Climate-Risk Disclosures and "Dirty Energy" Transfers: "Progress" Through Evasion

By John C. Coffee

Transnational Migration of Laws and Norms in Corporate Governance

By Jennifer G. Hill

Reforming the Macroprudential Regulatory Architecture in the United States

By Kathryn Judge and Anil Kasi

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Skadden Discusses Agency Perspectives on the Merger Guidelines Review

By Karen Lent, Kenneth Schwartz and Mara Chin Loy March 16, 2022

Comment

On Jan. 18, 2022, the Federal Trade Commission (FTC) and the Department of Justice's (DOJ) Antitrust Division announced a joint public inquiry related to the federal merger guidelines, with the goal of "strengthening enforcement against illegal mergers." Members of the public are encouraged to provide comments pursuant to the joint request for information through March 21, 2022. After considering these public comments and other available evidence, including their own research, the agencies are expected to publish revised proposed guidelines for public comment. In announcing the joint inquiry, the agency heads identified and explained some of their concerns with current antitrust merger enforcement.

Originally issued in 1968, the merger guidelines undergo regular review and scrutiny from the agencies to ensure they reflect current priorities and practices. The agencies last revised the Horizontal Merger Guidelines in 2010, and while the Vertical Merger Guidelines last received an update in 2020, the FTC recently announced that they will no longer follow them (the DOJ—while not outright abandoning the Vertical Merger Guidelines—has indicated that it has significant concerns about them, particularly their treatment of efficiencies and failure to account for certain anticompetitive effects). The current 2022 review follows a period of unprecedented merger filings with the agencies, which amounted to nearly $6 trillion in total deal value—the highest annual valuation of mergers ever recorded. Kaye Wiggins et al., "Dealmaking surges past $5.8tn to highest levels on record," Fin. Times (Dec. 30, 2021). The agencies' decision to review the merger guidelines also comes in the wake of the Executive Order on Promoting Competition in the American Economy, issued on July 9, 2021, which expressly called for the review of the federal merger guidelines "to address the consolidation of industry in many markets across the economy." President Biden just recently echoed the call for increased enforcement to address rising consolidation in his State of the Union address, noting that "[w]hen corporations don't have to compete, their profits go up, your prices go up" and announcing a "crackdown on these companies overcharging American businesses and consumers." 2022 State of the Union Address (March 1, 2022). Lawmakers have also turned their attention to consolidation in various sectors including beef processing, technology, and defense. Competition advocates across these sectors (and others) have expressed serious concerns about not only consumer welfare, but also issues like data privacy, innovation, food safety, and more; undoubtedly the agencies face pressure from all directions to better understand consolidation in the contemporary era and to ensure that the merger guidelines reflect the realities and needs of today.

In announcing the public inquiry and review, FTC Chair Lina Khan and Assistant Attorney General Jonathan Kanter stated that both agencies will seek to understand if the guidelines actually "explain and implement" the statutory standard of preventing transactions that may substantially lessen competition or tend to create a monopoly. The agencies have asked for public input on several specific issues. For instance, the agencies recognize the increasing prevalence of mergers that do not neatly fit into "vertical" or "horizontal" categories, and they seek public input on whether to modify these sharp distinctions. In addition, the agencies seek public comment about whether to adjust the guidelines' current use of market concentration to justify a presumption of anticompetitive harm to include, for example, different metrics, qualitative factors, concentration thresholds or evidentiary standards. Moreover, the agencies seek public input on the issue of whether and how to adjust market definition analysis to better address non-price competition. The agencies are increasingly interested in concentrated buyer power, particularly in labor markets, and seek public input on the issue of how best to update the guidelines to address mergers' effects on labor markets. And as the economy evolves to include digital markets, many of which have zero-price products and multi-sided platforms, the agencies hope to learn more about these industries and other issues, including data aggregation. To date, approximately 83 public comments have been submitted, many from individual consumers worried about consolidation in health care, media and telecommunications and technology industries. The comment period is slated to formally close on March 22nd, with the bulk of comments (including those from influential third parties) expected to come near the end of this period.

In remarks accompanying the announcement, agency leadership each identified three distinct areas of "particular interest" that perhaps shed some light on notable distinctions in enforcement policy between the two agencies. FTC Chair Khan outlined three areas of priority concern for the FTC. First, Chair Khan expressed the agency's concern about whether the guidelines adequately address the range of business strategies and incentives that might drive acquisitions, such as data-aggregation strategies by digital platforms. Second, Chair Khan explained that the FTC is concerned about whether the guidelines adequately address mergers that may lessen competition in labor markets and whether, in the context of such mergers, the agency should consider (1) factors beyond wages, salaries, and financial compensation when determining anticompetitive effects and (2) transaction-generated cost savings through layoffs or reduction of capacity as cognizable efficiencies. Finally, the FTC is concerned about whether the guidelines unduly limit the types of evidence used to determine market power and anticompetitive effects, particularly nonprice effects.

While these initiatives reflect President Biden's agenda to "crack down" on consolidation and anticompetitive mergers, they are also consistent with Chair Khan's personal views on the adequacy of the antitrust laws and merger guidelines to preserve competition in an increasingly global, interconnected and digital economy. In her Yale Law Journal article "Amazon's Antitrust Paradox," a pre-FTC Chair Khan detailed the history of the merger guidelines and their various revisions and called for greater recognition of non-price elements in agency analysis of mergers. Khan further questioned whether vertical acquisitions are more problematic than suggested by past agency enforcement. Chair Khan has already begun addressing these priority areas in FTC enforcement actions, including the mergers the FTC decides to investigate and ultimately challenge (e.g., NVIDIA/Arm, Lockheed Martin/Aerojet), as well as the FTC's approach to in-depth merger investigations (Second Requests). With respect to the latter, while the FTC and DOJ have historically generally followed the publicly available "model" request, the FTC, in particular, has recently added inquiries addressing effects on labor markets, wages and hiring practices, data issues and environmental concerns, among others.

For his part, Assistant Attorney General Kanter identified three additional priority concerns for the Antitrust Division. First, AAG Kanter explained his view that the agency should consider whether it has faithfully construed the Clayton Act in with respect to the assessment of transactions by already dominant firms. Second, he asked whether the guidelines' two-dimensional framing of horizontal versus vertical analysis might be too narrow to assess the competitive effects of transactions in modern markets that are often multi-dimensional. And finally, AAG Kanter observed that, in a dynamic, multi-dimensional economy, the static formalism of market definition might not always be the most reliable tool for assessing a transaction's potential harm, and that market realities—not merely market definition—should drive the antitrust analysis. With respect to this final concern, Assistant Attorney General Kanter suggested that the DOJ may have historically placed too much reliance on market definition and not enough focus on other "indicia of market power or of head-to-head competition between merging parties."

AAG followed up these remarks with a speech before the Antitrust Section of the New York State Bar Association on Jan. 24, 2022, in which he elaborated on his views of merger enforcement. Specifically, AAG Kanter questioned whether the existing approach to antitrust enforcement is too formulaic to effectively evaluate the highly dynamic and fluid global economy of the 21st century, noting that "concentration has increased in more than 75% of U.S. industries" and that "[p]rice-cost markups have tripled over the past 40 years." AAG Kanter also referenced increased concentration in labor markets and the "monopsony" power of employers, which has led to lower wages and increased difficulty in changing jobs. Building off the key themes outlined in his January 18th remarks, AAG Kanter stressed the importance of not "fighting the last generation's war" and "adapt[ing] our approach to reflect the obvious economic and transformational technological changes that now define our economy." Referencing the pending review of the Horizontal Merger Guidelines, AAG Kanter specifically questioned whether the current guidelines adequately reflect the purpose of the antitrust laws as originally intended by Congress (including whether the second prong of the Clayton Act—which outlaws mergers that "tend to create a monopoly"—has been given enough attention from an enforcement standpoint) and address the market and economic realities faced by businesses and consumers in today's economy.

Relatedly, AAG Kanter also expressed skepticism regarding the viability of structural remedies to effectively cure merger-related anticompetitive effects and stated a preference to seek to enjoin a problematic deals rather than negotiate limited asset divestitures. According to AAG Kanter, an injunction to block an anticompetitive merger is the surest way to preserve competition that already exists in a market, rather than trying to predict whether a divestiture will serve to keep a market competitive. In his view, partial divestitures often result in "concentration creep," where divested assets lose value or become less effective over time. While he did not completely reject divestitures as a remedy, AAG Kanter thought that divestiture should be the exception, not the rule. Lastly, the Assistant Attorney General observed that settlements do not move antitrust law forward, and called for more litigation and published opinions that apply antitrust law in contemporary markets and give industries a clear understanding of the law.

However the merger guidelines are revised later this year, it seems likely that transactions, especially those in newly emerging digital markets, and those that threaten to harm workers, will likely face more vigorous enforcement activity. As the federal enforcement agencies shape their own enforcement policy through their individual decision-making and review, that enforcement activity may also include more litigated challenges. Watch this space.