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US Antitrust Enforcers Take Next Steps to Strengthen Merger Enforcement

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To strengthen enforcement, the US Department of Justice (DOJ) and the Federal Trade Commission (FTC) are undertaking a review of the Horizontal Merger Guidelines, last revised by the Obama administration in 2010, and the Vertical Merger Guidelines, issued in 2020 by the Trump administration.

The Biden DOJ and FTC on January 18, 2022, jointly issued a request for information (RFI), soliciting public comment on revisions to "modernize" the analytical framework used to assess mergers. Comments are due March 21, after which the agencies have said they will publish proposed guidelines for further comment, with a goal of finalizing new guidelines before the end of 2022.

This process follows President Joe Biden's July 2021 issuance of an executive order, which called on the antitrust agencies to evaluate whether the Horizontal and Vertical Merger Guidelines required revision.

In announcing the RFI, the DOJ and the FTC said the objective is to "strengthen enforcement against illegal mergers" and combat "mounting concerns" that "many industries across the economy are becoming more concentrated and less competitive."

This joint effort is the latest example of the antitrust agencies' efforts to aggressively enforce antitrust law, announce enforcement principles and influence the courts when they challenge mergers in court.

Role of the merger guidelines

Both sets of guidelines lay out how the antitrust agencies will approach merger enforcement. As the current Horizontal Merger Guidelines put it, the guidelines "outline the principal analytical techniques, practices, and the enforcement policy of the [DOJ] and [FTC] with respect to mergers and acquisitions." Historically, they have been important in influencing merger case law, and federal courts have often cited the guidelines in ruling on merger challenges.

The current Horizontal Merger Guidelines were last published in 2010 jointly by the DOJ and the FTC. The current Vertical Merger Guidelines were published jointly in 2020, but the FTC withdrew from those guidelines in September 2021. While the DOJ did not withdraw at the same time, DOJ Assistant Attorney General Jonathan Kanter has said that "too much has been made of the purported divergence between the DOJ and the FTC on the treatment of vertical mergers." He also said that the Antitrust Division "shares the FTC's substantive concerns" that the guidelines overstate potential efficiencies and fail to identify important relevant theories of harm.

What might change?

The RFI seeks public comments on 15 categories of questions which, according to Kanter, are an attempt to "understand why so many industries have too few competitors, and to think carefully about how to ensure our merger enforcement tools are fit for purpose in the modern economy."

Kanter and FTC Chair Lina Khan homed in on specific categories of interest in their public statements announcing the review. Kanter highlighted a desire to explore whether the "framing of horizontal versus vertical analysis" implicitly limits the agencies to analyzing transactions in a "two-dimensional view" that may not reflect complex markets. He also indicated the agencies will be looking at tools that may be used to assess potential harms from mergers aside from "market definition."

Khan questioned whether the guidelines are "adequately attentive to the range of business strategies and incentives that might drive acquisitions," including "data aggregation strategies" and "roll-up plays by private equity firms." She also questioned whether the current guidelines take into account harm to competition in labor markets, which is an enforcement priority for the Biden administration.

Of particular interest, the agencies are focusing on aspects of what they have said are "unique aspects of digital markets," highlighting characteristics such as zero-price products, multisided markets and data aggregation, while asking questions about the impact of network effects and interoperability.

The agencies will also be examining:

- The adequacy of the presumptions in the merger guidelines regarding unlawful transactions, suggesting they may strengthen presumptions based on concentration, which currently are really just a starting point for analysis.
- The need to develop a formalized process for divestitures and other remedies that are not currently addressed by the guidelines.
- The weight efficiencies should have on merger review, suggesting the DOJ and FTC are likely to downplay efficiencies.

The FTC's Republican commissioners, Noah Phillips and Christine Wilson, issued a statement welcoming review and lauding the benefits of administrability, predictability and credibility that guidelines offer, but suggested skepticism, noting that some questions the agencies are raising "appear to be premised on debatable assumptions" and that "much of the legal authority cited … is nearly or more than half a century old." They suggested that asking for examples of mergers that "made it more difficult for rivals to compete with the merged firm" may equate harm to competitors with harm to competition, which would conflict with the oft-cited mantra that antitrust law protects "competition, not competitors."

Guidelines review follows 2021 procedural changes to merger review

The announcement that the agencies intend to revise the guidelines follows efforts over the past year to amp up the merger review process. Noteworthy developments to the merger review process over the past year include:

- **"Temporary" suspension of early termination:** Since February 2021, the antitrust enforcers have suspended granting early termination for transactions subject to Hart-Scott-Rodino Act (HSR) filings.
- **Rescinded 1995 policy statement:** In July 2021, the FTC rescinded a 1995 Clinton administration Policy Statement on Prior Approval and Prior Notice Provisions. The FTC is now requiring prior approval and prior notice provisions for mergers subject to consent decrees, though the scope of such approvals remains unclear.
- **Warning letters following expiration of the HSR waiting period:** The FTC began sending letters to merging companies in August 2021 warning that the agency's decision not to issue second requests to investigate a transaction does not indicate approval and that consummation of the transaction would be at the parties' "own risk." These letters also indicate that the FTC's investigation would continue, though few if any investigations have in fact continued after the transactions subject to such letters have been consummated.

Looking forward

The RFI and statements by the antitrust enforcers reflect a desire to update the merger guidelines to "accurately reflect modern market realities," and to equip the DOJ and FTC to aggressively enforce antitrust law. Revisions to the guidelines are likely to alter merger review and lead to challenges on new theories of harm. How significant those changes will be, and whether courts would be willing to adopt substantial changes in merger case law, remains to be seen.

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