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Kirkland Alert

U.S. Antitrust Authorities Issue RFI to Revamp Merger Guidelines

20 January 2022

On January 18, 2022, the U.S.' antitrust enforcement agencies, the Federal Trade Commission ("FTC") and Antitrust Division of the Department of Justice ("DOJ"), jointly announced they are issuing a [Request for Information](#) ("RFI") seeking public comment on a number of potential revisions to the horizontal and vertical merger guidelines. The RFI is thorough, requesting comments on 15 topical areas through almost 100 separate questions, many of which contain sub-parts. FTC Chair Lina Khan and the DOJ's Assistant Attorney General, Jonathan Kanter, explained that the revision process is driven by the FTC's and DOJ's desire to better align the guidelines with what they described as "the realities of markets after the digital revolution." The present leadership at the FTC and DOJ believe that the guidelines need to be more dynamic and take into consideration a broader set of factors than the current guidelines, and they made clear that the revision process would allow the agencies to focus on the effects of mergers rather than whether to define them as horizontal or vertical. The FTC and DOJ are soliciting comments in response to the RFI through March 21, 2022, will publish a set of draft guidelines and will open those up for public comment before publishing a final set of revised guidelines. The FTC and DOJ made clear they are interested in hearing comments from all stakeholders, including large entities, independent businesses, startups, employees and investors, and they hope to complete the process by year's end.

This effort is designed to re-evaluate the merger review process, including its scope, and the role and mechanics of market definition. The topics focus on labor monopsony, competitive effects in digital markets, markets involving nascent competitors, the tech industry, and the remedies process and options, all areas where we have witnessed recent increased FTC and DOJ scrutiny. The RFI also seeks comments on whether and how the merger guidelines should analyze certain markets and deal structures, such as private equity roll-ups and common

ownership.

During the press conference, Chair Khan and Assistant Attorney General Kanter elaborated on their particular priorities for the review and revisions.

Chair Khan's stated questions were:

- Whether the guidelines are adequately attentive to the range of business strategies and incentives, specifically whether they involve "moat-building," data aggregation strategies by digital platforms, or private equity roll-ups. And, more broadly, how the guidelines should analyze whether a merger may "tend to create a monopoly," including in its incipiency, or whether there is a trend "toward concentration" in a particular industry.
- Do the guidelines adequately assess mergers that may lessen competition particularly in labor markets thereby harming workers? She inquired whether there may be factors beyond salaries, wages and compensation that impact such a determination. Relatedly, she posed the question whether the cost savings generated by layoffs or reduction in capacity should be treated by the guidelines as efficiencies.
- Are the guidelines unduly limited in the focus of evidence considered? Are there particular markets that should have more tailored frameworks? What type of indicia of market power should the guidelines take into account? What type of evidence should the guidelines consider in evaluating nonprice effects?

AAG Kanter's remarks focused on the following:

- Emphasizing that there is too much focus on the purported divergence between DOJ and FTC on vertical mergers. He said that the DOJ shares the substantive concerns about the vertical merger guidelines and believes they fail to address important theories of harm.
- Explaining that market realities should drive the antitrust analysis, not just market definition.
- Assuring the guidelines advance economic justice to make sure everyone benefits from a free and fair economy. In his view, the merger guidelines need to explore the views of workers, businesses and farmers that actually interact on a daily basis with the merging parties.
- Incorporating the "tend[ing] to create a monopoly" prong of the Clayton Act because merger review historically focused too much on only the "substantially

lessen competition” prong.

Given the Biden administration’s intensive focus on antitrust, exemplified by its Executive Order on Promoting Competition in the American Economy, this announcement is not a surprise. The substantive direction in which Chair Khan and Assistant Attorney General Kanter appear to be driving both agencies is also expected. This announcement is another indication that the current leadership at the FTC and DOJ are pushing forward with an enforcement-minded agenda and will use all of the tools available to them (and they want more) to increase merger enforcement efforts. These tools potentially include unique, expanded theories of harm and consideration of broader types of evidence. Though these potential new guidelines may expand the scope of antitrust analysis of mergers, they may also bring greater transparency and guidance on the current administration’s views on future mergers. We are continuing to monitor developments related to the comment period in response to this RFI and potential new guidelines.

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