

Axinn Antitrust Insight: U.S. Antitrust Agencies to Significantly Revise and Broaden Merger Guidelines

A photograph of a modern building with a curved glass facade, showing multiple floors and windows, set against a clear sky.

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Axinn Update

On January 18, 2022, the heads of the Federal Trade Commission and the Department of Justice's Antitrust Division announced a broad public inquiry "aimed at strengthening enforcement against illegal mergers" through revised merger guidelines, and released a Request for Information on a wide variety of topics. The review reaches virtually every aspect of merger enforcement, including whether: presumptions of anticompetitive harm should be strengthened; labor markets should have their own metrics and presumptions; and more scrutiny of private equity acquisitions is warranted. The announcement follows the sweeping July 2021 White House Executive Order directing the antitrust agencies to consider modifying the merger guidelines and the agencies' contemporaneous announcement that they would take "a hard look" to determine whether the guidelines are "overly permissive."

While the specifics of any revised merger guidelines remain to be seen, the agency heads' prepared remarks and the questions the agencies are asking – together with the Biden Administration's steady messaging in support of more aggressive antitrust enforcement – suggest that the new merger guidelines will call for expanded and more frequent enforcement to block mergers. In particular, the agencies are at least considering significant revisions which would support increased scrutiny of transactions involving digital markets, labor markets, nascent competition, and private equity acquisitions, among other types of deals.

The agency leaders highlighted what they believe to be shortcomings with the status quo, asserting that: “Recent evidence indicates that many industries across the economy are becoming more concentrated and less competitive – imperiling choice and economic gains for consumers, workers, entrepreneurs and small businesses.” Chair Khan claimed that the review is “especially timely and ripe” given the surge in deal-making and merger filings, suggesting that a modernized analytical toolkit will better position the agencies to detect and prevent potentially illegal mergers. In an interview following the announcement, Khan stated her goal not to repeat what she views as the mistakes of Internet 2.0 with Internet 3.0, and that she intends to examine closely the practice of oligopolistic firms who create “kill zones,” especially for next generation platforms. On a similar note, AAG Kanter asserted the need for the guidelines to be “fit for purpose” in the dynamic modern economy.

The agencies’ review will tee up a debate about the fundamental tenets of antitrust merger law. The revised guidelines could lay the groundwork for a major shift in merger enforcement policy. In addition, the agencies contemplate the possibility of significant structural changes to the guidelines, such as specific guidelines for digital markets, and “a formal process and deadlines for remedy proposals” – reminiscent of the European Commission’s regimented remedy process. The agencies also ask questions that seem to solicit support for expanded merger enforcement in a number of dimensions, including consummated mergers, minority investments in horizontal stockholding, and acquisitions of potential competitors. Crucially, without a change in existing law – or a shift in interpretation of current law by the Supreme Court, currently led by a majority that many consider more “business friendly” – certain elements of the forthcoming guidelines will likely face resistance by merging parties in the courts.

Republican FTC Commissioners Wilson and Phillips issued a separate statement. While expressing support for the review, they called on the agencies “to proceed with care and caution.” They invited participants in the consultation process to question the “debatable assumptions” underlying certain requests, such as that “mergers generally or often fail to realize cognizable efficiencies.” They also observed that “much of the legal authority cited in the RFI is nearly or more than half a century old” even though “[c]ourts have decided quite a few antitrust cases in the intervening years.” And they noted that the persuasive force of the current horizontal merger guidelines derives from their ability to lay out a “consensus view,” “reflecting precedent from courts and the agencies, and based on accepted economic principles” – suggesting that revised guidelines that stray from this course may not hold much weight in the courts.

Comments in response to the Request for Information are due by March 21, 2022. Then, the agencies intend to release draft guidelines and are planning to offer another opportunity for public comment before any final guidelines are issued. Based on past experience, the full process could take around a year.

Axinn intends to play a significant role in commenting about these proposed revisions. Please contact Axinn to discuss your questions or views about proposed changes in the guidelines.

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