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FEDERAL ANTITRUST ENFORCERS ANNOUNCE REVIEW OF MERGER GUIDELINES

To Our Clients and Friends:

On January 18, 2022, the U.S. Federal Trade Commission (“FTC”) and the Department of Justice’s Antitrust Division (“DOJ”) held a press conference to announce a joint public inquiry aimed at revising the agencies’ merger guidelines. The agencies’ Horizontal Merger Guidelines, previously revised in 2010, reflect the framework the agencies use to evaluate whether M&A transactions between actual and potential competitors violate the antitrust laws. The 2020 Vertical Merger Guidelines—which the FTC previously announced it will no longer follow—address combinations of companies at different levels of a supply chain (e.g., manufacturers and their customers).

FTC Chair Lina Khan and Assistant Attorney General (“AAG”) Jonathan Kanter opened the conference with remarks about the agencies’ decision to undertake a review of the merger guidelines, along with details about the accompanying Request for Information (“RFI”). The theme of their remarks was a shared desire to strengthen the “joint merger guidelines to meet the challenges and realities of the modern economy.”^[1]

The RFI addresses fifteen topics associated with merger review,^[2] but Chair Khan and AAG Kanter focused their remarks on a handful of priorities:

- **Monopolies:** The agencies plan to review how the merger guidelines should more specifically address transactions that might create or strengthen dominant firms, taking into account a range of “business strategies and incentives” that might drive acquisitions by such firms. For example, the agencies’ RFI asks how the guidelines should address “serial” and “rollup” acquisitions of competitors by large companies and private equity firms—and whether such transactions collectively might “tend to create a monopoly” in violation of Section 7 of the Clayton Act.
- **Labor Issues:** The agencies seek comment and information on whether the guidelines should specifically address the possible effects of mergers on employees and workers. In doing so, the agencies signal that they may consider factors such as the impact of a merger on wages, salaries, and other forms of compensation. They will also seek information on whether the guidelines should treat the elimination of jobs as a cognizable efficiency of a merger.
- **Evidence of Anticompetitive Effects:** The agencies seek information as to whether the current guidelines and agency merger analysis are unduly limited in their focus on price effects of a merger. Specifically, the agencies will consider whether other indicia of anticompetitive effects, such as head-to-head competition between the merging parties, should be given more weight, and whether such evidence is more appropriate to analyzing mergers in certain industries.

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- **Accounting for “Market Realities:”** The agencies seek comment as to whether, in a “dynamic and multi-dimensional economy,” defining markets is a reliable tool for assessing the potential harm of mergers. They further seek information on how to capture dynamism in the market and whether the guidelines should consider competition in terms of “stacks” or “clusters” of component products and services that drive digital and physical supply chains.
- **Convergence of Horizontal and Vertical Merger Analysis:** The agencies seek input as to whether the traditional separation of horizontal and vertical merger analysis accurately reflects the realities of the modern economy. They will assess, in general, whether rigid categories accurately capture complex and dynamic business relationships, particularly in technology markets.

Focus on Digital Markets

The above concerns reflect the agencies’ leadership’s view that the current merger guidelines fail to fully account for the types of competitive harms mergers present in today’s technology markets generally, and digital markets in particular. Indeed, AAG Kanter stated that “[o]ur country depends on competition to drive progress, innovation and prosperity . . . [and for that reason] [w]e need to understand why so many industries have too few competitors, and to think carefully about how to ensure our merger enforcement tools are fit for purpose in the modern economy.” The RFI calls out digital markets specifically. Agency officials explained they want to establish an analytical roadmap for assessing digital markets because such markets raise “different issues” like tipping, zero price issues, and data aggregation.

Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson

Following the announcement, FTC Commissioners Noah Joshua Phillips and Christine S. Wilson issued a joint statement endorsing the effort to seek public comment on the guidelines because “it reflects [the FTC’s] posture of continual learning.” Their comments also highlight that the 2010 Horizontal Merger Guidelines have largely been accepted by the courts because they are based on a consensus framework developed over decades. They noted that the 2010 Guidelines succeeded in providing transparency and predictability to the business community. Any revisions to the guidelines must reflect the administrability, transparency, and predictability considerations that made the 2010 guidelines successful. In order to fully account for these considerations, Commissioners Phillips and Wilson encourage the public to submit comments and concerns on both the legal and economic issues presented in the RFI, as well as the assumptions that underlie those particular questions.

Next Steps and Implications

Chair Khan remarked that “[t]his inquiry . . . is designed to ensure that [the agencies’] merger guidelines accurately reflect modern market realities and equip [the agencies] to forcefully enforce the law against unlawful deals.” [3] As many expected, the FTC and DOJ under the Biden Administration are proceeding with revisions to the federal merger guidelines that will reflect the Administration’s goal of strengthening antitrust enforcement. It remains to be seen whether and how the revised guidelines address this broad range of topics, and whether they will be adopted by the courts. Commissioners Phillips and Wilson observed that the existing guidelines embraced well-established legal and economic

principles and enhanced transparency for merging parties. For new guidelines to have the same impact, they will need to reflect a similar approach.

Companies concerned about the forthcoming guidelines should begin making plans now to ensure those concerns are amply documented before the agency. As Commissioners Wilson and Philips emphasized, substantial, evidence-based comments—whether submitted directly by a company, or by a trade association—have historically driven guidelines that reflect a consensus framework. Businesses and the agencies alike share an interest in a merger review framework that results in necessary enforcement while avoiding over deterrence in merger and acquisition activity.

[1] Statement of AAG Jonathan Kanter (Jan. 18, 2022).

[2] The full list of topics are as follows: Purpose, Harms, and Scope, Types and Sources of Evidence, Coordinate Effects, Unilateral Effects, Presumptions, Market Definition, Potential and Nascent Competition, Remedies, Monopsony Power and Labor Markets, Innovation and IP, Digital Markets, Special Characteristics Markets, Barriers to Firm Entry and Growth, Efficiencies, and Failing and Flailing Firms.

[3] Statement of Chair Lina Khan (Jan. 18, 2022).



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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please feel free to contact the Gibson Dunn attorney with whom you usually work in the firm's Antitrust and Competition Practice Group, the authors, or any of the following:

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