

Public comments on US merger guidelines may be harbinger of stronger enforcement

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Key points

- U.S. antitrust regulators at the DOJ and FTC embarked on a joint review of merger enforcement by soliciting public input on modernizing federal merger guidelines.
- While public comments ran the gamut from pro-enforcement to pro-merger, some key voices, including a collection of state AGs, advocated for an elevated level of scrutiny.
- With nearly 2,000 comments provided, the agencies will turn to revising the merger guidelines, with a stated goal of releasing them publicly “in the coming months” and finalizing a new set of guidelines by the end of the year.

Citing evidence that many industries are becoming more concentrated and less competitive as merger filings multiply, the Department of Justice (DOJ) and Federal Trade Commission (FTC) began a joint review of U.S. enforcement against illegal mergers at the beginning of 2022.

The review could result in an overhaul of the existing guidelines by the end of the year.

In her remarks about the review, FTC Chair Lina Khan expressed the importance of having merger guidelines that “accurately reflect modern market realities.”¹ Specifically, the agencies sought input on topics like the purpose and scope of merger review, presumptions that certain transactions are anticompetitive, the use of market definition in analyzing competitive effects, threats to potential and nascent competition, the impact of monopsony power, including in labor markets, and the unique characteristics of digital markets.

This joint review announcement was not altogether surprising given the heightened focus on stricter merger enforcement at both agencies — evident in practice and in statements by agency heads.

In addition, the DOJ and FTC have both criticized the 2020 Vertical Merger Guidelines in the past year for overstating potential pro-competitive benefits of vertical mergers and failing to identify

relevant theories of harm. The FTC actually withdrew its approval of those guidelines in September 2021 and, more recently, Assistant Attorney General (AAG) for Antitrust Jonathan Kanter emphasized that the DOJ shares the FTC’s concerns.

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The review could result in an overhaul of the existing guidelines by the end of the year, a potentially significant shift in a U.S. merger enforcement practice that has been rooted in the 2010 Horizontal Merger Guidelines since their release.

Public comments

The public comment period of the agencies’ request for information (RFI) ended in mid-April 2022 after a 30-day extension and resulted in the submission of nearly 2,000 comments. The commenters included groups of state attorneys general (AGs), legal scholars, economists, think tank and advocacy groups, and a large number of individual consumers. Consistent with current agency posture, a majority of the substantive comments argued for more aggressive enforcement measures.

The primary topics identified in many of those pro-enforcement comments were the same issues highlighted in the RFI, but many also pointed to specific conduct or industries of concern, including:

- serial or “roll-up” acquisitions (resulting from private equity activity or otherwise);
- the impact of merger enforcement on wages and labor markets;
- possible harm from tech mergers (e.g., harm to potential competition, consideration of harm specific to digital platforms); and

- concerns about health care consolidation.

The comments that favored a more merger-friendly approach tended to suggest that:

- the current guidelines provide adequate enforcement;
- revisions to bolster enforcement could chill innovation and reduce the efficiencies that result from beneficial mergers; and
- the agencies should aim to provide greater clarity on enforcement policy to merging parties.

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One such comment, from a bipartisan group of AGs from 23 states, addressed a number of concerns with the existing guidelines, suggesting changes including facilitating challenges to acquisitions of nascent competitors, implementing modernized presumptions of illegality, enhancing enforcement against nonhorizontal mergers and emphasizing increased joint enforcement collaboration between state and federal regulators.²

In addition, this comment focused on several other potential theories of harm based on modern markets, including concentration of consumer data/attention, harm from private equity transactions and nonprice harms (e.g., harm to quality or innovation).

A second comment, from nearly the same state AGs but without any Republican co-signers, focused solely on labor markets, including with respect to "equity groups" (i.e., women, racial and ethnic minorities, the elderly and workers in rural communities).³ The comment argued that consolidation in labor markets has negatively impacted compensation and benefits for these groups, and merger enforcement practice should consider them and related nonprice harms.

A third comment, from the AGs of Colorado (a Democrat) and Nebraska (a Republican), echoed similar pro-enforcement themes.⁴ While a number of state AGs, mostly Republicans, did not join these pro-enforcement comments, the submissions indicate strong state-level support for the stricter enforcement suggested by recent federal agency practice, particularly among more left-leaning state regulators.

What's next?

Chair Khan expects to have new guidelines finalized by the end of the year, which means a new draft should be forthcoming in late summer or early fall. The question remains whether, or perhaps how much, Chair Khan and Mr. Kanter plan to reshape U.S. antitrust enforcement.

It seems likely that the new guidelines will mirror the more aggressive stance the agencies have taken under President Joe Biden and will aim to give the agencies an expanded merger enforcement "toolbox."

The new guidelines might enable stricter scrutiny by lowering the thresholds at which a merger is presumptively illegal (e.g., based on merging party market shares) or by looking to novel evidence of potential future harm. Chair Khan's statement introducing the RFI specifically identified concerns regarding mergers that may "tend to create a monopoly" even in that monopoly's incipiency.

Certain sectors like tech, health care and private equity might receive special attention due to market-specific issues impacting competition (including concerns around elimination of *potential* competition and increasing overall consolidation), which could result in closer agency review of any proposed merger in these spaces. The new guidelines might even include a stated preference for structural versus behavioral remedies.

Indeed, Mr. Kanter noted in his first speech as AAG that, "in most circumstances, [the DOJ] should seek a simple injunction to block" mergers likely to lessen competition, calling this approach "the surest way to preserve competition."

Almost certainly there will be increased focus on vertical theories and other nontraditional theories of harm, in line with recent agency practice and public statements.

Companies considering transactions that could put parties in front of the DOJ or FTC before the guidelines are updated should keep a close eye on agency announcements regarding the status of the revisions as well as any recent enforcement actions, as these may provide up-to-the-minute insight into agency views. For merging parties, updated guidelines may ultimately provide a clearer picture of current agency practice.

Notes

¹ <https://bit.ly/3yRkphp>

² <https://bit.ly/3asA6Dx>

³ <https://bit.ly/3uB0Ata>

⁴ <https://bit.ly/3lvD4DI>

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