

## Antitrust/Competition

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# Antitrust Agencies Seek Public Comment To Shape Future Merger Guidelines

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On January 18, the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ, and together with the FTC, Antitrust Agencies) announced that they are “seek[ing] public comment on how the agencies can modernize enforcement of the antitrust laws regarding mergers.” In conjunction with that announcement, the Antitrust Agencies published a [Request for Information on Merger Enforcement](#) (RFI) with 15 topics, which include dozens of questions related to all aspects of antitrust merger review. Responses and comments to the RFI must be submitted by March 21.

Following the close of the RFI comment period, the Antitrust Agencies plan to propose new merger guidelines—based at least in part on the comments to the RFI—which will then be subject to another public comment period.

The Antitrust Agencies’ merger guidelines—which currently consist of the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines (which the FTC recently rescinded approval of)—are guidelines and not FTC or DOJ rules, so their adoption or revision does not require the Administrative Procedure Act’s formal notice and comment process. Thus, when adopting or revising guidelines, the Antitrust Agencies are not required to respond to particular points raised by commenters.

Historically, the Antitrust Agencies have viewed their merger guidelines as a reflection of how they actually evaluate mergers, and they have hoped (with considerable success) that courts would rely on such guidelines along with statutory language and case law in deciding merger challenges.

This RFI is the latest move by the Antitrust Agencies to implement President Biden’s July

2021 [Executive Order on Promoting Competition in the American Economy](#), which urged the FTC and DOJ to revisit their merger guidance. FTC Chair Lina Khan stated that the inquiry launched by the Antitrust Agencies’ RFI “is designed to ensure that our merger guidelines accurately reflect modern market realities and equip us to forcefully enforce the law against unlawful deals.”

Some of the specific areas of interest that the Antitrust Agencies highlighted in the RFI include: (i) the purpose and scope of merger review, (ii) the use of market definition in analyzing competitive effects, (iii) threats to potential and nascent competition, (iv) the impact of monopsony power (including in labor markets), and (v) the unique characteristics of digital markets (“which often have characteristics like zero-price products, multi-sided markets, and data aggregation that the current guidelines do not address in detail”).

Some of the RFI questions are particularly telling as to the Antitrust Agencies’ areas of concerns, how they may evaluate certain transactions (including those involving digital markets), and the factors they may consider in a merger analysis.

In particular, Question 6 of the RFI reflects a view that guidelines should better mirror concerns beyond short-term price effects, asking: “How should markets be defined when the potential harm to competition stems not from the risk of an immediate price increase, but instead from other longer-term or non-price factors such as a loss of innovation, changes to product quality or variety, or creation of new entry barriers?”

RFI Question 11 is directed at digital markets and how the Antitrust Agencies’ guidelines should approach transactions in those markets, asking: “How, if at all, should the guidelines’ analysis of

mergers in digital markets differ from mergers in other markets? . . . How should the guidelines address prospective competitive harms in rapidly evolving markets? . . . How should the guidelines analyze mergers involving data aggregation as an important motive and/or effect? . . . How should the guidelines analyze mergers involving competition for attention?" All of these questions have already been at issue in recent digital market mergers that faced antitrust scrutiny, and the revised guidelines will likely have more thorough guidance on how the Antitrust Agencies will continue to evaluate these issues.

Another topic covered by the RFI reflects the FTC's growing interest in private equity deals.

In particular, RFI Question 12.i asks whether the existing guidelines' approach to private equity acquisitions is adequate, and if not, what changes should be made?

The Antitrust Agencies aim to have the revised merger guidelines finalized before the end of 2022.

In the meantime, companies considering potential transactions should take note of the topics raised and questions posed in the RFI, as they provide insight into how the Antitrust Agencies might evaluate them.

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