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Justice Department and Federal Trade Commission Seek Public Comment on Revisions to the Horizontal Merger Guidelines

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January 31, 2022 - On January 18, 2022, the U.S. Justice Department Antitrust Division and Federal Trade Commission (the “agencies”) announced a joint initiative to revise the Horizontal Merger Guidelines. The Guidelines articulate and explain the standards the agencies apply when reviewing and challenging proposed mergers and acquisitions, particularly those between competitors. The initiative includes the solicitation of public comments during a 60-day period ending March 21, 2022.

Recently appointed reform-minded leaders at both agencies—Assistant Attorney General Jonathan Kanter at the DOJ’s Antitrust Division and Chair Lina Khan at the FTC—declared their intention to “modernize” the Guidelines with respect to both horizontal and vertical transactions¹.

The agencies have already brought a number of notable actions to block transactions they view as potentially anticompetitive, including Lockheed Martin’s recent proposal to acquire one of its major suppliers, Aerojet, and the proposed acquisition of Simon & Schuster by Penguin Random House, which would combine two of the largest publishing houses in the United States.

The effort to revise the Merger Guidelines reflects the Biden Administration’s more aggressive stance on antitrust enforcement. In July 2021, President Biden issued an executive order directing over a dozen federal agencies to carry out 72 initiatives to foster competition in the United States. Over the last few months the FTC has announced significant policy changes including the rescission of the Trump-era version of the Vertical Merger Guidelines,

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and implement the statutory ban on transactions that “may” substantially lessen competition or tend to create a monopoly, and what harms are contemplated by those standards. The agencies further seek input on whether the distinctions between horizontal and vertical transactions embodied in the current Guidelines should be revisited in light of trends in the modern economy.

- **Agency presumptions that certain transactions are anticompetitive:** The current Guidelines identify certain market circumstances that support an agency presumption of competitive harm based on market concentration. The agencies seek information on whether concentration thresholds should be adjusted to improve the efficiency and effectiveness of enforcement, whether alternative metrics or qualitative factors should also trigger agency presumptions of competitive harm, and evidence regarding the accuracy of such presumptions.
- **Use of market definition in analyzing competitive effects:** The agencies seek input on potential updates to market definition analysis to better account for non-price competition. They also seek input on when direct evidence of a transaction’s likely competitive effects, such as evidence of head-to-head competition, may eliminate the need for a separate market definition exercise.
- **Threats to potential and nascent competition:** The agencies seek input on potential updates to the Guidelines’ discussion of potential and nascent competitors as potential sources of innovation and competition.
- **Impact of monopsony power, including in labor markets:** The agencies seek input on how to address the issue of buyer power in more detail in the Guidelines, including how the Guidelines should analyze the likely effects of mergers on labor markets.
- **Unique characteristics of digital markets:** The agencies seek information on how to assess digital markets. Digital markets often have characteristics like zero-price products, multi-sided markets, and data aggregation that the current Guidelines do not address in detail.

Additional details of these topics are available at <https://www.regulations.gov/docket/FTC-2022-0003/document>.

Companies that have concerns about potential revisions to the Merger Guidelines or that wish to submit public comments to the agencies should consult Hughes Hubbard & Reed’s antitrust group regarding potential strategies for doing so.

References

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- 1 In antitrust terms, a “horizontal” transaction combines firms that compete with each other. A “vertical” transaction combines firms that currently are at different levels of the same distribution chain, such as between a manufacturer and its distributor, or between the manufacturer of a component and a firm that assembles

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