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U.S. Department of Justice  
U.S. Federal Trade Commission

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## Request for Information on Merger Enforcement

The Federal Trade Commission and Antitrust Division of the Department of Justice (“the agencies”) seek public comment on how the agencies can modernize enforcement of the antitrust laws regarding mergers.<sup>1</sup> The Commission and the department have a long history of developing and publishing frameworks for the analysis of mergers under the antitrust laws.<sup>2</sup> The merger guidelines<sup>3</sup> set forth analytical techniques, practices, and enforcement policy of the agencies, and are under review to ensure that they (1) reflect current learning about competition based on modern market realities,<sup>4</sup> and (2) faithfully track the statutory text, legislative history, and established case law around merger enforcement. A key overriding question is how effectively the current guidance documents capture the competitive issues raised by mergers today and whether these documents adequately equip enforcers to identify and proscribe unlawful, anticompetitive transactions.<sup>5</sup>

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<sup>1</sup> As used herein, the term “mergers” refers to mergers, acquisitions, joint ventures, and other structural realignments of firms.

<sup>2</sup> Mergers may violate Section 7 of the Clayton Act (as amended by the Celler-Kefauver Antimerger Act of 1950), Sections 1 and 2 of the Sherman Act, and Section 5 of the FTC Act.

<sup>3</sup> As used herein, the term “merger guidelines” refers both to the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines. While the agencies work to jointly develop replacement guidance, market participants should be advised that the Federal Trade Commission has already withdrawn the 2020 Vertical Merger Guidelines, and the Department of Justice shares the Commission’s substantive concerns with economic and legal errors in them and seeks to replace them expeditiously with a document better reflecting its current approach. *See* Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines, Comm’n File No. P810034, at 8-9 (Sep. 15, 2021), <https://www.ftc.gov/public-statements/2021/09/statement-chair-lina-m-khan-commissioner-rohit-chopra-commissioner-rebecca>; Press Release, Dep’t of Just., Justice Department Issues Statement on the Vertical Merger Guidelines (Sept. 15, 2021), <https://www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines>.

<sup>4</sup> The Supreme Court has explained that “careful analysis of market realities” is necessary in antitrust enforcement because “[i]f those market realities change, so may the legal analysis.” *NCAA v. Alston*, 141 S.Ct. 2141, 2158 (2021).

<sup>5</sup> The FTC similarly requested information to improve enforcement in pharmaceutical mergers in May 2021, as part of the Multilateral Pharmaceutical Merger Task Force. *See* Press Release, Fed. Trade Comm’n, Multilateral Pharmaceutical Merger Task Force Seeks Public Input (May 11, 2021), <https://www.ftc.gov/news-events/press-releases/2021/05/multilateral-pharmaceutical-merger-task-force-seeks-public-input>. Comments received in response to that request will be considered as well.

In support of this review, the agencies seek new learning related to firm and market behavior and comments on how these advances should inform the guidelines. The agencies are particularly interested in aspects of competition the guidelines may underemphasize or neglect, such as labor market effects and non-price elements of competition like innovation, quality, potential competition, or any “trend toward concentration.”<sup>6</sup> Finally, the agencies seek specific examples of mergers that have harmed competition, with descriptions of how the merger harmed competition, including how those mergers made it more difficult for customers, workers, or suppliers to work with the merged firm or competitors of the merged firm or made it more difficult for rivals to compete with the merged firm.

The agencies encourage the public, including market participants, government entities, economists, attorneys, academics, unions, workers, farmers, ranchers, businesses, franchisees, and consumers, to share feedback, evidence, and ideas that will lead to the development of merger enforcement and policy guidance. The agencies invite submissions addressing the following questions:

1. Purpose, Harms, and Scope

- a. Does the analytical framework described in the guidelines properly reflect the text and purpose of the Clayton Act, namely, to prevent mergers and acquisitions whose effect “may be substantially to lessen competition, or to tend to create a monopoly”? Are the guidelines sufficiently clear that mergers may be enjoined when there is sufficient risk that they will substantially lessen competition in any relevant downstream or upstream market? Are they sufficiently clear about the circumstances in which mergers may be enjoined because they tend to create a monopoly?
- b. What effects should be covered by the term “lessen competition”?
- c. Do the guidelines sufficiently reflect the Act’s concern with mergers that “may” substantially lessen competition?
- d. Do the guidelines reflect any additional competitive concerns reflected in the statute’s prohibition against mergers that “may ... tend to create a monopoly”? Is this statutory language directed at preventing monopolies in their incipiency such as through serial acquisitions, including rollups? How should the guidelines address a merger that may tend to create a monopoly? How should the guidelines analyze whether there is a “trend toward concentration in the industry,”<sup>7</sup> and what impact should such a trend have on the analysis of an individual transaction?
- e. Do the guidelines sufficiently reflect the observation that assessing the likely effects of a merger “is not the kind of question which is susceptible of a ready and precise answer in most cases”?<sup>8</sup>
- f. Are the guidelines sufficiently “alert to the danger of subverting congressional intent by permitting a too-broad economic investigation”?<sup>9</sup>

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<sup>6</sup> See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 316 (1962); *United State v. Baker Hughes*, 908 F.2d 981, 990 (D.C. Cir. 1990), (quoting *United States v. Phil Nat’l Bank*, 374 U.S. 321, 363 (1963)).

<sup>7</sup> *Id.* at 332.

<sup>8</sup> *Phil. Nat’l Bank*, 374 U.S. at 362; see also *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 496-7 (1974).

<sup>9</sup> *Phil. Nat’l Bank*, 374 U.S. at 362.

- g. Should the guidelines' traditional distinctions between horizontal and vertical mergers be revisited in light of recent economic trends in the modern economy? What aspects of modern market realities may be lost by focusing on these relationships categorically? Should the guidelines address all mergers in a common framework that covers all market relationships relevant to competition? If so, how?
  - h. How should the guidelines assess whether a lessening of competition is "substantial"?<sup>10</sup> What factors should be considered in assessing the likelihood and, separately, the magnitude of harms resulting from a merger?
  - i. Does the guidelines' framework suggest limiting enforcement to a subset of the mergers that are illegal under controlling case law?
  - j. Should the guidelines include more discussion of applicable case law? What lessons from recent enforcement experience should the agencies consider incorporating in the guidelines?
2. Types and Sources of Evidence
- a. Has the guidelines' framework been interpreted unduly narrowly as focusing primarily on the predicted price outcome of a merger? Are there nonprice effects that are not adequately analyzed by analogy to price effects, and how should the guidelines address such effects? What evidence should the guidelines consider in evaluating these effects?
  - b. Has the guidelines' framework made it difficult to identify some mergers that are illegal by focusing on certain types of evidence? For example, should the guidelines make it clearer that the tests for an antitrust market can often be satisfied using direct evidence of likely effects (such as evidence of head-to-head competition between the merging parties) or qualitative evidence about substitution?<sup>11</sup>
  - c. Does the guidelines' framework make it difficult to identify some anticompetitive mergers by overemphasizing predictive quantification techniques? What does contemporary economic learning suggest the role of predictive quantification should be in predicting a transaction's competitive effects?
  - d. Does the guidelines' framework sufficiently capture the range of circumstances in which a merger will likely enhance the ability and/or incentive of the merging parties or other market participants to reduce competition, and the range of evidence that may be relevant to that consideration?
  - e. How frequently have unchallenged mergers or mergers that were subject to remedies resulted in a lessening of competition, and how does that lessening of competition typically manifest? Please identify examples of such mergers. What are the characteristics of those transactions that, if recognized before the merger, would have helped anticipate the adverse outcomes?

### 3. Coordinated Effects

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<sup>10</sup> See, e.g., *Brown Shoe Co.*, 370 U.S. at 321-22 (noting that while the Clayton Act provides no definition of substantial, "Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry.").

<sup>11</sup> *Id.* at 325 (identifying "practical indicia" of substitutability).

- a. What developments have there been in research or practice with respect to identifying possible coordinated effects from a merger? What revisions, if any, to the guidelines should the agencies consider in light of those developments?
  - b. Does the guidelines' approach adequately account for the likelihood of coordinated effects in oligopolistic and oligopsonistic market structures?
  - c. How have changes in the modern economy affected the incentive and ability of firms to engage in harmful tacit coordination, particularly in oligopolistic and oligopsonistic markets? How should these changes affect enforcement?
  - d. How should the guidelines address the incentive and ability of firms to develop moats around oligopolistic and oligopsonistic market structures by explicit or parallel exclusionary conduct?
  - e. Should evidence of conscious parallelism in the relevant market be sufficient to establish that a merger will likely further diminish competition by facilitating oligopolistic post-merger coordination?
4. Unilateral Effects
- a. What developments have there been in research or practice with respect to unilateral effects from a merger? What revisions, if any, to the guidelines' approach to unilateral effects should the agencies consider?
  - b. Should evidence of substantial competition between the merging parties be sufficient to establish the loss of competition due to merger?
5. Presumptions
- a. Do the guidelines adequately identify mergers that are presumptively unlawful under controlling case law?<sup>12</sup> Do they accurately identify those circumstances where the agencies will conclude a merger would substantially lessen competition absent rebuttal evidence?
  - b. Does the structural presumption in the guidelines accurately reflect current understanding of the characteristics of mergers that prove to be anticompetitive? Should the guidelines be revised to adjust the stated thresholds, emphasize certain criteria, or include other metrics such as the number of significant competitors as a supplement or alternative to, or even as a replacement for, HHI-based metrics?
  - c. What specific metrics or observable features of a transaction, firm, or market should, alone or in combination, trigger a presumption that a horizontal transaction is anticompetitive? Are there factors that could be applied in such screens, such as whether the transaction involves a leading firm, a maverick firm, the closest competitor, or a nascent competitor? What would be their accuracy and predictive power relative to the quantitative factors in the guidelines?
  - d. Should the guidelines identify thresholds for customer diversion and margins that, solely or together, create a presumption of competitive harm from certain mergers?
  - e. What specific metrics or observable features of a transaction, firm, or market should, alone or in combination, trigger a presumption that a non-horizontal transaction is anticompetitive?

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<sup>12</sup> *Phil. Nat'l Bank*, 374 U.S. at 363 (“Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.”).

- f. Would the inclusion of multiple alternative presumptions better reflect the diversity of transactions and evidence presented by the modern economy?
  - g. Should separate metrics be considered or specified for markets involving labor, based on the unique characteristics of such markets (e.g., search frictions typically greater than those present in product/service markets)?
  - h. How does the administrative cost and accuracy of the guidelines' structural presumption or any proposed alternative presumption(s), standing alone, compare to the administrative cost and accuracy of individually analyzing each transaction in depth?
6. Market Definition
- a. Is it necessary to precisely define the market in every case?<sup>13</sup> In what cases is it more or less important? Does the importance of market definition vary between horizontal and non-horizontal mergers? What conclusions about the existence of a relevant market can be drawn from the identification of probable harm?
  - b. Are there tools used to define markets that are or should be unique to merger analysis? If so, which ones and why?
  - c. Where a market is defined, do the guidelines explain sufficiently clearly that markets can be defined using qualitative evidence, and that direct evidence of probable harm, such as evidence of substantial competition between the merging parties, is one way to define a market?
  - d. What conclusions about the existence of a relevant market can be drawn from direct evidence that one of the merging parties possesses market power? What factors constitute such direct evidence?
  - e. Are the guidelines sufficiently clear that the same product or service may be in multiple relevant antitrust markets depending on the competitive effects being evaluated?
  - f. Do the guidelines imply that precision is necessary or possible in defining relevant markets? In the various inputs used to define relevant markets?
  - g. Does the focus on the SSNIP test in implementing the Hypothetical Monopolist Test specifically, and in undertaking market definition more broadly, obscure the various types of harms in addition to price effects that may arise?
  - h. 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?
  - i. Does a formalistic market definition exercise mask the potential for dynamic competition to be lost as a result of a merger, such as through emergent and disruptive competition, competition for the market, and the development of component competition to decrease dependency on stacks of services?

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<sup>13</sup> Compare *Brown Shoe Co.*, 370 U.S. at 324 (“determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition ‘within the area of effective competition.’ Substantiality can be determined only in terms of the market affected.”), with *Phil. Nat’l Bank*, 374 U.S. at 363 (“intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects.”).

- j. To what extent does a focus on product market overlaps fail to identify broader concerns about other aspects of competition?
7. Potential and Nascent Competition
    - a. What changes in standards or approaches would appropriately strengthen enforcement against mergers that eliminate a potential competitor?
    - b. Should the guidelines focus on whether either merging firm is contemplating entry<sup>14</sup> into, or is well situated to enter, a market where the other firm competes? Should it be sufficient to demonstrate either firm's capability of entering a concentrated market or that the acquiring firm has market power?
    - c. How can the guidelines characterize, and perhaps quantify, the importance of a potential competitor to market competition? What sources of evidence are most probative?
    - d. In the case of a nascent competitor—a firm that, while small now, might evolve into a competitive force—how should the guidelines assess its potential path of evolution into a plausible competitor? What degree of probability should serve as sufficient, especially in cases where technology and products evolve rapidly or unpredictably?<sup>15</sup> Should the sufficient probability vary depending on the degree of market concentration?
    - e. How should the guidelines account for the possibility that competition may develop from unexpected sources?
    - f. How should the guidelines assess an acquisition where the acquiring firm would likely develop its own product if acquisition was not possible?
  8. Remedies
    - a. Parties often propose or alter divestitures or other partial remedies for an unlawful transaction after the agencies have expended significant resources investigating the competitive effects of the transaction as proposed. Should the guidelines adopt a formal process and deadlines for remedy proposals? How should any such approach be structured?
  9. Monopsony Power and Labor Markets
    - a. How should the guidelines' analysis of monopsony power differ from its analysis of monopoly power? How, if at all, should the thresholds for applicable market-structure presumptions differ from those used in analysis of monopoly power?
    - b. How should the guidelines treat a merger that may generate monopsony power, but does not substantially lessen competition in an output market?
    - c. Are there specific monopsony situations that the guidelines should address explicitly, such as monopsony power in labor markets? Are there differences between monopsony power in labor markets and other upstream markets?

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<sup>14</sup> See, e.g., *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 532 (1973) (“error lay in the assumption that because Falstaff, as a matter of fact, would never have entered the market *de novo*, it could in no sense be considered a potential competitor.”).

<sup>15</sup> See, e.g., *United States v. Microsoft Corp.*, 253 F. 3d 34, 79 (D.C. Cir. 2001) (finding that Java and Netscape constituted nascent competitive threats to Microsoft because they “showed potential” in the context of a Sherman Act § 2 monopolization claim).

- d. Do the guidelines set forth a sufficient framework to analyze mergers that may lessen competition in labor markets and thereby harm workers?
- e. In addition to employers' ability and incentive to exert downward pressure on wages via employment restrictions, what other signs of an uncompetitive labor market should the guidelines consider?
- f. What characteristics of labor markets are most likely to be associated with transactions that risk substantially lessening competition? What lessons about relevant labor markets can be taken from enforcement cases against identified anticompetitive restraints on competition for workers?
- g. In addition to wages, salaries, and other financial compensation, what aspects of workers' terms and conditions of employment should be considered?
- h. How should a labor market be defined in terms of job characteristics, geography, and worker flows? Should the guidelines adopt presumptions around the definition of relevant labor markets based on existing government analyses such as defined commuting zones and labor market areas? How should the guidelines address switching costs and other barriers to changing jobs?
- i. Should the guidelines address coordinated effects in upstream markets separately from coordinated effects in downstream markets?

#### 10. Innovation and IP

- a. Should the guidelines use a different approach to market definition when considering innovation as compared to price effects? Should market definition play a secondary role to analysis of how the merger directly affects the incentive to innovate?
- b. To what extent does a focus on product market overlaps fail to identify broader concerns about incentives to innovate, particularly given that innovation may involve the creation of new product or service categories?
- c. What approaches can the guidelines use to determine whether technologies subject to a license or acquisition either compete with or complement the licensee's or acquirer's own technologies? How do those approaches perform in circumstances where parties own or license many patents related to the same categories of products?
- d. Where technology-by-technology analysis is impractical, what alternative methods of analysis could be used to identify anticompetitive concerns in merger cases involving intellectual property?
- e. How should the guidelines analyze innovation in markets with high failure rates?

#### 11. Digital Markets

- a. How, if at all, should the guidelines' analysis of mergers in digital markets differ from mergers in other markets? How should markets be defined in the case of mergers in the digital sector where products and services undergo rapid change? How should the guidelines address prospective competitive harms in rapidly evolving markets?
- b. How should the guidelines analyze mergers in markets subject to tipping toward oligopoly or monopoly, such as may result from significant network effects? How should the nature and timing of enforcement strategy differ in markets subject to tipping?

- c. How should the guidelines approach market definition in zero-price markets, negative-price markets, or markets without explicit prices? Can “quality” and other characteristics play the same role as price in market definition?
- d. How should the guidelines evaluate mergers in two-sided simultaneous transaction platform markets? What are the competitively-relevant differences between two-sided simultaneous transaction platforms and other kinds of multi-sided platforms?
- e. What are the appropriate indicia of market power in complex and multi-sided markets? Are traditional market definition approaches reliable frameworks for assessing the existence and magnitude of market power in these markets? Are other tools as effective or more effective than market definition in those contexts?
- f. How should the guidelines analyze mergers involving data aggregation as an important motive and/or effect? How should economies of scale and scope be measured in these cases?
- g. How should the guidelines account for multihoming or interoperability? To what degree does multihoming or interoperability offset competitive concerns in actual practice?
- h. How should the guidelines analyze mergers involving competition for attention? How should relevant markets be defined? What types of harms should the guidelines consider?

## 12. Special Characteristics Markets

- a. Bargaining. Is the guidelines’ approach to markets characterized by bargaining adequate? If not, what changes should be made? Does increased bargaining leverage give rise to competitive effects?
- b. Auctions. Is the guidelines’ approach to auction markets adequate? If not, what changes should be made?
- c. Bundled products. Is the guidelines’ approach to bundled products adequate? If not, what changes should be made?
- d. Cluster markets. Is the guidelines’ approach to cluster markets adequate? If not, what changes should be made, and in what circumstances should such markets be analyzed?
- e. Price discrimination. In what circumstances is evidence of potential price discrimination helpful in defining a relevant market?<sup>16</sup> In those circumstances, how precise or targeted must price discrimination be to support a relevant market?
- f. Non-horizontal mergers. Do the current guidelines adequately identify the full range of non-horizontal mergers that may harm competition? Should the guidelines address the acquiring firm’s market power in markets adjacent to the target’s business? Should the guidelines address the possibility that a large firm entering a new market comprised of smaller companies by acquiring one of those market participants may eliminate potential competition or raise entry barriers and thereby substantially lessen competition?
- g. Consummated mergers. Do the current guidelines adequately explain the appropriate analysis of consummated mergers and the use of post-merger evidence?
- h. Common ownership. Is the guidelines’ approach to common ownership and horizontal stockholding adequate? If not, what changes should be made?

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<sup>16</sup> See, e.g., *Fed. Trade Comm’n v. Whole Foods Mkt, Inc.*, 548 F.3d 1028, 1039 (D.C. Cir. 2008).



- i. Private equity. Is the guidelines' approach to private equity acquisitions adequate? If not, what changes should be made?

### 13. Barriers to Firm Entry and Growth

- a. Does the guidelines' approach to analyzing whether merger-induced entry may counteract a merger's potentially harmful effects account for modern learning?
- b. What factors impact the ability of new firms to enter a market that are not currently addressed by the guidelines?
- c. What objective indicators could be used to estimate the size and significance of entry barriers in a market, such as incumbent firm size, rates of entry and exit over time, behavior of capital markets toward new entrants, or other metrics?
- d. To what extent should the guidelines treat an increase in the size of entry barriers or new impediments to rivals' growth as a harm to competition,<sup>17</sup> even in the absence of any identified potential entrant? How should they do so?

### 14. Efficiencies

- a. Is the guidelines' approach to efficiencies consistent with the prevailing legal framework as enacted by Congress and interpreted by the courts?<sup>18</sup>
- b. Do the guidelines reflect the best evidence regarding how often mergers in fact achieve the cost savings and other benefits claimed by merging parties? What are some examples of cases where merger-specific efficiencies were, in fact, realized or not realized? What types of claimed efficiencies and other benefits appear more likely to be realized? How often do these appear to be passed through to consumers? What evidence is there concerning the durability of any beneficial effects?
- c. For those mergers that appear to yield cognizable efficiencies, what degree of certainty should the guidelines require that they cannot be achieved in any other way?
- d. Where a merger is expected to generate cost savings via the elimination of "excess" or "redundant" capacity or workers, should the guidelines treat these savings as cognizable "efficiencies"? How should the guidelines address the potential for capacity reductions to reduce resilience of supply or otherwise lower product or service quality?
- e. For those mergers that appear to yield lower input purchasing prices, how can cost savings due to monopsony power be distinguished from other forms of savings?
- f. If mergers generally or often fail to realize cognizable efficiencies, how should that affect the guidelines' treatment of efficiency claims?
- g. How often do mergers lead to cost or quality inefficiencies such as diseconomies of scale? Do the guidelines adequately address the possibility that a merger may lead to such inefficiency? How should the potential for such inefficiencies be addressed?

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<sup>17</sup> See, e.g., *Microsoft Corp.*, 253 F.3d at 55 (actions to prevent erosion of the "applications barrier to entry" constituted monopolization under Sherman Act § 2).

<sup>18</sup> See, e.g., *Fed. Trade Comm'n v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) ("Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."); *United States v. Anthem, Inc.*, 855 F.3d 345, 353 (D.C. Cir. 2017) ("it is not at all clear that [efficiencies] offer a viable legal defense to illegality under Section 7.").

### 15. Failing and Flailing Firms

- a. Is the guidelines' approach to failing firms adequate? If not, what changes should be made?
- b. In what situations, if any, should a weakened competitor defense apply? What are the characteristics of a "weakened competitor"? How, if at all, is a weakened competitor defense related to the failing firm defense? Are there circumstances in which a firm may meet the criteria for a "weakened competitor," but an acquisition of that firm may still substantially lessen competition? How should the guidelines address the potential for the acquired firm to weaken its competitiveness by reducing investment after deciding to put itself up for sale?