In Advance of Election, Antitrust Enforcement Revs Up

By Ed Pivin and Evan Reid

The Revival of Antitrust Enforcement

The theme for 2024 in the area of antitrust in the United States is increased enforcement and, consequently, increased costs and risks for business. While high-profile suits against big players in the tech industry grab headlines, behind the scenes the story has been one of increased agency activity and coordination between the Department of Justice and the Federal Trade Commission in the area of merger enforcement. Last year ended with the issuance of new final merger guidelines that lower the market concentration threshold at which the agencies may presume anticompetitive effect from a transaction. The new guidelines made numerous other changes, including focusing on partial acquisitions (minority owners) and "conglomerate mergers" that risk entrenching a company in a dominant market position even if a particular acquisition involves a different product or service market.

Earlier this year, the agencies banded together to probe "serial acquisitions", defined as "corporate consolidation strategies that occur when a company becomes larger — and potentially dominant — by buying several smaller firms in the same or related business sectors or industries." These sorts of roll-ups can quietly achieve sufficient power to dominate markets over time, and the agencies are wanting to learn more about them. A discussion of serial acquisitions was also included in the new merger guidelines, so it should be expected that targeted enforcement actions will follow in the future.

Overall, the last two years, dating back to DOJ's successful challenge of the Penguin-Simon & Schuster publishing merger, more than twenty proposed deals have been abandoned following concerns raised by the Antitrust Division. For the first time, a merger was successfully challenged in the airline industry. After a two-year battle, the FTC prevailed in its challenge to a vertical merger, resulting in Illumina divesting Grail after the Fifth Circuit Court of Appeals determined that the acquisition threatened competition in the market for cancer detection tests.

While the numbers of formal challenges to mergers has yet to rise substantially, rules have been broadened and modernized. The antitrust enforcement agencies are more engaged and active than they have been for decades. Any business contemplating and acquisition or sale must take antitrust concerns seriously well before the first offer is made.

FTC Strengthens Pre-Merger Review

Consistent with increasing focus on mergers and acquisitions, the FTC has approved long-awaited changes to the pre-merger reporting requirements under the Hart-Scott-Rodino ("HSR") Antitrust Improvements Act of 1976. Barring a successful legal challenge, the new reporting requirements are expected to take effect in early 2025. The changes will significantly increase the cost and burden to prepare an HSR filing for most transactions. The FTC estimates that the time required to prepare an HSR filing under the new requirements will increase by an average of 68 hours, and, for more complicated transactions, up to 120 hours. Parties contemplating transactions that require reporting under the HSR Act should start preparing for these changes now, before deals are finalized, and should account for the additional time required.

The FTC first announced its plan to overhaul the HSR reporting requirements in June 2023, stating at the time that the proposed changes would allow it to more effectively and efficiently review transactions for anticompetitive effects. The Final Rule follows a lengthy public comment period and includes substantial modifications to the FTC's original proposed changes. In its public announcement, the FTC stated that the Final Rule attempts to address "critical gaps in the information provided in the [HSR] form that, over time, have impeded the detection of mergers that may violate the antitrust laws." The FTC stated that additional guidance for complying with the new filing requirements will be issued in advance of the Final Rule taking effect. Among the key changes are:

- **Expanded Submission of Documents**. One of the most onerous changes under the Final Rule will be the obligation to gather and submit certain "ordinary course" documents that are not prepared for specific purposes of analyzing the transaction at issue. This change will require filing parties to expand the scope of their Item 4(c) and 4(d) document canvasses. Additionally, documents considered responsive to Item 4(c) and 4(d) will no longer be limited to those prepared by or for officers or directors, but will now include certain documents prepared by or for supervisory deal team leads.

- **Narratives**. The Final Rule will require narrative descriptions of: (1) the parties' business operations or operating businesses; (2) transaction rationale (citing to documents within their filings); (3) "overlap" between the parties, including current (planned) products or services that compete with the other party, along with sales and customer information from the previous year; and (4) "supply relationships" detailing the products, services, or assets—limited to sales and purchases representing at least $10 million from the previous year—sold to, or purchased from, the other party, or a competitor of the other party, and the sales information of top suppliers.

- **Expanded Disclosures of Minority Holders and Prior Transactions**. The Final Rule will require limited partnerships to disclose both general and limited partners with certain management rights. Additionally, the Final Rule will require both acquiring and acquired parties to report a broader range of prior acquisitions within the five years preceding the filing. This change is designed to facilitate increased scrutiny of "roll-up" transactions.

- **Filing on Letters of Intent**. Under the Final Rule, parties filing on the basis of a letter of intent must provide a document that identifies the parties, structure of the transaction, scope of the acquisition, calculated purchase price, estimated closing timeline, employee retention policies, post-closing governance and transactions, and other material terms.

- **Reporting on International Merger Control**. The Final Rule requires acquiring persons to disclose whether the transaction is subject to merger control in a foreign jurisdiction and, if so, provide a list of each jurisdiction in which it has filed, is preparing to file, or has a good faith belief it will need to file. Such reporting is voluntary under the current version of the HSR form.

- **Foreign Investments & Defense Contracts**. Under the Final Rule, parties must identify any subsidy received from any foreign entity or government of concern, as well as products

produced in areas of concern that are subject to countervailing duties or an investigation of countervailing duties. Filers must also identify government contracts and bids with the intelligence community that are valued at $100 million or more and involve specific NAICS industry overlap or overlapping product or services.

- **Online Portal for Public Comment on Proposed Transactions**. The FTC announced a new online portal for the general public to comment on pending transactions that may be under review by the FTC and DOJ. This portal is intended for exclusive use by the FTC and DOJ in their review of transactions, and is not searchable by the public.

- **Return of Early Termination**. The FTC announced that it would lift the longstanding moratorium on Early Termination for transactions that do not pose antitrust concerns.

In short, filing an HSR notification is about to become substantially more complex and time-consuming. Recognizing these burdens and incorporating them into your acquisition planning process is essential.

Looking Forward

Of course, this article is being written just a few days before presidential and congressional elections and so while it describes recent developments, it cannot predict the future. While polls show that American voters support the increased competition and innovation that are the stated goals of the antitrust enforcement agencies, there has been little discussion of antitrust during the campaign.

At this writing, it is unclear how either of the two major-party candidates will differ from the Biden Administration in their approach to antitrust enforcement. Experience tells us that it takes at least a year after a new president is inaugurated before substantive, lasting changes begin to appear in antitrust policy. In the meantime, the new merger guidelines and HSR reporting requirements will remain on the books and will have to be taken into consideration. Caution, patience, and planning remain the watchwords with respect to how businesses approach antitrust enforcement policy.