

What To Expect From Merger Guideline Modernization

By **David Shaw, Vishal Mehta and Alexa DiCunzolo**

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On Jan. 18, the Federal Trade Commission and the U.S. Department of Justice's Antitrust Division held a joint press conference to announce the launch of a broad-ranging public inquiry aimed at modernizing the merger guidelines, which outline the agencies' framework for analyzing mergers and acquisitions.

The inquiry takes the form of a detailed request for public input on several aspects of merger review, including standards of proof, evidence of competitive harm, presumptions based on market share, the role of market definition, evaluation of competitive effects unrelated to price and treatment of efficiencies.

The request also focuses heavily on how the guidelines should approach the effect of transactions on labor markets, acquisitions of nascent or potential competitors, and unique competitive dynamics of digital markets.

Both agencies reiterated a desire for more aggressive antitrust enforcement and expressed concern that the current guidelines fail to adequately consider modern market realities, hampering their ability to detect and prevent anticompetitive transactions.

The announcement was in line with the mandate outlined in President Joe Biden's executive order on competition,^[1] the agencies' public pronouncements regarding the need for major antitrust reform and parallel legislative efforts on Capitol Hill.

Their announcement and request highlight areas of concern that the agencies may address in the revised guidelines, and signal that a significant departure from the standards governing merger review for over a decade may be on the horizon.

Background

The guidelines outline the analytical framework and enforcement policies of the DOJ and FTC when investigating mergers and acquisitions under federal antitrust laws, and provide a playbook for the basic elements of merger review, including types of competitive harm and evidence thereof, how to define markets, how to assess market concentration, the significance of market entry, buyer power and



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efficiencies, and how to evaluate acquisitions of distressed firms or assets.

The guidelines have historically been relied upon by state enforcers, federal courts and state courts in merger reviews, and serve as a bedrock for U.S. antitrust enforcement in the M&A context.

The current horizontal merger guidelines were issued by the FTC and DOJ in 2010 under the Obama administration, replacing the 1992 guidelines, as partially revised in 1997, after public comment, and have remained in place since. The 2010 iteration significantly expanded on prior versions, introducing new theories of harm and placing greater emphasis on the variety of factors and sources of evidence the agencies consider when evaluating a transaction's potential effect on competition.

The vertical guidelines are more recent and controversial. They were jointly issued by the DOJ and FTC in 2020, but in 2021, under Chair Lina Khan's leadership, the FTC withdrew from them.[2] Nevertheless, the vertical merger guidelines provide a comprehensive public description of the agencies' enforcement toolkit in evaluating vertical mergers.

The Agencies' Request for Information

The FTC and DOJ posed nearly 10 pages of questions seeking input from the public, including "market participants, government entities, economists, attorneys, academics, unions, workers, farmers, ranchers, businesses, franchisees, and consumers."

The questions cover over a dozen broad topics, including (1) the purpose and scope of antitrust merger review; (2) presumptions that certain transactions are anticompetitive; (3) the use of market definition in analyzing competitive effects; (4) threats to potential and nascent competition; (5) the effect of monopsony power, including in labor markets; and (6) unique characteristics of digital markets, including competitive effects unrelated to price.[3]

The agencies drilled down on a number of topics in their joint press conference. Khan noted her particular interest in hearing about whether the current guidelines adequately consider "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," potential harms to labor markets, and direct evidence of market power, especially competitive effects unrelated to price.[4]

Unsurprisingly, Khan referred repeatedly to the FTC's growing scrutiny of transactions involving technology companies, digital markets and private equity firms.

DOJ Assistant Attorney General Jonathan Kanter's remarks focused on topics such as whether the guidelines adequately address transactions involving already dominant firms, whether they should continue to strictly bifurcate horizontal and vertical merger analyses where transactions may resist neat classifications, and the need to consider direct evidence of potential anticompetitive effects instead of "the static formalism of market definition." [5]

FTC Commissioners Noah Phillips and Christine Wilson issued a statement welcoming the agencies' request for information.

Phillips and Wilson encouraged the public to address certain "assumptions that appear to underlie particular questions," including the assumption — contrary to traditional antitrust analysis — that harm to rivals, as distinguished from harm to competition, generally, is an antitrust problem, and the

suggestion "that the agencies should discount or ignore efficiencies when analyzing mergers." [6]

Their statement expresses some skepticism that revised guidelines will adequately consider legal precedent, and asks the agencies to "proceed with care and caution."

Process and Next Steps

The agencies will be accepting public comments in response to their request for 60 days, until March 21. The agencies have expressed an intent to incorporate public views and evidence into the revised guidelines as appropriate, and will publish the proposed guidelines for further public comment.

Key Takeaways

The agencies' joint press conference and request for information is the latest indication that significant reform to U.S. antitrust enforcement in the M&A context may be on the horizon.

The request provides perhaps the clearest indication yet of where revisions to the existing guidelines might focus, including on structural presumptions, the role of market definition, tools to evaluate deals in digital markets and the effect of transactions on labor.

The request also provides an important opportunity for market participants and other stakeholders to provide commentary, insight and advocacy to inform and potentially influence the modernization process.

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[1] Exec. Order No. 14,036, 86 Fed. Reg. 36987 (Jul. 17, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

[2] See Fed. Trade Comm'n, "Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary" (Sept. 15, 2021), available at <https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines>.

[3] See Fed. Trade Comm'n, "Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers" (Jan. 18, 2023), available at <https://www.ftc.gov/news-events/press-releases/2022/01/ftc-and-justice-department-seek-to-strengthen-enforcement-against-illegal-mergers>.

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

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

[6] See Fed. Trade Comm'n, "Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Request for Information on Merger Enforcement" (Jan. 18, 2022), available at <https://www.ftc.gov/public-statements/2022/01/statement-commissioners-phillips-wilson-request-for-information-merger-enforcement>.