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DOJ and FTC's Aggressive Antitrust Enforcement Agenda Set to Continue

Alert

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There are five crucial areas of focus that will impact mergers, acquisitions and corporate governance going forward:

1. New Hart Scott Rodino (HSR) rules are expected in weeks, not months.
2. Under new merger guidelines, merger benefits do not offset other market harms.
3. Private equity firms face continued scrutiny for roll ups.
4. Risks from interlocking directorates enforcement.
5. Merger remedies remain hard to sell.

NEW HSR RULES ARE EXPECTED IN WEEKS NOT MONTHS

Federal Trade Commission (FTC) Bureau of Competition Director Henry Liu said that new HSR guidelines are expected to be released in weeks — not months.[1] According to FTC representatives, the agency took seriously the many comments suggesting the proposed changes announced in 2023 would make the HSR requirements unduly burdensome and overbroad, and the final HSR guidelines will seek to address those concerns. The new guidelines should reduce some of the burden originally feared, but we expect the new HSR rules to closely follow the blueprint of the newly adopted merger guidelines, and require information and data to help the FTC and Department of Justice (DOJ) apply the new merger guidelines, including employee data and information about suppliers, customers and past transactions.

In short, the new rules will likely require firms to gather and produce entirely new categories of information and more ordinary course documents.

Given the expected increase in filing information, parties that can file for HSR clearance now should move quickly to do so. Parties who are considering transactions further out in time should plan to prepare for the new rules with HSR and antitrust counsel.

UNDER NEW MERGER GUIDELINES BENEFITS DO NOT OFFSET OTHER MARKET HARMS

The merger guidelines state that if a merger reduces competition under any one of the guidelines, it may be blocked.[2] At a recent Q&A session, Liu confirmed that a merger that reduces consumer prices, but harms workers, could be considered anticompetitive.[3] This zero-sum position, however, has not been adopted by federal courts. The challenge is that merging parties in strategic deals may need to factor in the need for litigation.

Liu also discussed Merger Guideline 2, which permits the agencies to attempt to block a merger if it substantially reduces competition between the parties, even if the parties' relative market shares are low.[4] The antitrust agencies have been clear that, in their view, direct evidence of competitive harm as shown by the parties' ordinary course documents is enough to block a transaction. Indeed, under this approach, the agencies could avoid having to define a market — a fundamental aspect of antitrust analysis. This approach could transform merger reviews where the parties are competitors. That said, the courts have not tested or embraced this approach.

Consequently, deal makers should consult antitrust counsel early in the deal formation process to identify risks from the different guidelines and potential remedies.

PRIVATE EQUITY FIRMS FACE CONTINUED SCRUTINY FOR ROLL UPS

Last month, the antitrust agencies held a joint workshop with the U.S. Department of Health and Human Services and Centers for Medicare & Medicaid Services to discuss the Biden Administration's concerns about the potential harm to competition from private equity's involvement in health care markets.[5] FTC Chair Lina Khan noted in her kickoff remarks that the agencies were not condemning all private equity firms. She stated that "[s]ome private equity firms take a more long-term view and focus on creating real operational improvements to generate value in ways that provide broader benefits, but we've also seen some private equity firms take a different approach."[6]

Much of the workshop focused on examples where private equity firms allegedly increased short term profits when acquiring hospitals and acute care facilities by highly leveraging those facilities. The participants then discussed how the cost of servicing the debt led to staffing cuts, increased patient loads, and worse patient outcomes. These characterizations were disputed as outdated practices during a recent panel at the American Bar Association spring antitrust meeting.[7]

The antitrust agencies reiterated their focus on serial acquisitions, or "roll ups," including non-reportable acquisitions, by private equity firms. In fact, the agencies noted that they actively search for any mention of roll ups in documents submitted with pre-merger HSR filings. In addition, in examining roll ups, the agencies are also investigating whether some private equity firms intentionally withheld information in prior HSR filings.[8]

FTC attorney Richard Mosier said the DOJ's Antitrust Division (Division) is closely analyzing private equity acquisitions because of the use of roll ups that result in a trend toward concentration. He emphasized that roll ups can be both horizontal and vertical. Mosier also noted that the Division will review prior non-reportable transactions.[9]

Mosier also said the Division is concerned about HSR deficiencies in the private equity space and questioned whether private equity firms are "not taking seriously" their HSR obligations. He said the Division will not hesitate to bring cases for violating the HSR Act.[10] Private equity firms should remember to fully comply with their obligations under the HSR Act.

INTERLOCKING DIRECTORATES ENFORCEMENT WILL INCREASE RISKS

Section 8 of the Clayton Act prohibits individuals from serving as directors on boards of competing firms. Since the middle of 2021, the DOJ has been active in enforcing Section 8 and has also taken an expansive view of what counts as an interlocking directorate.

While there is no monetary penalty for a Section 8 violation — the remedy is for the offending director to resign — the costs of a Section 8 violation are not trivial. Indeed, the DOJ has been busy publishing its Section 8 successes with press releases on its web page.[11]

Another important risk is that, in investigating a potential Section 8 violation, the DOJ discovers other information that opens a separate investigation or enforcement action. In this aggressive enforcement environment, dealmakers need to be aware of Section 8 risks and proactively address any conflicts before the agencies start asking questions.

MERGER REMEDIES REMAIN HARD TO SELL

The DOJ and FTC do not view their role as finding a solution to an anticompetitive merger. The agencies will listen to proposed remedies, but the FTC and DOJ remain skeptical of merger remedies, particularly behavioral remedies.

There are, however, some key tips to increasing the likelihood of a remedy being accepted by the DOJ or FTC:

1. Agencies must have enough time to evaluate the remedy and the remedy has to address all of the competitive concerns of the agencies.
2. Divestitures of businesses are preferred over divestiture of assets.
3. Ongoing entanglements between the proposed remedial buyer and the parties must be eliminated or limited.
4. Remedial buyer has to be financially stable and viable as a credible competitor from day one.
5. Antitrust agencies want unfettered access to the potential remedial buyer.

Parties should consider potential remedies up front as part of their merger clearance strategy.

For more information on the antitrust enforcement agenda, please contact Jeetander Dulani, William Kearney, J. Nicci Warr or one of the attorneys listed below or the Stinson LLP contact with whom you regularly work.

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[1] Speech by FTC Bureau of Competition Director Henry Liu, Thursday, April 11, 2024

[2] 2023 Merger Guidelines at 27. https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf ("Because the Clayton Act prohibits mergers that may substantially lessen competition or tend to create a monopoly in any line of commerce and in any section of the country, a merger's harm to competition among buyers is not saved by benefits to competition among sellers.")

[3] Speech by FTC Bureau of Competition Director Henry Liu, Thursday, April 11, 2024

[4] Speech by FTC Bureau of Competition Director Henry Liu, Thursday, April 11, 2024

[5]https://www.ftc.gov/news-events/events/2024/03/private-capital-public-impact-ftc-workshop-private-equity-health-care

[6] *Id.* at 1.

[7] ABA Antitrust Spring Meeting, *The PE Effect: Antitrust Scrutiny Abounds* (Apr. 10, 2024).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] https://www.justice.gov/opa/pr/justice-department-s-ongoing-section-8-enforcement-prevents-more-potentially-illegal

CONTACTS

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