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Justice Department and Federal Trade Commission Seek to Strengthen Enforcement Against Illegal Mergers

Agencies Launch Joint Public Inquiry Aimed at Modernizing Merger Guidelines to Better Detect and Prevent Anticompetitive Deals

Today, the Justice Department's Antitrust Division and Federal Trade Commission (FTC) launched a joint public inquiry aimed at strengthening enforcement against illegal mergers. Recent evidence indicates that many industries across the economy are becoming more concentrated and less competitive – imperiling choice and economic gains for consumers, workers, entrepreneurs and small businesses. These problems are likely to persist or worsen due to an ongoing merger surge that has more than doubled merger filings from 2020 to 2021. To address mounting concerns, the agencies are soliciting public input on ways to modernize federal merger guidelines to better detect and prevent illegal, anticompetitive deals in today's modern markets.

"Our country depends on competition to drive progress, innovation and prosperity," said Assistant Attorney General Jonathan Kanter of the Justice Department's Antitrust Division. "We 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."

"Illegal mergers can inflict a host of harms, from higher prices and lower wages to diminished opportunity, reduced innovation and less resiliency," said FTC Chair Lina M. Khan. "This inquiry launched by the FTC and DOJ is designed to ensure that our merger guidelines accurately reflect modern market realities and equip us to forcefully enforce the law against unlawful deals. Hearing from a broad set of market participants, especially those who have experienced first-hand the effects of mergers and acquisitions, will be critical to our efforts."

Competition is critical to the success of the economy. It ensures that Americans have the freedom to choose among different suppliers and different employers. When businesses face competition, it spurs them to improve their products, develop new ones and lower prices. Mergers can reduce choices for consumers, workers and other businesses, leaving them increasingly dependent on larger and more powerful firms that have purchased greater power to dictate the terms of their deals. To protect competition and prevent increased consolidation, Congress passed a series of antitrust laws and authorized the Justice Department and FTC to enforce them.

The antitrust laws charge the Justice Department and the FTC with preventing mergers that may substantially lessen competition or tend to create a monopoly. Merger guidelines are frameworks for the analysis of mergers under the antitrust laws. The Justice Department first published merger guidelines in 1968, with the goal of providing transparency into the standards it applied in reviewing mergers. Since then, the agencies have published a number of updates, generally specified by whether the transaction is considered horizontal (within the same market) or vertical (within the same supply chain). Although the guidelines identify some of the competitive harms mergers present, markets may fall outside the frameworks under the current approach.

The public inquiry launched today seeks comments on developments in the modern economy and new evidence of mergers' effects on competition to inform potential revisions to the guidelines. The agencies encourage the public, including market participants, government entities, economists, attorneys, academics, unions, employees, farmers, workers, businesses, franchisees and consumers, to share feedback, evidence and ideas that may inform revisions to the guidelines. Some of the specific areas of inquiry on which the agencies are seeking public input and information include:

- **Purpose and scope of merger review:** The agencies seek information on whether the guidelines explain 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 distinctions between horizontal and vertical transactions reflected in the guidelines should be revisited in light of trends in the modern economy.
- **Presumptions that certain transactions are anticompetitive:** The guidelines identify certain market circumstances that justify a 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 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 the guidelines' market definition analysis to better account for non-price competition. They also seek to 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, which may be key 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. Labor markets are a key example of buyer power, and the agencies seek information regarding how the guidelines should analyze labor market effects of mergers.
- **Unique characteristics of digital markets:** The agencies seek information on how to account for key areas of the modern economy like digital markets in the guidelines, which often have characteristics like zero-price products, multi-sided markets and data aggregation that the current guidelines do not address in detail.

The Request for Information is available at https://www.regulations.gov/docket/FTC-2022-0003/document.

The comment period is open for 60 days. Comments can be submitted to regulations.gov and must be received no later than Monday, March 21, 2022. The information will be used by the agencies to consider updates and revisions to the guidelines. If such revisions are contemplated in light of the evidence received and the agencies' independent research, the agencies will publish proposed guidelines for public comment.

Click to view AAG Kanter's remarks.

Click to view Chair Khan's remarks.

Attachment(s):
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