

FEDERAL TRADE COMMISSION AND DEPARTMENT OF JUSTICE ANTITRUST DIVISION LAUNCH PUBLIC INQUIRY AIMED AT MODERNIZING MERGER GUIDELINES, SEEKING COMMENTS BY MARCH 21, 2022

On January 18, 2022, Chair Lina Khan of the Federal Trade Commission ("FTC"), and Assistant Attorney General Jonathan Kanter of the Department of Justice Antitrust Division ("DOJ"), launched a joint public inquiry aimed at modernizing both the horizontal and vertical merger guidelines. As part of this effort, the agencies are soliciting comments from the public, including "market participants, government entities, economists, attorneys, academics, unions, employees, farmers, workers, businesses, franchisees and consumers" ¹ The comment period is open for 60 days, requiring all comments to be received no later than March 21, 2022. It will likely be approximately one year before a final version of any new guidelines are published. But the announcement and request for information provide useful insight into some of the issues and new theories of harm the DOJ and FTC are already considering when reviewing transactions.

BACKGROUND

First published by the DOJ in 1968, merger guidelines² provide the framework that the agencies use when analyzing mergers under U.S. antitrust law. It was not until 1984 that the DOJ began publishing separate guidelines for mergers that were horizontal (1984 Merger Guidelines) and vertical (1984 Non-Horizontal Merger Guidelines). In 1992, the FTC joined the DOJ in jointly issuing guidelines with the 1992 Merger Guidelines. The Horizontal Merger Guidelines were last updated in

¹ Press Release, Dep't of Justice & Fed. Trade Comm'n, *Justice Department and Federal Trade Commission Seek to Strengthen Enforcement Against Illegal Mergers* (Jan. 18, 2022), available at <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-strengthen-enforcement-against-illegal>.

² Despite the nomenclature, the merger guidelines apply to all transaction structures, including acquisitions, joint ventures, etc.

2010, while the Vertical Merger Guidelines were last updated in 2020. In September 2021, the FTC voted 3-2 to rescind its approval of the Vertical Merger Guidelines as the majority felt that the "flawed discussion of the purported procompetitive benefits (*i.e.*, efficiencies) of vertical mergers, especially its treatment of the elimination of double marginalization, could become difficult to correct if relied on by courts."³ This withdrawal came several months after President Biden signed the *Executive Order on Promoting Competition in the American Economy*, where the President said, "To address the consolidation of industry in many markets across the economy, as described in section 1 of this order, the Attorney General and the Chair of the FTC are encouraged to review the horizontal and vertical merger guidelines and consider whether to revise those guidelines."⁴

REMARKS BY CHAIR KHAN AND AAG KANTER⁵

In announcing the inquiry aimed at modernizing the merger guidelines and the public document asking for input on the process, the "Request for Information on Merger Enforcement" (hereinafter "Request"), both Chair Khan and Assistant Attorney General Kanter issued remarks. Of note, Chair Khan stated, "While periodic review of existing guidance is good practice generally, this review of the merger guidelines is especially timely and ripe. Global deal-making in 2021 soared to \$5.8 trillion, the highest level ever recorded, with the FTC and DOJ receiving more than double the number of merger filings received on average in any of the past five years. Major technological and economic changes, meanwhile, have led to shifts in how businesses compete and grow, creating new interconnections and dynamics across multiple dimensions. For us to accurately detect and analyze potentially illegal transactions in the modern economy, ensuring that our merger guidelines reflect these new realities is critical."⁶ Acknowledging the Request identified a broad set of topics, she highlighted that her agencies would focus its review on certain markets and industries, particularly digital markets, labor markets, and private equity. She also emphasized the need to rethink market definitions and the types and ways in which evidence is used for evaluating non-price effects.

In his remarks, Assistant Attorney General Kanter stressed technological developments and how the guidelines should be adjusted to address changing market realities. He articulated, "[t]imes have changed because the advent of the

³ *Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines*, Fed. Trade Comm'n (Sept. 15, 2021), available at https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

⁴ *Executive Order on Promoting Competition in the American Economy* (July 9, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

⁵ Commissioners Noah Philips and Christine Wilson also published a joint statement regarding the Request. While their statement welcomed the Request and encouraged responses, their statement struck a more conversative tone regarding the need to update the existing guidelines. According to their statement, "If there are changes in legal precedent, updated and validated empirical or theoretical learning, or competitive dynamics that we are missing in merger review, consumers will benefit from reflecting them in agency guidelines. Prudence dictates, though, that any recalibration of our current approach to merger enforcement should be undertaken only if warranted . . ." The statement also pointed out that a number of the questions within the Request were underpinned by certain assumptions they hoped the public would opine on, such as an assumption that mergers generally fail to realize cognizable efficiencies, and that mergers which making it more difficult for a rival to compete equates to harm to competition.

⁶ *Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement*, Fed. Trade Comm'n (Jan. 18, 2022), available at <https://www.ftc.gov/public-statements/2022/01/statement-chair-lina-m-khan-regarding-request-information-merger>.

digital economy has transformed industry. The digital revolution has not only impacted new markets like tech, but markets across our economy, many of which have been rebuilt from the inside out. The connections and interrelationships among companies and markets have increased by orders of magnitude. Think about what happens when you check a weather forecast or purchase your morning coffee. In seconds, whether you see them or not, you interact with dozens of distinct services that share complex interactions and business relationships. Many present an opportunity to create or exploit market power."⁷

REQUEST FOR INFORMATION ON MERGER ENFORCEMENT

The FTC and DOJ publicly posted the Request, soliciting public input on a wide range of topics.⁸ The fifteen topics covered in the Request are:

- 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
- Failing and Flailing Firms

While the Request covers a broad range of merger control issues, the agencies are focusing on these key topics.

MARKET DEFINITION

Under the market definition section, the questions posed suggest that the agencies are looking to move away from a rigid market definition. For example, the agencies question whether it is necessary to precisely define the market in every case, and if the importance of market definition may vary between horizontal and non-horizontal mergers. They also ask if "a formalistic market definition exercise mask[s] the potential for dynamic competition to be lost as a result of a merger, such as through emergent and disruptive competition, competition for the market, and the development of component competition to decrease dependency on stacks of services." The Request questions whether the current guidelines are clear enough that a single product could be in multiple antitrust product markets. The agencies want to examine not only immediate price harms, but how a

⁷ *Assistant Attorney General Jonathan Kanter Delivers Remarks on Modernizing Merger Guidelines*, Dep't of Justice (Jan. 18, 2022), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-modernizing-merger-guidelines>.

⁸ Dep't of Justice & Fed. Trade Comm'n, *Request for Information on Merger Enforcement* (Jan. 18, 2022), available at <https://www.regulations.gov/docket/FTC-2022-0003/document>.

transaction could be problematic in terms of non-price factors, such as loss of innovation, changes to product quality or variety, or creation of new entry barriers.

POTENTIAL AND NASCENT COMPETITION

Given the recent agency focus on potential and nascent competition, the guideline review focuses on this topic. The agencies seem to be looking to codify ways to account for companies expanding into other markets. For example, the agencies ask, "[s]hould the guidelines focus on whether either merging firm is contemplating entry into, or is well situated to enter, a market where the other firm competes? Should it be sufficient to demonstrate either firm's capability of entering a concentrated market or that the acquiring firm has market power?" The agencies also anticipate competition developing from "unexpected sources." For nascent competitors, the agencies are contemplating whether the guidelines should "assess [the] potential path of evolution into a plausible competitor" and what degree of probability is sufficient.

LABOR MARKETS

The agencies have also continued their focus on labor markets and hiring monopsony power, asking:

- whether the guidelines provide a sufficient framework for analyzing whether transactions lessen competition in labor markets;
- what are other signs of an uncompetitive labor market that the guidelines should consider outside of employment restrictions (such as employers' ability and incentive to exert downward pressure on wages); and
- how the guidelines should be defined in terms of job characteristics, geography, and worker flows, and if switching costs and other barriers to changing jobs should be addressed.

INNOVATION

Under innovation, the agencies ask if a different approach to market definition should be utilized when considering innovation as compared to price effects. Further, they ask if market definition should play a secondary role to the analysis when incentives to innovate are directly affected. The questions also contemplate how the guidelines should analyze innovation in markets with high failure rates, along with what alternative methods of analysis could be used to identify anticompetitive concerns in merger cases involving intellectual property.

DIGITAL MARKETS

Unsurprisingly, digital markets are a separate topic for consideration in the Request. The Request asks if the guidelines should analyze mergers in digital markets differently from other markets, given the rapid changes that occur in the industry. The agencies also asked for comment on how the guidelines approach market definitions in zero-price markets, negative-price markets, or markets without explicit prices, and if "quality" and other characteristics play the same role as price in market definition. The Request also asks how two-sided platforms should be evaluated, a topic discussed in

the Supreme Court's 2018 *Ohio v. American Express* decision.⁹ Lastly, the agencies are interested in how transactions will affect data aggregation and interoperability, and how the guidelines should analyze mergers involving competition for attention.

KEY TAKEAWAYS

First, the remarks of Chair Khan and Assistant Attorney General Kanter show that they believe the current horizontal and vertical merger guidelines are inadequate to address challenges raised by the rapidly changing landscape, especially with the transformations brought on by the digital market. Additionally, the agencies emphasize that both labor markets and private equity will be the subject of increasing antitrust scrutiny. While this approach is unsurprising from Chair Khan given her previous statements that the status quo is insufficient to take on Big Tech, it does signal that Assistant Attorney General Kanter also will take an aggressive stance in his tenure at the DOJ.

Second, Assistant Attorney General Kanter acknowledged in his comments that this process would be an extensive undertaking and involve antitrust enforcers in the United States and abroad. He estimated it could be a year before final revised guidelines are published.

Third, the remarks make clear that the DOJ and FTC are keen to apply merger analysis that explores alternative theories of harm. A prime example is a merger's potential effects on a given labor market. Even without the new guidelines in place, merging parties facing scrutiny from the DOJ or FTC should be prepared to address these alternative theories of harm.

Last, both Chair Khan and Assistant Attorney General Kanter made a deliberate effort to say that input was welcome from everyone, not just antitrust practitioners or economists. Chair Khan commented, "I want to take this opportunity to also encourage those beyond the antitrust community-including consumers, workers, entrepreneurs, start-ups, farmers, investors, and independent businesses-to share feedback and evidence." Assistant Attorney General Kanter followed up by observing, "Here is our message to entire American public: please share your views-we need your input and we care what you think."

The previous versions of the Horizontal Merger Guidelines often received a level of deference from U.S. courts, in large part because the 2010 Horizontal Merger Guidelines largely followed judicial precedent and mainstream economic scholarship. Because the new guidelines may seek to push the bounds of existing precedent, the agencies may find that courts are hesitant to adopt new approaches to antitrust analysis.

⁹ 138 S. Ct. 2274 (2018).

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