



Regulatory Alert

Regulatory Insights



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Fairness and Competition: Information requests on merger guidelines

As directed by Executive Order, M&A activity across all industries will be subject to heightened scrutiny for potential concentration and anticompetitive impacts. Regulatory agencies note they are currently seeing a “merger surge” and the FTC, in particular, states that it is looking to “understand why so many industries have too few competitors.”

The banking regulators also indicate they are exploring ways to enhance their merger framework to promote competition, innovation, and consumer choice as, notably, transactions subject to the Bank Merger Act are specifically called out in the Executive Order. Proposed transactions, especially those deemed “large” or involving large institutions should anticipate heightened regulatory scrutiny.

Companies should actively assess how increased regulatory scrutiny and oversight of mergers and acquisitions activity could impact their business strategies.

The Department of Justice (DOJ) and the Federal Trade Commission (FTC) have jointly released a [Request for Information \(RFI\)](#) seeking input on ways to modernize the federal merger enforcement guidelines to improve detection and prevention of consolidating or anticompetitive deals. The RFI responds to a July 2021 [Executive Order](#) on *Promoting Competition in the American Economy*, which affirmed the Administration’s focus on the enforcement of antitrust laws to address excessive concentration of industry, abuses of market power, and other negative effects of anticompetitive practices, all of which may potentially pose harm to consumers and small businesses. (See KPMG Regulatory Alert [here](#).) The order established numerous initiatives to promote competition, generally directing regulatory agencies, including the federal banking agencies specifically, to resist consolidation and promote competition through the independent oversight of mergers, acquisitions, and joint ventures.

The Executive Order directed the DOJ and FTC to review horizontal and vertical merger guidelines. The agencies explain that mergers are currently reviewed based on

whether the transaction is considered horizontal (within the same market) or vertical (within the same supply chain). The announcement notes that while these guidelines identify some of the potentially anticompetitive harms mergers may present, certain markets may fall outside the frameworks under the current approach. The RFI seeks comments on developments in the modern economy and new evidence of the effects of merger activity on competition to inform potential revisions to the merger guidelines. Specific topics and inquiries include:

- Purpose and scope of merger review
 - Do the guidelines adequately explain and implement the statutory ban on transactions that may substantially lessen competition or tend to create a monopoly as well as contemplate the potential for harms?
 - Should the distinctions between horizontal and vertical transactions be revisited considering trends in the modern economy?
- Presumptions that certain transactions are anticompetitive



- Should the concentration thresholds be adjusted to improve the efficiency and effectiveness of enforcement?
- Should alternative metrics or qualitative factors also trigger a presumption of, or the potential for, competitive harm?
- Use of market definition in analyzing competitive effects
 - Are there potential updates to the market definition analysis that would better account for non-price competition?
 - Does direct evidence of a transaction’s likely competitive effects, such as evidence of head-to-head competition, eliminate the need for market definition analysis?
- Threats to potential and nascent competition
 - Are there potential updates to the discussion of potential and nascent competitors?
- Impact of monopsony power, including in labor markets
 - How can buyer power (e.g., labor market effects) be addressed in more detail?
- Unique characteristics of digital markets
 - How can the guidelines be updated to account for key areas of the modern economy, like digital markets, that are not addressed in detail?

Comments on this RFI are requested through March 21, 2022.

The Executive Order specifically calls out merger activity under the Bank Merger Act (BMA) and the Bank Holding Company Act (BHCA), and directs DOJ, in consultation with the FRB, OCC, and FDIC, to review current practices and adopt a plan, within 180 days, for providing more

robust oversight of mergers under those laws. To date, relevant actions include:

- A DOJ [announcement](#) seeking additional comment on whether and how the Antitrust Division should revise the 1995 Bank Merger Competitive Review Guidelines. Comments are requested through February 15, 2022.
- A [letter](#) from the Chair of the House Financial Services Committee encouraging the banking agencies to impose a moratorium on approving any large merger or acquisition application that would result in a banking entity with more than \$100 billion in total assets while the agencies are conducting their review of the merger guidelines.
- The release of a [joint statement](#) from members of the FDIC board indicating their support for the agency to seek public comment on an [RFI](#) covering potential updates to the BMA. The OCC [released](#) a separate statement similarly expressing support. Though not yet published in the Federal Register, the key areas of inquiry, including financial stability, prudential regulation, and the convenience and needs of the community, serve as an indicator of the issues and priorities of the board members.

Please refer to:

- [Press Release: Justice Department and Federal Trade Commission Seek to Strengthen Enforcement Against Illegal Mergers](#)
- [KPMG Special Alert | Actions to promote competition and protect consumers](#)

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