



July 19, 2023

FTC and DoJ Issue Proposed New Merger Guidelines

Today, July 19, 2023, the U.S. Federal Trade Commission ("FTC") and Department of Justice ("DoJ") issued their long-awaited proposed new merger guidelines for public comment. The new guidelines, consisting of 13 principles, can be found [Here](#).

We reported last year on the FTC/DoJ January 18, 2022 launch of a joint public inquiry aimed at modernizing merger guidelines to better detect and prevent anticompetitive mergers pursuant to section 7 of the Clayton Act and sections 1 and 2 of the Sherman Antitrust Act (see, "FTC and DoJ Launch Effort to Restrict Anticompetitive Mergers," Jan. 24, 2022, available at [Kurtin PLLC Mergers & Acquisitions](#)).

We have also reported on the series of initiatives under FTC chair Lina M. Khan and DoJ Antitrust Chief Jonathan Kanter to shift from a decades-long generally tolerant merger review policy deemed by them to have allowed many potentially anticompetitive deals to proceed to a more restrictive posture. See, "FTC Rescinds 2020 Vertical Merger Guidelines...", Sept. 29, 2021 and "FTC Reinststitutes Restrictive 'Prior Approval' Merger Control Review Policy," Oct. 26, 2021. The FTC also earlier this month proposed changes to enhance reporting requirements on the Hart-Scott-Rodino ("HSR") Form, used to seek pre-merger clearance on transactions meeting the HSR thresholds. See, "FTC Issues Rulemaking for Major Revision of HSR M&A Reporting," July 3, 2023. The foregoing advisories are also available at [Kurtin PLLC Mergers & Acquisitions](#)).

The new proposed guidelines represent a continuation of the FTC/DoJ aggressive merger review posture notwithstanding recent court reversals of attempts to block deals, such as recently reported for the Microsoft-Activision Blizzard transaction. The new guidelines

consist of 13 overarching principles for merger review going forward. The guidelines propose:

- Guideline 1: Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets.
- Guideline 2: Mergers Should Not Eliminate Substantial Competition Between Firms.
- Guideline 3: Mergers Should Not Increase the Risk of Coordination.
- Guideline 4: Mergers Should Not Eliminate a Potential Entrant in a Concentrated Market.
- Guideline 5: Mergers Should Not Substantially Lessen Competition by Creating a Firm that Controls Products or Services that Its Rivals May Use to Compete.
- Guideline 6: Vertical Mergers Should Not Create Market Structures that Foreclose Competition.
- Guideline 7: Mergers Should Not Entrench or Extend a Dominant Position.
- Guideline 8: Mergers Should Not Further a Trend Toward Concentration.
- Guideline 9: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies (the FTC and DoJ) May Examine the Whole Series.
- Guideline 10: When a Merger Involves a Multi-sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform.
- Guideline 11: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers.
- Guideline 12: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine its Impact on Competition.
- Guideline 13: Mergers Should Not Substantially Lessen Competition or Tend to Create a Monopoly (this last guideline is explicitly intended to provide a "residual" basis for blocking a merger for which none of the preceding 12 guidelines clearly apply).

The Draft Guidelines are open for public comments for 60 days, with comments to be received no later than September 18, 2023. If you would like assistance submitting a comment or other information on the Joint FTC-DoJ Proposed Merger Guidelines, please contact us at info@kurtinlaw.com.

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