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BLOG

# DOJ and FTC Joint Announcement Signals Sweeping Changes to Merger Guidelines

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On January 18, 2022, the U.S. Department of Justice ("DOJ") and Federal Trade Commission ("FTC") jointly announced their intention to begin a sweeping rewrite of their merger guidelines and issued a request for public comment on specific questions that will drive this revision process. The review is expected to lead to the replacement of the existing joint Horizontal Merger Guidelines, which were last updated in 2010, and the Vertical Merger Guidelines, which were updated in 2020 but then withdrawn by the FTC in 2021 under new leadership. The guidelines are intended to establish a framework for evaluating how the agencies review the competitive effects of mergers and—although they do not have the force of law—have long been considered persuasive by courts. In their announcement, the agencies signaled five areas of interest with potentially wide-ranging ramifications on the merger review process, particularly for large tech deals, digital markets, and private equity. Importantly, the agencies' sweeping review will consider whether, in their view, bifurcated guidelines for vertical and horizontal transactions are an outdated "two-dimensional" view of modern markets. Assistant Attorney General ("AAG") Kanter stated a goal of completing updated merger guidelines this year.

First, the agencies emphasized the need for the guidelines to better reflect the realities of a digital economy and modern acquisition strategies. FTC Chair Lina Khan questioned whether the guidelines currently dedicate enough attention to potential drivers of acquisitions such as so-called moat-building and data-aggregation strategies by digital platforms that, in the agencies' view, are a potential threat to nascent competition and roll-up strategies by private equity firms. Similarly, John Kwoka, a senior advisor at the FTC, noted in a press conference following the announcement that issues unique to digital markets were "not fully addressed . . . in the 2010 guidelines," such as "[markets] subject to tipping, . . . zero price issues, and data aggregation [which arise] most distinctly in digital mergers."

Second, consistent with the Biden administration's recent Executive Order, the agencies signaled a greater focus on monopsony power and the impact of market concentration on labor markets. For instance, Chair Khan asked whether the guidelines should treat cost-savings resulting from layoffs or the reduction of capacity in a merger as "cognizable efficiencies," and AAG Kanter referenced the recent Executive Order, noting that concentrated markets can harm both "downstream consumers" and "upstream workers."

Third, AAG Kanter questioned whether the current guidelines adequately address the Clayton Act's prohibition on transactions that "substantially lessen competition," as distinct from those "that tend to create a monopoly." In doing

so, the AAG suggested that being "truly faithful" to the Clayton Act might require a renewed focus on "transactions by firms that already have market power."

Fourth, AAG Kanter suggested that dividing transactions into either "horizontal" or "vertical" categories may "narrow us to a two-dimensional view of modern markets, which in reality are multi-dimensional." On this point, the AAG addressed the ostensible divisions between the FTC and DOJ on the topic of vertical merger guidelines, which the FTC recently unilaterally withdrew, agreeing that those guidelines "overstate the potential efficiencies of vertical mergers and failed to identify important but relevant theories of harm." The AAG, therefore, instructed market participants to view the vertical merger guidelines "only in the context of the broad-based review and overhaul that we are launching today."

Finally, fifth, the agencies indicated that "market realities" should drive enforcement rather than "market definition," which AAG Kanter derided as "static formalism." While the agencies did not indicate what this would mean in practice—including how they might reconcile a new approach with courts' continued insistence that the agencies define markets in challenges to mergers under the Clayton Act[1]—they looked forward to public comment on potential "direct sources of evidence . . . that may be more reliable in some situations than market definition."

While agency representatives declined to speculate on the exact content of the future guidelines, the areas of concern highlighted by the agencies today suggest a continued focus on nonprice harms and the impact of antitrust policy on the broader economy. Because the Biden administration has signaled a ramp-up in enforcement activity, we encourage companies to engage in the public comment process, both to ensure that the concerns of stakeholders are adequately addressed and to better prepare for potentially wide-sweeping rule changes to come.

**Takeaways**

- Both the FTC and the DOJ appear to be focused on so-called roll-up acquisition strategies, particularly by private equity. Prospective buyers that are seeking to acquire multiple businesses in the same space over a condensed period of time should expect additional scrutiny.
- Although the vertical merger guidelines have not been formally withdrawn by the DOJ, merging parties should be just as wary of resting any defense of a vertical transaction under investigation by the DOJ on efficiencies arguments as they would making such arguments before the FTC following the FTC's September 15, 2021 withdrawal of the vertical merger guidelines. From a practical perspective, the agencies appear to be on the same page with respect to vertical mergers.
- The DOJ, like the FTC, appears to be increasingly skeptical of efficiencies defenses, and both agencies may increase scrutiny of efficiencies claims related to labor cost savings.

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[1] In a separate statement, Commissioners Phillips and Wilson highlighted the need for any new guidelines to reflect recent legal precedent interpreting the antitrust laws, noting that "much of the legal authority cited in the RFI is nearly or more than a half-century old" and "[c]ourts have decided quite a few antitrust cases in the intervening years, merger and non-merger alike, which further elucidate the Sherman, Clayton, and FTC Acts."

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## Authors

Richard Falek

Conor Reidy

Kevin B. Goldstein

Christian W. Gray

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Richard Falek

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