

Back to the drawing board: FTC and DOJ rethink merger guidelines

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MARCH 7, 2022

On Jan. 18, 2022, the Federal Trade Commission and Department of Justice announced a joint initiative to conduct a comprehensive analysis of their merger guidelines. The initiative is likely to further ratchet up merger enforcement with the most significant impact on digital mergers, mergers with potential or nascent competitors, and vertical mergers (typically, combinations between suppliers and their customers).

Companies, in consultation with their legal counsel, need to evaluate the likelihood of obtaining merger clearance under these new guidelines. The agencies plan to issue the new guidelines before the end of the year.

The new merger guidelines will, no doubt, contain much stronger tools than the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines for blocking illegal mergers.

This initiative is in response to President Joe Biden's Executive Order on Promoting Competition, which urged the FTC and DOJ to revise their joint merger guidelines as part of a broader program to increase antitrust enforcement. The merger guidelines are the agencies' key policy statements on merger enforcement. They "describe the principal analytical techniques and the main types of evidence" that the agencies rely on to determine whether a merger may substantially lessen competition.

The Horizontal Merger Guidelines, issued jointly by the FTC and DOJ and last revised in August 2010, have been well accepted by prior administrations and frequently cited in judicial opinions. In contrast, the Vertical Merger Guidelines, issued in June 2020 after an extensive drafting and public comment period, were the first set of vertical merger guidelines issued since 1984.

Barely a year old, the new FTC leadership withdrew them in September 2021, stating that they were based on "unsound economic theories that are unsupported by the law or market realities" and that "the guidelines adopted a particularly flawed

economic theory regarding purported pro-competitive benefits of mergers, despite having no basis of support in the law or market reality."

The leadership at the FTC and DOJ have been transparent in their desire to update the merger guidelines for the modern economy and to increase merger enforcement. In announcing the joint initiative to revise the merger guidelines, FTC Chair Lina Khan stated that the agencies need to "ensure that our merger guidelines reflect modern realities and equip us to forcefully enforce the law against unlawful deals."

Assistant Attorney General Jonathan Kanter stated that the agencies "need 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 the purpose in the modern economy."

The FTC and DOJ are seeking public comments by March 21, 2022, to "better detect and prevent illegal, anticompetitive deals in today's modern markets." The agencies are seeking public comments not only from attorneys, economists, and academics, but also from consumers, entrepreneurs, start-ups, investors, farmers, workers, and independent businesses.

They seek input on a broad range of important issues, including:

- Purpose and scope of merger review. Do the merger guidelines adequately explain that mergers that "may" substantially lessen competition or tend to create a monopoly are illegal, as well as the types of harms that the antitrust laws are intended to prevent? Do the merger guidelines implement the necessary standards to prevent these types of harmful mergers?
- Presumptions that certain transactions are anticompetitive. Should market concentration levels for presumptively anticompetitive mergers be adjusted to enhance merger enforcement? Should the agencies consider alternative metrics or qualitative factors for determining presumptively anticompetitive mergers?
- Use of market definition in analyzing competitive effects. Should there be changes or updates to the analysis of market definition to account for non-price competition? Is market definition necessary when there is direct evidence of a merger's likely competitive effects?

- Threats to potential and nascent competition. Should there be updates to the analysis of potential and nascent competitors, which may become sources of innovation and competition?
- Impact of monopsony power, including in labor markets. How should the merger guidelines address monopsony power, where there is only one buyer, including the effects of buyer power in labor markets?
- Unique characteristics of digital markets. How should the merger guidelines analyze digital markets in the modern economy where there are zero-price products, multi-sided markets, and data aggregation?

The new merger guidelines will, no doubt, contain much stronger tools than the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines for blocking illegal mergers. In addition to focusing on harm to consumers, the new merger guidelines will likely also focus on harm to workers, small businesses, and the disadvantaged.

The new merger guidelines will likely change the analysis of nascent and potential competition issues, which, due to changes in the modern economy, are now front and center issues before the agencies.

One of the key changes will likely include new thresholds for when certain mergers are presumptively illegal based on market concentration levels. The 2010 Horizontal Merger Guidelines state that mergers resulting in highly concentrated markets with a significant increase in concentration “potentially raise significant competitive concerns.” The new guidelines are likely to state that mergers resulting in highly concentrated markets are “presumptively illegal.”

About the authors



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This article was first published on Reuters Legal News and Westlaw Today on March 7, 2022.