

CLIENT ALERT

DOJ and FTC Seek Information on New, Stricter Merger Guidelines

January 21, 2022

AUTHORS

William H. Rooney | Jeffrey B. Korn | Wesley R. Powell | Jonathan J. Konoff
Agathe M. Richard | Ariel Blask | Thomas Obersteiner

On January 18, 2022, the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) announced a comprehensive review – and in fact a revision – of the horizontal and vertical merger guidelines with the apparent goal of finding more mergers anticompetitive. Indeed, FTC Chair Lina Khan recently professed “to act with a ‘fierce sense of urgency’ to police competition in the economy and reverse what she described as a pattern of inaction by previous antitrust enforcers.”¹

The DOJ and FTC are [seeking public comment](#) on mergers and their competitive effects through a [request for information](#) (“RFI”) to the general public that, they say, will inform the guidelines’ revision.² Public comments are [due by March 21, 2022](#).

We are pleased to assist with public comments or to submit comments anonymously on behalf of clients. We are also pleased to assist you in navigating the [antitrust regulatory uncertainty](#), especially with respect to mergers. Clients may wish to account for that uncertainty in merger-agreement covenants, closing conditions, and termination rights.

¹ David McLaughlin, *FTC’s Khan Vows to Act With ‘Fierce Urgency’ on Antitrust Front*, [BLOOMBERG LAW](#) (Jan. 19, 2022), available [here](#).

² *Request for Information on Merger Enforcement*, DEP’T OF JUSTICE & FED. TRADE COMM’N (Jan. 18, 2022), [here](#) (*hereinafter*, “RFI”).

DOJ and FTC Seek Information on New, Stricter Merger Guidelines

The guideline revision process indicates stricter merger review even now while new guidelines are being drafted.³ At a joint press conference held earlier this week, Chair Khan expressed an interest in the impact of mergers on labor and job loss. She also discussed the importance of evaluating the parties' reasons for a transaction as well as its non-price effects. Merging parties should be aware that the documents they generate regarding the reasons for the proposed transaction and its effects – whether on prices, labor, or non-price elements of competition⁴ – will receive particularly close regulatory scrutiny.

Jonathan Kanter, head of the Antitrust Division at the DOJ, [suggested](#) that the traditional distinction between horizontal and vertical mergers and the emphasis on market shares may be ill-suited for digital markets. Combinations of companies that are not direct competitors and lack high market shares may thus receive searching antitrust scrutiny on an expanded interpretation of “anticompetitive” effects.

Khan and Kanter further suggested that excessive consolidation has slowed the growth of both wages and output. The agency heads thus echoed an earlier era of antitrust enforcement in which market structures with relatively low concentration were deemed unduly conducive to oligopolistic conduct.

Indeed, the RFI footnotes cite many restrictive Supreme Court merger cases from the 1960s and early 1970s, including those that identified a presumption of illegality associated with market shares and concentration levels.⁵ Since the late 1970s, antitrust law has become less restrictive and more receptive to the efficiencies and disciplines of free markets.

The Supreme Court, however, has not had the opportunity to revisit the older merger cases, largely due to the adoption in 1976 of the premerger notification system under the Hart-Scott-Rodino Act. Most of the earlier cases reviewed recently closed transactions that were no longer subject to termination due to timing. Premerger clearance allows for divestiture settlements, and contested pre-closing cases typically do not reach the Supreme Court before the merger contract terminates. In the absence of a substantive merger case in the last several decades, the earlier Supreme Court merger cases remain intact.

Further to the prevailing regulatory preference for a restrictive approach to merger law, the text of the RFI indicates that the agencies are considering whether a transaction that involves a “leading firm, a maverick firm, the closest competitor,

³ The DOJ and FTC issued revised joint vertical merger guidelines in June 2020. The 2020 guidelines indicated increased agency attention to possible anticompetitive effects of vertical mergers. The FTC withdrew its approval of those guidelines in September 2021, after Lina Khan's confirmation as Chair, demonstrating a preference for an even stricter approach. We issued a [memorandum](#) regarding navigating M&A deals through the uncertainty caused by the FTC's withdrawal from the vertical merger guidelines and other changes related to obtaining Hart-Scott-Rodino (“HSR”) clearance.

⁴ *RFI* at 2.

⁵ *RFI* at 2 nn.6, 8.

DOJ and FTC Seek Information on New, Stricter Merger Guidelines

or a nascent competitor” should trigger a presumption of illegality.⁶ The agencies also seem ready to alter, if not jettison, such established modes of merger review as HHI-based metrics (the Herfindahl–Hirschman Index), the SSNIP test (considering a small but significant and non-transitory increase in price), aspects of the market definition exercise, and, in some instances, the distinction between horizontal and vertical mergers.⁷

The agencies are requesting comments on the following issues (among others):

- Whether the existing merger guidelines properly capture the text and purpose of the Clayton Act, which prohibits mergers that “may . . . substantially . . . lessen competition, or [] tend to create a monopoly.”⁸
- Whether the guidelines’ current approach to private equity transactions is adequate.⁹
- Whether the guidelines unduly focus on price effects while underemphasizing effects on labor markets, product quality, and innovation.¹⁰
- Whether evidence of substantial direct competition between the merging parties should be sufficient to establish an unlawful lessening of competition.¹¹
- Whether the guidelines sufficiently account for coordinated effects due to post-merger oligopolistic conscious parallelism.¹²
- Whether specific metrics or observable features of a horizontal transaction should trigger a presumption of illegality and whether those metrics should be used with, or replace, the current HHI concentration index.¹³
- Whether market definition is necessary for every merger review. Which factors constitute direct evidence of market power? Whether the SSNIP market definition test obscures non-price harms to competition.¹⁴

⁶ *RFI* at 4.

⁷ *RFI* at 4, 5.

⁸ *RFI* at 2.

⁹ *RFI* at 9.

¹⁰ *RFI* at 2, 3, 7.

¹¹ *RFI* at 3.

¹² *RFI* at 4.

¹³ *Id.*

¹⁴ *RFI* at 5-6.

DOJ and FTC Seek Information on New, Stricter Merger Guidelines

- How should markets be defined in digital markets where products and services rapidly change?¹⁵
- Whether changes in standards and approaches are necessary to strengthen enforcement against mergers that eliminate a potential or nascent competitor.¹⁶
- Should the guidelines address monopsony power differently from monopoly power, particularly in labor markets?¹⁷

As noted above, public comments are [due by March 21, 2022](#).

Also as noted, we are pleased to assist with public comments, to submit comments anonymously on behalf of clients, and to assist you in navigating the uncertain antitrust regulatory environment, especially with respect to mergers and merger agreements.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

William H. Rooney

212 728 8259

wrooney@willkie.com

Jeffrey B. Korn

212 728 8842

jkorn@willkie.com

Wesley R. Powell

212 728 8264

wpowell@willkie.com

Jonathan J. Konoff

212 728 8627

jkonoff@willkie.com

Agathe M. Richard

212 728 8190

arichard@willkie.com

Ariel Blask

202 303 1075

ablask@willkie.com

Thomas Obersteiner

212 728 8444

tobersteiner@willkie.com

Copyright © 2022 Willkie Farr & Gallagher LLP.

This alert is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This alert may be considered advertising under applicable state laws.

Willkie Farr & Gallagher LLP is an international law firm with offices in Brussels, Chicago, Frankfurt, Houston, London, Los Angeles, Milan, New York, Palo Alto, Paris, Rome, San Francisco and Washington. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at www.willkie.com.

¹⁵ RFI at 7-8.

¹⁶ RFI at 6.

¹⁷ RFI at 6-7.