LEGAL UPDATES

PUBLISHED: FEBRUARY 23, 2022

Biden Antitrust Enforcers Take Aim at Mergers and Acquisitions

Services

Antitrust & Competition

Antitrust Litigation

Merger Clearance

Mergers & Acquisitions

Securities & Corporate Governance

Professionals

WENDY K. ARENDS
MADISON:
608.258.7382
WENDY.ARENDS@
HUSCHBLACKWELL.COM

MARK B. TOBEY
AUSTIN:
512.479.9740
MARK.TOBEY@
HUSCHBLACKWELL.COM

President Biden's top antitrust cops, Jonathan Kanter at the U.S. Department of Justice Antitrust Division (DOJ) and Lina Khan at the Federal Trade Commission (FTC), are putting more arrows in their quiver to take aim at perceived consolidation in a variety of industries. Their changes to long-standing tenets of U.S. merger review policy fall in line with the Biden Administration's whole-of-government approach to ferreting out concentration in a wide variety of industries. The FTC also cited a significant increase in mergers in the last year and over the past decade as the impetus for some of these reforms. While more change is expected, the recent pronouncements by the FTC and DOJ are likely to lead to increased scrutiny of reportable transactions under the Hart-Scott-Rodino Act (HSR), more uncertainty about the process, and a broader view of whether a transaction harms competition.

Increased scrutiny of transactions

HSR changes. Among the FTC's announcements are changes to the HSR Act premerger notification process. The FTC indefinitely suspended early terminations of the 30-day HSR waiting period. Previously, the agency would grant early terminations upon request and the deal could be reviewed before the 30 days had run, allowing the parties to close prior to the expiration of the waiting period. Since the start of the Biden Administration, the FTC is no longer granting early terminations—for the time being, all deals will have to wait at least the full 30 days after filing the HSR notification before the parties can close.

In addition, the FTC also reversed course on well-established guidance regarding retirement of debt in connection with acquisitions—parties can no longer subtract the amount paid to retire debt when calculating the HSR size

of transaction value. This will likely increase the number of HSR reportable transactions.

Prior approval policy is reinstated. The FTC voted to change its Prior Notice policy and turned back the clock to again require prior approval in settlement agreements. This means if the parties settle a merger investigation with the FTC, the FTC will require a consent decree provision requiring that the parties receive prior FTC approval of future acquisitions for the term of the decree. This will likely result in more acquisitions being subject to FTC scrutiny. Whether DOJ adopts this stance remains to be seen.

Second requests—broader in scope and duration. Additionally, the FTC has announced other changes to merger review that will lead to increased scrutiny. In particular, the FTC changed its procedures for Second Requests. A Second Request may be issued if the FTC or DOJ continue to investigate a transaction beyond the 30-day HSR waiting period, and it generally consists of a very lengthy request for documents and information. The FTC announced that the Second Request process will be more demanding by heightening the requirements to request a modification to limit the scope of a Second Request, the effect of which may be to give the FTC more time and leverage to challenge a deal. The FTC also noted that a Second Request "may factor in additional facets of market competition that may be impacted," including labor markets, cross-market effects and market incentives following investment firm involvement.

More unpredictable merger review process

FTC warning letters. In addition to the increased scrutiny outlined above, the FTC has also introduced reforms that will increase the uncertainty of the process. For instance, for deals in which the HSR waiting period has expired but the FTC has not completed its review, the FTC may decide to send warning letters advising the parties that the investigation remains open and that they will close the transaction at their own risk. Some practitioners report that the FTC is reaching out prior to the parties' receipt of a warning letter, although this does not seem to be occurring in every instance.

FTC informal opinions. The FTC announced that it is reviewing its informal opinions of HSR rules. Many HSR attorneys utilize these informal opinions to confirm the FTC's view as to the applicability of the HSR rules to various situations. The FTC cites concerns that some parties may be misguided in their reliance on prior opinions that are not applicable (or are misconstrued) with respect to their specific transaction.

Overhaul of merger guidelines. The FTC and DOJ have also requested comments on merger enforcement to determine whether and how to overhaul the agencies' Horizontal and Vertical Merger Guidelines (Guidelines). The Guidelines (which have been updated over the years) provide practitioners and parties with an analytical framework within which to determine whether a transaction complies with antitrust law. The agencies are seeking input to help "modernize antitrust

enforcement laws" relating to the following topics: the scope of review, anticompetitive presumptions, market definition, threats to potential and nascent competition, impacts of monopsony (buyer) power, and unique qualities of digital markets. The practical effect of these revisions is expected to increase the number of transactions that are found to be illegal by the agencies, although it remains to be seen whether courts take the same approach.

DOJ's preference is to litigate, not settle. DOJ's Kanter recently stated that merger review settlements should be "the exception, not the rule," because divestitures and other remedies are not sufficient to protect consumers. That said, DOJ will need to choose its litigation battles wisely given resource constraints and the current state of the law.

A broader view of harm to competition

DOJ and FTC have signaled they are open to a variety of theories regarding a transaction's harm to competition and are not tied to the consumer welfare standard established over decades of economic analysis and judicial precedent. Chair Khan declared that the FTC will investigate a transaction's potential effects on employees and small business, not just consumers. DOJ's Kanter questioned the necessity of defining the market in a given case, and both agencies have signaled ramped-up enforcement of transactions in banking and finance, food and agriculture, healthcare, technology, and transportation, among other industries.

The agencies are also taking a closer look at transactions that may not present traditional horizontal overlap issues, but instead raise vertical concerns, such as the denial of access to a key supplier or purchaser or harm to a rival. Examples of current transactions that were or are being investigated for vertical issues include:

Microsoft/Activision. It is reported that the FTC is investigating Microsoft's proposed $69 billion acquisition of Activision (creator of Call of Duty and Candy Crush) and is likely to scrutinize how the acquisition could harm rivals by limiting their access to content, among other issues.

NVIDIA/Arm. In December 2021, the FTC filed suit to block U.S. semiconductor chip supplier Nvidia Corp.'s $40 billion acquisition of UK-based semiconductor design firm Arm Ltd. The FTC alleged that the transaction would harm competition in markets for computer chips used in datacenters and in automotive advanced driver assistance systems. Arm is a critical technology supplier to most of NVIDIA's competitors. It is reported that the parties are abandoning the transaction.

Lockheed Martin/Aerojet. The FTC is suing to block Lockheed Martin's $4.4 billion acquisition of Aerojet Rocketdyne. Aerojet supplies critical components for the missiles made by Lockheed and other defense prime contractors. The FTC's complaint alleges that if the deal is allowed to proceed, Lockheed will use its control of Aerojet to harm rival defense contractors and further consolidate multiple markets critical to national security and defense.

Amazon/MGM. It is reported that the FTC continues to investigate Amazon's proposed $8.45 billion acquisition of MGM.

Penguin Random House/Simon & Schuster. DOJ filed a complaint in November 2021 to block the proposed acquisition by Penguin Random House of Simon & Schuster, two of the "Big Five" U.S. publishers. The complaint alleges not only elimination of head-to-head competition between the two, but also potential harm to best-selling authors by lessening incentives to give competitive pre-publication advances.

Practical considerations

When looking at a potential transaction, consider not only horizontal product or service overlaps, but also the potential for vertical concerns.

If the transaction is HSR reportable, consider whether certain purchase agreement provisions need to be adjusted to account for the possibility of an FTC warning letter or a lengthier Second Request review, or the likelihood of a litigated agency challenge.

The HSR rules and agency merger review process are complex and rapidly evolving under the Biden Administration—if your transaction may be HSR reportable or it involves significant horizontal or vertical issues, HSR and antitrust experts need to be a part of your deal team.

Contact us

Husch Blackwell continues to monitor the evolving situation and its implications for our clients. Should you have any questions, please do not hesitate to contact Wendy Arends, Mark Tobey, Julia Banegas or your Husch Blackwell attorney.