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# FTC and DOJ Seek Public Comment on Broad Review of Merger Guidelines

- The FTC and DOJ are undertaking a wide-ranging review of their merger guidelines and have issued a lengthy request for public comment, which suggests that everything in the guidelines is on the table.
- Even though the review and revision process is still in early stages, one can reasonably expect that at least some of the questions raised in the request for public comment are also being asked in pending merger reviews.
- While the agencies' guidelines are not binding on courts, they have often been cited as persuasive, and any revisions have the potential to influence judges' analysis in future merger cases.

Today, the Federal Trade Commission (FTC) and Antitrust Division of the Department of Justice (DOJ) issued a wide-ranging ten-page [request](#) for public comment in connection with their review of the agencies' merger guidelines. The agencies are [characterizing](#) the exercise as being "aimed at strengthening enforcement against illegal mergers." According to the agencies' document, the agencies' key focus is on "how effectively the current guidance documents capture the competitive issues raised by mergers today and whether [the guidelines] adequately equip enforcers to identify and proscribe unlawful, anticompetitive transactions." The agencies are "particularly interested in aspects of competition the guidelines may underemphasize or neglect, such as labor market effects and non-price elements of competition like innovation, quality, potential competition, or any trend toward concentration." The agencies are also asking for examples of competitively harmful mergers. The comment period is open until March 21, 2022. Assistant Attorney General Kanter [said](#) that the agencies will release draft revised guidelines and seek further comment and that the agencies hope to finish the exercise this year.

There are several notable areas of focus in the questions the agencies are asking, many of which touch at the core of traditionally accepted approaches to merger review. For example, the agencies are calling for views on:

- Whether the existing guidelines have been too narrowly interpreted to focus only on the predicted price effects of a merger.
- Whether the guidelines should "address all mergers in a common framework that covers all market relationships relevant to competition," rather than distinguish between horizontal and vertical mergers.
- The presumptions used to screen mergers for potential anticompetitive effects, including whether the current increase-in-concentration analysis should be revised and whether other factors should be considered, such as "whether the transaction involves a leading firm, a maverick firm, the closest competitor, or a nascent competitor."
- The evidence used to identify potential harms resulting from increased post-merger coordination among firms, including whether "evidence of conscious parallelism in the relevant market [may] be sufficient to establish that a merger will likely further diminish competition by facilitating oligopolistic post-merger coordination."

- The evidence used to identify potential harms resulting from the loss of competition between two merging firms, including whether “evidence of substantial competition between the merging parties [may] be sufficient to establish the loss of competition due to merger.”
- The evidence used to define markets – and even whether it is “necessary to precisely define the market in every case.” The document also asks whether “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.” In addition, the agencies ask whether they should “use a different approach to market definition when considering innovation as compared to price effects” and whether market definition should “play a secondary role” in analyzing “how the merger directly affects the incentive to innovate.”
- The analysis of competition in digital markets, including questions related to analysis in “zero-price markets” and “two-sided simultaneous transaction platform markets;” and the analysis of “mergers involving data aggregation as an important motive and/or effect.”

The document also asks several questions about the evaluation of potential and nascent competition; monopsony power; labor markets, potential harms to workers, and labor-related efficiency claims; the appropriateness of considering efficiency claims in general; barriers to entry; consummated mergers; common ownership; and acquisitions involving private equity.

The request for public comment comes after a call last year from President Biden for the DOJ and FTC to review their merger guidelines and the FTC’s [rescission](#) of the Vertical Merger Guidelines, which had been adopted by the agency and the DOJ in 2020. The current Horizontal Merger Guidelines were issued jointly by the DOJ and FTC in August 2010.

As we have [previously written](#), the re-examination of the agencies’ merger guidelines has the potential to have a significant impact on merger enforcement and may portend the emergence of agency merger challenges to deals that would not have been challenged in the past, potentially based on novel theories of competitive harm. To the extent the agencies adopt a more aggressive stance in revised merger guidelines that reflects increased skepticism of mergers, the revised guidelines will likely result in an increased number of merger challenges. In addition, although merger guidelines are not binding on the federal courts, it is often the case that courts hearing merger challenges cite the guidelines as persuasive authority under the view that they reflect the expertise of the agencies tasked by Congress with merger reviews. As a result, the revised guidelines ultimately may influence court decisions in particular cases and affect the development of merger law more generally.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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