade Commission (FTC) and the Department of Justice Antitrust Division (DOJ) launched a joint public inquiry aimed at strengthening enforcement against anticompetitive mergers and acquisitions. This initiative, which fulfills one of the recommendations from President Biden's Executive Order on Promoting Competition in the American Economy, issued in July of last year, could have significant implications for antitrust review of M&A deals across numerous industry sectors.

The antitrust agencies issued a Request for Information that seeks public input on a wide range of topics relating to merger review to inform potential revisions to existing merger guidelines. The DOJ first published merger guidelines in 1968, with the goal of providing transparency into the standards and analytical framework applied when reviewing mergers from a competition standpoint. Since then, the FTC and DOJ have published a number of updates, with the most recent iterations being the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines, although the FTC under new leadership last year withdrew its approval of the Vertical Merger Guidelines. While the merger guidelines are not binding on courts, judges adjudicating merger challenges often cite to them as persuasive, and they also provide important transparency and predictability for the business community and antitrust practitioners. This review process comes in the midst of a surge in M&A activity, with the number of premerger filings under the Hart-Scott-Rodino (HSR) Act doubling from 2020 to 2021.

In public remarks explaining the rationale for this review of existing merger guidance, both antitrust agency heads, FTC Chair Lina Khan and Assistant Attorney General Jonathan Kanter, expressed concern about industry consolidation as well as complexities of the modern economy that can provide new ways for firms to create or exploit market power. According to Chair Khan, "[w]hile the current merger boom has delivered massive fees for investment

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banks, evidence suggests that many Americans historically have lost out, with diminished opportunity, higher prices, lower wages, and lagging innovation.” Expressing a similar sentiment, AAG Kanter noted that “concentrated market structures can harm downstream consumers and upstream workers at the same time that they foster coordination or exclusion in adjacent markets.” These comments reflect a broader view within the Biden Administration as well as many members of Congress, primarily Democrats, that merger enforcement has been too permissive for years and has allowed numerous sectors of the economy to become far too concentrated.

The Request for Information is extremely broad in scope and invites comments on numerous topics that touch on almost every aspect of the existing merger guidelines, suggesting that a major overhaul of the agencies’ approach to merger reviews could be in the works. Specific areas of inquiry include:

- **Purpose and scope of merger review:** The agencies are seeking information on whether the guidelines should more clearly address mergers that violate the Clayton Act’s prohibition of transactions that may “tend to create a monopoly,” for example, through serial acquisitions and rollups by private equity firms or data-aggregation strategies by digital platforms. In addition, the agencies are considering whether traditional distinctions between horizontal tie-ups combining direct competitors and vertical transactions involving firms at different points on the supply chain should be revisited in light of trends in the modern economy.
- **Use of market definition in analyzing competitive effects:** The FTC and DOJ are requesting input on the importance of defining a market as a predicate to merger analysis and whether direct evidence of a transaction’s likely competitive effects, such as evidence of substantial head-to-head competition between the merging parties, may negate the need for a separate market definition exercise. They are also inviting comment on appropriate methods for defining markets to better account for non-price competition.
- **Monopsony power and labor markets:** A key focus of the current inquiry is on how mergers may lessen competition in labor markets by conferring “monopsony” (buyer) power on merged firms and thereby harm workers, for example, through reduced wages and salaries. The relationship between antitrust law and labor markets, which historically has played little or no role in merger reviews, has generated significant interest recently and was also highlighted in President Biden’s Executive Order on Competition.
- **Unique characteristics of digital markets:** The agencies are inviting comment on how to assess mergers involving digital markets that exhibit unique features such as zero-price products, multi-sided platforms, and rapid change.

There is a 60-day public comment period that runs until March 21, 2022, following which the FTC and DOJ will evaluate the information received and

integrate it with their own independent research. They will then publish proposed new merger guidelines for further public comment. The agencies hope to complete the review process this year.

In a [separate statement](#), the FTC's two Republican Commissioners, Noah Phillips and Christine Wilson, welcomed the merger guidelines review, observing that the Request for Information seeks public input "on many important legal and economic questions." However, in noting that the potential revision of existing merger guidelines "could have a dramatic impact on the economy," they urged "care and caution" and specifically called for comments on certain assumptions that appear to underlie several questions in the Request for Information. For example, Commissioners Phillips and Wilson reference an apparent assumption in the Request for Information that a transaction that makes it more difficult for rivals to compete with the merged firm can be anticompetitive, even if consumers are not harmed through higher prices, lower quality, or reduced innovation.

The merger guidelines review comes on the heels of several recent policy changes at the FTC that signal the Democratic Commissioners' general skepticism towards consolidation and their desire to prevent more deals in their incipency. On August 3, 2021, the FTC announced that it had begun issuing warning letters to companies in some deals notified under the HSR Act that it may continue to investigate their transaction after expiration of the statutory waiting period and that if the parties choose to close their deal before the FTC concludes its investigation, they do so at their own risk. On September 28, 2021, the FTC instituted several changes aimed at making its "second request" process more streamlined, but also more rigorous. On October 25, 2021, the FTC resurrected its pre-1995 practice of requiring all parties that enter into a merger divestiture order to agree to obtain prior approval from the FTC before closing any future transaction affecting each relevant market for which a violation was alleged, for at least 10 years. All of these policy changes, along with the FTC's withdrawal of the Vertical Merger Guidelines in September 2021, were opposed by the FTC's two Republican Commissioners.

While the precise outcome of the merger guidelines review process remains to be seen, when viewed within this broader context, it seems virtually certain to culminate in new, stricter guidelines for antitrust review of M&A deals. This will lead to greater scrutiny of more transactions, with impacts on deal cost and timing, and it could also result in more merger challenges, potentially based on novel theories of competitive harm.