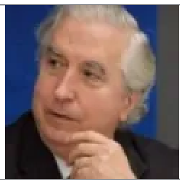

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THE CLS BLUE SKY BLOG
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Skadden Discusses Merger Enforcement and New Deal Strategies

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Comment

Key Points

- New merger guidelines reflect the aggressive approach that has defined merger enforcement in the Biden administration, including novel theories of harm.
- Proposed changes to HSR notification will make merger filings more burdensome while providing agencies with more information to assess mergers against the new guidelines.
- Though the agencies have lost most recent merger challenges, suggesting that courts may be reluctant to accept the principles articulated in the new merger guidelines, the agencies still hope to deter deals they view as problematic.
- Merging parties must be prepared to defend strategic deals through litigation and should proactively consider remedies to remove concerns and maximize the odds of litigation success.

Throughout 2023, the Department of Justice (DOJ) and Federal Trade Commission (FTC) continued to pursue an aggressive merger enforcement agenda, including releasing new merger guidelines and proposed changes to Hart-Scott-Rodino Act (HSR) notification requirements that threaten to make dealmaking more burdensome.

However, the courts have been an important counterweight to the agencies' efforts to block deals, and parties undertaking strategic transactions can adapt to the new regulatory environment with deal strategies that include the willingness to litigate or alter transactions in ways that address alleged competition concerns.

Updated Merger Guidelines Seek To Formalize Agencies' Existing Approach

The FTC and DOJ jointly released draft merger guidelines in July 2023 that were finalized in December 2023, setting forth several "frameworks" under which the agencies will assess the competitive impact of mergers. The guidelines formalize the aggressive enforcement approach the agencies have been following in the Biden administration and read as a menu of ways a transaction might harm competition.

The new guidelines consolidate and sometimes blends horizontal, vertical and other theories of harm into an amalgamation that targets not only mergers between competitors and parties in the same supply chain, but also those involving adjacent relationships, parties with "dominant" positions and any other kind of merger that the agencies believe is harmful.

Rather than establishing a flexible framework of economic analysis for assessing competitive effects, the guidelines have a heavy focus on **presumptions of harm**. In particular:

- For **horizontal transactions**, a combined market share of 30% is deemed sufficient to presume competitive harm, even if one party's share is minimal.
- For **vertical mergers**, the guidelines presume foreclosure harm if one party holds 50% market share in an upstream or downstream market.

In addition, the guidelines' approach to defining product markets potentially allows for the exclusion of "significant substitutes," meaning the agencies may focus on "narrow group[s] of products" to find positions where market shares exceed the new, lower thresholds.

Notably, the draft guidelines also focus on heightened scrutiny of transactions that could "entrench" or extend dominant positions. The draft guidelines included a proposed presumption that a firm with 30% market share could be considered dominant. Nevertheless, the guidelines continue to target dominance-enhancing transactions, including with respect to transactions involving "ecosystems" that are influenced or controlled by one party.

The guidelines also adopt principles for assessing competitive harm in **mergers involving actual or perceived potential competitors, multisided technology platforms and transactions that could impact the supply of labor.**Notably, the guidelines seek to prohibit deals that facilitate a "trend toward consolidation" and acquisitions that are part of a series of transactions deemed anticompetitive as a whole, even if an individual transaction does not violate the law.

Critically, the guidelines are not legally binding, but in the hope that courts will follow them, the agencies cite a wealth of case law in footnotes. However, these cases skew heavily toward pre-1980s precedent. While presented as both an update for the "modern economy" and a statement of existing law, the guidelines do not mention many relevant cases from the last several decades where judges grappled with exactly this challenge of applying the competition laws to modern market dynamics.

In court, the agencies have suffered repeated defeats in the last several years, involving cases where they relied on the kinds of theories they promote in the guidelines, including vertical theories (*Microsoft/Activision*,*UnitedHealth/Change Healthcare*), potential competition theories (*Meta/Within*) and circumstances where they pressed very narrow product or geographic market definitions (*Booz Allen/EverWatch*, *U.S. Sugar/Imperial Sugar*).

These losses demonstrate that courts are a key check on the agencies and potential roadblock to the guidelines turning into legal precedent.

The agencies have claimed success despite these losses, pointing out that many transactions have been abandoned in the face of regulatory scrutiny. Indeed, in a recent letter responding to questions from Rep. Tom Tiffany, R-Wis., about merger enforcement, FTC Chair Lina Khan pointed to 19 mergers that were abandoned during FTC investigations and remarked that "deterrence is a real mark of success."

Nevertheless, the fact that courts have not endorsed the agencies' aggressive new theories suggests that strategic transactions will continue to sign and close.

Overhaul of HSR Filing Requirements Seeks More Information on Transactions

Consistent with the goal of merger deterrence, less than a month before releasing a draft of the merger guidelines in July 2023, the agencies proposed changes to HSR form and filing requirements that would not only give the agencies more tools to develop the theories of harm in the guidelines but also increase the burden of HSR filings.

At an international summit of competition enforcers in November 2023, FTC Commissioner Rebeca Slaughter opined that the HSR changes are "going to have a much more material effect" than the nonbinding …guidelines "on how we can actually … execute our responsibilities to review transactions."

If adopted, the proposed changes would dramatically increase upfront disclosures in HSR notifications, requiring parties to produce a cross-section of strategic business documents beyond just transaction-related ones, including, among other things:

- Drafts of transaction-related documents rather than only the final versions of the documents currently required.
- Narrative descriptions of the products, markets and competitive dynamics of the relevant industries.
- Representations about planned products that may be potentially competitive with those of the other merging party.
- Data on employee types.
- More information on prior transactions.

These changes would arm the agencies with information early in the review process (*i.e.*, before the issuance of a second request) that would allow them to scrutinize a transaction under each of the new merger guidelines.

Further, the systematic collection of documents and data will provide the agencies with greater ability to police long-term M&A strategies and identify patterns or trends across individual transactions. Those include industry "roll-ups" (where companies acquire and combine businesses to gain scale and efficiencies), strategies to leverage a strong position in one market as a means to enter others and concentration of bargaining power in labor markets.

With these changes, it will be more critical than ever for merging parties to fully understand what their internal documents say before signing and develop a strategy to engage with regulators on potential issues under the new guidelines.

Litigation Readiness and the Role of Remedies

Although the agencies are scrutinizing more transactions with novel theories of harm, their recent court setbacks show that difficult deals can still close if the parties are ready and able to fight in court and have a timetable in the merger agreement that allows for the possibility of litigation.

To maximize the chance of success, parties must build enough time into merger agreements to allow for extended reviews and potential litigation, particularly if parallel reviews in other jurisdictions could allow a U.S. agency to delay filing a complaint for tactical reasons. Parties should also develop a credible litigation strategy early in the merger investigation and be ready to consider remedies or changes to the transaction that could remove concerns and/or improve litigation odds.

The agencies have taken a highly skeptical view of remedies in merger cases, preferring to sue to block transactions rather than accepting divestitures or behavioral commitments they deem inadequate. However, the agencies risk losing in court when parties proactively make changes to a transaction that alters the competitive impact of a deal and forces the agencies to “litigate the fix” in court. That was demonstrated by *UnitedHealth/Change Healthcare* in 2022, where the court evaluated the parties’ proposed divestiture and denied the DOJ’s request for an injunction.

In the second half of 2023, the agencies agreed to settle some cases with remedies. However, in court papers for the only merger case where the DOJ has accepted a remedy since Jonathan Kanter became assistant attorney general (*Assa Abloy/Spectrum Brands*), the agency indicated its reluctance, saying that it did “not contend the remedy would fully eliminate the risks to competition,” but that there were “risks associated with this litigation” that contributed to the decision to settle.

The FTC has also been skeptical of, but slightly less hostile to, formal remedies. Indeed, in August and September 2023, it reached settlements after the commencement of litigation to resolve both horizontal (*ICE/Black Knight*) and non-horizontal (*Amgen/Horizon Therapeutics*) concerns.

These examples do not mean that the agencies are now openly embracing remedies, but they reinforce the importance to merging parties of:

- being prepared to defend their merger “all the way” in court and
- developing strategies to offer or implement remedies — either within the regulatory process or outside of it — that can change the enforcement calculus for the agencies or improve the merging parties’ odds in court.

In Sum

The new merger guidelines and proposed changes to HSR notification requirements may make the merger control process in the U.S. more burdensome. While the U.S. antitrust agencies will continue to push the envelope of merger enforcement by advocating an expansive view of the antitrust laws, the U.S. agencies’ recent courtroom losses show that the courts remain a check on the agencies, and merging parties can navigate risks by framing deal strategies that include a plan to litigate and, when appropriate, offer changes to the transaction to eliminate competition concerns or make litigation riskier for the agencies.

This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm’s article, “As US Antitrust Agencies Double Down on Merger Enforcement Approach, New Deal Strategies Emerge,” dated December 13, 2023, and available here.