

January 19, 2022

FTC and DOJ Announce Joint Review of Merger Guidelines

FTC and DOJ Launch a Joint Review of Guidelines for Both Horizontal and Vertical Mergers, Issuing a Request for Public Comment

SUMMARY

THE JOINT PRESS CONFERENCE AND PROCESS FOR REVIEWING THE MERGER GUIDELINES

On January 18, 2022, Lina Khan, Chair of the Federal Trade Commission (“FTC”) and Jonathan Kanter, Assistant Attorney General for the Antitrust Division of the U.S. Department of Justice (“DOJ”), held a joint press conference announcing the launch of a joint review of the Horizontal Merger Guidelines and Vertical Merger Guidelines (together, the “Merger Guidelines”). The current Horizontal Merger Guidelines were issued in 2010, and the current Vertical Merger Guidelines were issued in 2020. In September 2021, the FTC voted to withdraw its approval of the Vertical Merger Guidelines. The DOJ has not withdrawn its approval of the Vertical Merger Guidelines, though Assistant Attorney General Kanter stated that the DOJ “shares the FTC’s substantive concerns” with those guidelines.¹

The FTC and DOJ had previously committed² to undertake a review of the Merger Guidelines in response to President Biden’s call to do so in his July 9, 2021 Executive Order entitled “Promoting Competition in the American Economy” (the “Order”). The Order emanated from the Administration’s view that a “trend of corporate consolidation” has led to a diminution in competition that has, in turn, increased prices, stunted economic growth, and suppressed wages. Chair Khan echoed those views in her remarks, stating that the 2021 “merger boom” has “delivered massive fees for investment banks,” while “many Americans historically have lost out, with diminished opportunity, higher prices, lower wages, and lagging innovation.”³ Assistant Attorney General Kanter likewise noted his view that “concentrated market structures can harm downstream consumers and upstream workers at the same time that they foster coordination or exclusion in adjacent markets.”⁴ He further stated that the Merger Guidelines need to be “modernized” because “the digital

economy has transformed industry,” impacting not only the tech industry, “but markets across our economy, many of which have been rebuilt from the inside out,” since the Horizontal Merger Guidelines were last revised during the Obama Administration.⁵

The FTC and DOJ stated that their review of the Merger Guidelines “will follow a rigorous, thoughtful, and inclusive process” that will include consideration of public comments from a variety of stakeholders, as well as engagement with state, federal, and international competition enforcers and agencies.⁶ Following an initial comment period, the FTC and DOJ plan to release a draft of updated Merger Guidelines and seek further comment before finalizing those documents. The FTC and DOJ aim to finish this process by the end of 2022.

THE REQUEST FOR INFORMATION

As a first step in the process of modernizing the Merger Guidelines, the FTC and DOJ released a joint Request for Information on Merger Enforcement (“RFI”) seeking public comment on how the agencies can “modernize” merger enforcement. The stated goal is to ensure that the Merger Guidelines “reflect current learning about competition based on modern market realities,” and “faithfully track the statutory text, legislative history, and established case law around merger enforcement.”⁷ The RFI contains more than 150 questions, organized into 15 categories: “Purpose, Harms, and Scope,” “Types and Sources of Evidence,” “Coordinated Effects,” “Unilateral Effects,” “Presumptions,” “Market Definition,” “Potential and Nascent Competition,” “Remedies,” “Monopsony Power and Labor Markets,” “Innovation and IP,” “Digital Markets,” “Special Characteristics Markets,” “Barriers to Firm Entry and Growth,” “Efficiencies,” and “Failing and Flailing Firms.”

The RFI notes that “[t]he agencies are particularly interested in aspects of competition the guidelines may underemphasize or neglect, such as labor market effects and non-price elements of competition like innovation, quality, potential competition, or any ‘trend toward concentration.’”⁸ The RFI also encourages commentators to provide “specific examples of mergers that have harmed competition, with descriptions of how the merger harmed competition, including how those mergers made it more difficult for customers, workers, or suppliers to work with the merged firm or competitors of the merged firm or made it more difficult for rivals to compete with the merged firm.”⁹ These statements suggest a presumption that many mergers that have occurred in recent times have been harmful for consumers and other constituencies.

Previewing the RFI, Chair Khan chose to “spotlight” three particular requests in her remarks:¹⁰

- “First, are the guidelines adequately attentive to the range of business strategies and incentives that might drive acquisitions, be it moat-building or data-aggregation strategies by digital platforms, or roll-up plays by private equity firms? More broadly, how should the guidelines analyze whether a merger may ‘tend to create a monopoly,’ including in its incipency, or whether there is a ‘trend toward concentration’ in the industry?”¹¹
- “Second, do the guidelines adequately assess whether mergers may lessen competition in labor markets, thereby harming workers? Are there factors beyond wages, salaries, and financial

compensation that the guidelines should consider when determining anticompetitive effects? And when a merger is expected to generate cost savings through layoffs or reduction of capacity, should the guidelines treat this elimination of jobs or capacity as cognizable ‘efficiencies’?”¹²

- “Third, are the guidelines unduly limited in their focus on particular types of evidence? Are there certain markets where the guidelines should provide a framework to assess direct evidence of market power? What types of indicia of market power should the guidelines consider? And more generally, what types of evidence should the guidelines consider in evaluating nonprice effects?”¹³

Likewise, Assistant Attorney General Kanter emphasized three additional areas where the agencies are particularly “enthusiastic about learning more”:¹⁴

- “First, the statutory text of the Clayton Act prohibits mergers that ‘may be substantially to lessen competition, or tend to create a monopoly.’ So often merger enforcement focuses on that first prong, but it is worth considering if we are being faithful to the full language of the Clayton Act, for instance in how we assess transactions by already dominant firms.”¹⁵
- “Second, the guidelines have bifurcated horizontal and vertical analysis, yet often transactions don’t neatly fit into these categorizations. Does the framing of horizontal versus vertical analysis itself narrow us to a two-dimensional view of modern markets that are often multi-dimensional? How should the guidelines account for these market realities?”¹⁶
- “Third, market realities should drive the antitrust analysis, not merely market definition. In a dynamic, multi-dimensional economy, the static formalism of market definition may not always be the most reliable tool for assessing the potential harms of mergers. We hope to learn more about additional tools that rely on direct sources of evidence, such as other indicia of market power or of head-to-head competition between merging parties, that may be more reliable in some situations. When we do focus on market definition, I also wonder whether we should do more to capture the dynamism of the economy. Stacks or clusters of component products and services often come together to drive both digital and physical supply chains—should we more thoughtfully consider competition within a market or for a market?”¹⁷

Following the press conference, Commissioners Noah J. Phillips and Christine S. Wilson issued a joint statement expressing their support for the RFI process, and encouraging public input, in particular, on questions that, in their view, rely on “debatable assumptions,” such as:

- The RFI requests that commenters provide examples of mergers that have harmed competition, including how those mergers “made it more difficult for rivals to compete with the merged firm,” which relies on the assumption that “difficulty for rivals equates to harm to competition”; and
- The RFI implies that the agencies should discount or ignore efficiencies when analyzing mergers because “mergers generally or often fail to realize cognizable efficiencies.”¹⁸

IMPLICATIONS

Revised versions of the Merger Guidelines are likely to lead to more merger challenges, which will likely feature novel theories of harm, while demonstrating greater skepticism towards efficiency claims asserted by the merging parties. In particular, the FTC and DOJ appear to be considering a more “multi-dimensional” approach to assessing a transaction’s likely effects, including likely effects on labor markets and adjacent markets for components or services, which have rarely been the subject of merger challenges historically, but have emerged as key components of the Biden Administration’s antitrust agenda. The FTC and DOJ’s

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remarks and RFI also suggest that a “trend towards concentration in the industry” generally, or a firm’s history of “serial acquisitions,” may be relevant to the agencies’ analysis of an individual transaction. And although traditionally one of the first steps in an agency’s review of a merger is to define the relevant product and geographic markets affected by the merger, the RFI questions whether it is even “necessary to precisely define the market in every case.”¹⁹

The Merger Guidelines are statements of enforcement policy and are not binding on courts. The extent to which federal courts find a basis to apply the revised guidance in specific cases will depend both on how radically any new Merger Guidelines depart from settled law and economics, and how well the DOJ and FTC are able to articulate the factual basis for their claims in court. For example, existing case law in merger cases relies heavily on the concept of defining the relevant market in which the competitive effects of a transaction can be assessed. Of perhaps more importance, many mergers could be “chilled” because one or both parties may not be prepared for what could be a lengthy judicial challenge.

Merging parties will need to consider carefully any new Merger Guidelines when assessing the risk of a prolonged antitrust review, or the likelihood that the agencies may seek to block a transaction or require a remedy as a condition for clearing the transaction, when negotiating the allocation of antitrust risk in their transaction documents. Parties to mergers that face a substantial risk of a prolonged review or a potential challenge in federal court may consider longer “drop-dead” dates or commitments to litigate should the merger be challenged to signal to the agencies that the parties are committed to closing.

The comment period on the RFI is open for 60 days, until March 21, 2022. Information submitted in response to the RFI will be used by the agencies to consider updates and revisions to the guidelines and will be posted publicly. Sullivan & Cromwell is actively consulting with clients and other interested parties seeking to understand how revisions to the Merger Guidelines might affect their interests. Parties who may be affected by the revision of the Merger Guidelines should consider submitting comments in response to the RFI. Companies who engage in regular M&A activity are likely to have particular interest in seeking to have meaningful input in the new Merger Guidelines.

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ENDNOTES

- 1 Assistant Attorney General Jonathan Kanter Delivers Remarks on Modernizing Merger Guidelines, January 18, 2022 (hereinafter “AAG Kanter Remarks”), at 4.
- 2 Statement of FTC Chair Lina M. Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Competition Executive Order’s Call to Consider Revisions to Merger Guidelines, July 9, 2021.
- 3 Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement, Docket No. FTC-2022-0003, January 18, 2022 (hereinafter “Chair Khan Remarks”), at 1.
- 4 AAG Kanter Remarks at 2.
- 5 AAG Kanter Remarks at 2.
- 6 AAG Kanter Remarks at 3.
- 7 Fed. Trade Comm’n, Request for Information on Merger Enforcement, Dkt. No. FTC-2022-0003 (Jan. 18, 2022) (hereinafter “RFI”), at 1.
- 8 RFI at 2. The RFI does not discuss whether these types of effects are within the boundaries of what Congress permits the agencies to consider in a competitive analysis.
- 9 RFI at 2.
- 10 Chair Khan Remarks at 3.
- 11 Chair Khan Remarks at 3.
- 12 Chair Khan Remarks at 3.
- 13 Chair Khan Remarks at 3.
- 14 AAG Kanter Remarks at 3.
- 15 AAG Kanter Remarks at 4.
- 16 AAG Kanter Remarks at 4 (typographical error in the original deleted).
- 17 AAG Kanter Remarks at 4-5.
- 18 Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Request for Information on Merger Enforcement, January 18, 2022, at 1-2.
- 19 RFI at 5.

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