Election aftermath: Antitrust enforcement under a new administration

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Election aftermath: Key takeaways

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We recently gathered a group of attorneys from across Reed Smith to provide an overview of key changes we expect to see within the regulatory landscape following the U.S. presidential election. If you missed the webinar, you can access the recording on demand.

Please see the summary of our top takeaways below and look out for an invite to the next installment of our quarterly Investigations and enforcement trends webinar series – we hope you can join us!

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Health care

1. Despite success in ballot initiatives in numerous states protecting reproductive rights, the new Trump administration is likely to implement restrictions on abortion medication, which will limit abortion access on a nationwide basis. However, we consider it unlikely that an explicit legislative federal abortion ban will be implemented because of shifting political strategies and campaign promises.

2. The Department of Health and Human Services (HHS) will likely face a brain drain under health secretary Kennedy and we expect regulatory direction on numerous gender-affirming care and LGBTQ+ rights will be reversed. It is likely that a new Congress will use the power of the purse to legislate against gender-affirming care and coverage for abortion travel for the military. Legislation is expected to make the Hyde Amendment permanent.

3. It is unlikely that there are sufficient votes to repeal the Affordable Care Act, but we expect legislation to change risk pools and otherwise present reforms. We anticipate legislation on pharmacy benefit management and possibly a re-evaluation of Medicare Advantage features – two areas with some bipartisan support.

Finance

1. Leadership changes at the U.S. Securities and Exchange Commission (SEC), Consumer Financial Protection Bureau (CFPB), Office of the Comptroller of the Currency (OCC) and Federal Deposit Insurance Corporation (FDIC) will likely result in a less aggressive attitude toward enforcement of financial services regulation.

2. Implementation of particularly onerous rules issued recently by the financial services regulators may be delayed or extended and those rules could be completely reworked, including the open banking rule, small business lending rule, merger guidelines, CRA regulations, FDIC advertising rules, Basel III endgame, etc.

3. Efforts to create a coherent regulatory framework for AI in financial services and digital assets may be delayed.

Government contracts

1. The administration plans to increase border security and infrastructure, along with mass deportation and stricter immigration enforcement, which will likely impact government contracts related to border security and immigration services.

2. There will be a rollback of Biden-era clean energy initiatives, with a focus on increased domestic energy production and mining. This could affect government contracts in the energy sector, particularly those related to renewable energy projects.

3. Federal sponsored or supported Diversity, Equity, and Inclusion (DEI) programs are expected to be dismantled, leading to changes in government procurement priorities and the criteria used for awarding contracts.

Corporate crime

FCPA/FEPA

1. Although Trump is not a fan of the FCPA, the prior Trump administration increased FCPA enforcement to record levels, with the SEC and DOJ imposing penalties and fines averaging $2.7 billion a year.

2. DOJ is expected to open fewer new FCPA investigations, but aggressively prosecute the many existing and ongoing FCPA investigations.

3. Expect first enforcement of the new FEPA statute.

Consumer protection

1. Federal agencies are likely to continue aggressive consumer protection enforcement based on clearly established sources of statutory and regulatory authority.

2. As a result, businesses will be expected to be on notice of any violations.

3. State and local consumer protection agencies will remain robust actors in this space, necessitating continued vigilance.

Antitrust

1. Recent cabinet appointments suggest that Trump will appoint an assertive Republican majority to control the FTC. New leadership is likely to abandon key Biden-era policies such as the noncompete ban and revised merger guidelines.

2. Policy rollback or revisions may take time, but immediate effects will likely be a de-escalation of the existing merger enforcement environment, including a more flexible approach to structural remedies and consent decrees to resolve challenged deals.

3. Even if the Trump administration employs a lighter touch on enforcement, the concept of "weaponized antitrust" is expected to persist among state attorneys general and private litigants, who will continue to assert the more aggressive and novel aspects of recent policy changes.

International trade policy

Latin America

1. The new Trump administration is expected to revive the Monroe Doctrine to counter foreign influence, particularly in Latin America, which will likely involve a more assertive stance on foreign policy, drug cultivation and trafficking, and trade relations within the Western Hemisphere.

2. Under Trump, potential stricter enforcement of existing sanctions and the introduction of new ones may impact trade flows and business operations between the United States and Latin American countries.

3. The administration plans to review the United States-Mexico-Canada Agreement with an eye toward tougher negotiations, which could lead to changes in trade terms and increased scrutiny of compliance with the agreement's provisions, especially as it pertains to Chinese products manufactured in Mexico.

Export controls

1. Both the Trump and Biden administrations have aggressively expanded export controls, particularly targeting China.

2. These controls restrict the export of critical U.S. technologies, such as semiconductors, AI and biotechnology to foreign adversaries.

3. A renewed Trump administration is likely to intensify these measures, further limiting access to emerging technologies, which is likely to impact global technology markets, disrupt international supply chains and create compliance challenges for multinational companies operating in sensitive sectors.

Sanctions

- Economic sanctions have been a significant tool for both the Trump and Biden administrations to exert pressure on adversaries such as China, Iran and Venezuela.

- This approach is expected to continue under a renewed Trump administration, potentially leading to increased geopolitical tensions and disruptions in international trade.

- There is likely to be an expansion of sanctions targeting specific sectors and entities, particularly those related to national security concerns such as technology, energy and finance.

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November 4, 2024 | 2 minute read

New HSR Rules – Five things to do before your next deal

Christopher Brennan
Partner

Acquisitions and mergers can impose significant stresses on both buyer and seller. Starting January 2025, the new HSR rules will impose significant additional burdens and risks on deals subject to premerger notification in the United States (see our client alert for more details on those changes). However, companies can prepare for many of those changes before they face the pressure and deadlines of their next transaction. To hit the ground running in 2025, you can – and should - do the following *before* your next deal:

1. **Train your deal team on antitrust best practices for document creation.** The new rules expand on both the scope and nature of documents that must be submitted with Premerger Notification Form. Whereas the old rules merely required the submission of transaction-related documents that were prepared by or for a company's officers and directors, the rule has been expanded to include documents prepared by or for the supervisory deal team lead(s), which is defined as any individual "who has primary responsibility for supervising the strategic assessment of the deal, and who would not otherwise qualify as a director or officer." Similarly, the new rules move beyond transaction-specific documents and now demand ordinary-course documents plans and reports that are provided to a company's CEO or board of directors.

This boarder document universe may include inadvertent statements or data that create significant antitrust risk (e.g., "we're the most dominant supplier," "our customers are locked-in," or "this acquisition will protect our price margins"). Before your next transaction, you should 1) identify the broader scope of document custodians under the new rules; 2) review your document retention policies; and 3) provide the authors of that document universe with antitrust training on how to avoid unintended language that may be viewed suspiciously by antitrust enforcers.

2. **Prepare new narrative responses and datasets.** Previously, filers were only required to provide limited, transaction-specific narrative responses. Going forward, the new HSR rules will require several additional narratives, including descriptions of the parties' ownership structures, products/services, and supplier relationships. Several of these narratives can be drafted in advance and modified as necessary for a given transaction. More importantly, this advance prep can ensure that these narratives are thoroughly vetted by antitrust counsel to ensure they are consistent with antitrust enforcers' expectations and accurately describe the relevant competitive landscape for your business.

3. **Rethink your timelines.** Frequent filers are familiar with the usual timelines for compiling the information and data submitted with the Premerger Notification Form. Depending on the complexity of the deal, many agreements set filings to be submitted within 10 business days of execution (or sooner). For the foreseeable future, those deadlines may be impractical given the additional information demands and the need for increased review by counsel. This additional time should be baked into the transaction timeline from the start, and further incentivizes parties to start working on HSR earlier in the deal process than was customary under the old rules.

4. **Vet your outside advisors and consultants.** Nearly all deals that meet the reporting thresholds involve one or more third parties, such

as bankers and consultants. Many of these third parties author key documents that are subject to disclosure under the new rules, and antitrust enforcers have shown an increased interest in directly requesting third-party materials during merger investigations. Now is the right time to make sure that your go-to advisors are preparing for the new rules.

5. **Reach out to your Reed Smith antitrust contact.** We're here to help! Whether it is providing training on document creation, reviewing draft language for narrative responses, or providing new information request checklists – we can ensure your deal teams avoid delays and confusion under the new HSR rules. Contact a member of the Antitrust & Competition team for next steps.

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11 October 2024 | Reed Smith In-depth

U.S. antitrust agencies finalize historic overhaul of merger review process: What can you do to prepare for the new HSR regime?

Key takeaways

- The FTC voted to pass a Final Rule implementing sweeping changes to the HSR Form and pre-merger review process, which will go into effect in early 2025.

- The Final Rule imposes a number of new requirements on filing parties, including: (1) collecting and providing Item 4(c) and 4(d) documents from a broader scope of custodians; (2) collecting and providing additional “ordinary course” and deal-related documents; (3) submitting descriptive information about the parties’ competitive overlap and supply relationships, ownership and shareholder structure, and strategic rationale; (4) attaching certain draft agreements; (5) providing details about areas of future competition or past acquisitions; and (6) identifying foreign merger control filings.

- These changes will impose substantial additional burdens on parties to comply with the HSR process, adding both time and expense to the process, and will require merging parties to change the way in which they manage the process of evaluating and planning for potential mergers in order to minimize the chances of inadvertently creating potentially damaging 4(c) and 4(d) documents.

- Despite this overhaul, the Agencies abandoned some of their originally proposed ideas in acknowledgment of the increased burden, such as requirements that filing parties submit

drafts of responsive deal documents, employee-related information, and the identity of other interest holders or board observers.

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On October 10, 2024, the Federal Trade Commission (FTC) voted unanimously to issue a Final Rule amending the Hart-Scott-Rodino (HSR) form and instructions and the premerger notification rules implementing the HSR Act. The same day, the Antitrust Division of the Department of Justice (DOJ and, together with the FTC, the Agencies) issued a press release concurring with the FTC's changes to the premerger notification form used in merger review. The Final Rule – the first amendment to the HSR form and instructions in over 46 years – is the culmination of the Agencies' long-standing effort to dramatically overhaul the requirements for merging entities.

The Final Rule is a mixed bag. The changes will impose significant additional burdens on filing parties by mandating that they disclose broad tranches of information about overlapping business lines, investors, areas of future competition and prior acquisitions, among others. The Agencies estimate that the HSR preparation time under the Final Rule will increase by an average of 68 hours and up to approximately 120 hours, depending on the scope and nature of the transaction. Fortunately for buyers and sellers, the Agencies have abandoned or substantially modified a number of earlier proposals – most notably by scuttling a proposal that would have required filing parties submit all drafts of competitive analysis documents, as well as onerous requirements designed to evaluate competitive impacts on labor markets.

The Final Rule will take effect 90 days following its publication in the Federal Register – likely, early 2025. That means the clock is ticking to prepare for your next deal. As the year turns, what can you do to prepare for the changes to come? This alert distills the most important changes to the U.S. merger control process and provides practical guidance on how business leaders can be ready when the Final Rule goes into effect.

The Final Rule

The Final Rule codifies a number of changes to the current HSR form, minor revisions to the premerger notification rules and amendments to the HSR instructions to effect the proposed changes. The crucial takeaway from these changes is that regulators will expect significantly more information from merging parties to determine whether a transaction is lawful under the antitrust laws. The key changes are set forth below and categorized in accordance with the impacted sections of the HSR form.

Paring back the proposed rule changes

While the Final Rule undoubtedly represents a sea change for filing parties, it is apparent that the FTC considered the approximately 721 comments that were submitted in response to the notice of proposed rulemaking last year, as it ultimately narrowed or abandoned outright many of the requirements from the proposed rule. The Final Rule does not require, among other things, the submission of employee information, geolocation information, the identity of other interest holders and information about board observers. Perhaps most significantly, the Final Rule also abandons a proposed requirement to submit **all drafts** of responsive documents, which would have imposed significant challenges on companies engaged in merger analysis and planning. Consistent with the HSR rules currently in effect, the Final Rule imposes fewer new reporting requirements on an acquired person as compared to an acquiring person. Finally, the Agencies will continue to permit filers to rely on "good faith estimates" or averments that certain information does not exist.

More documents required to be submitted

The Final Rule also proposes expanding the scope of business documents that must be submitted pursuant to items 4(c) and 4(d). Specifically, the Agencies will now require the submission of certain ordinary course documents not prepared specifically for the transaction – which generally has not been a requirement since the HSR Act was passed in 1976. This amendment is based on the Agencies' "experience with the probative value of **high-level** ordinary course documents," and requires the submission of ordinary course plans and reports that are provided to a company's CEO or board of directors. Moreover, whereas the old rules merely required the submission of transaction-related documents that were prepared by or for a company's officers and directors, the rule has been expanded to include documents prepared by or for the supervisory deal team lead(s), which is defined as any individual "who has primary responsibility for supervising the strategic assessment of the deal, and who would not otherwise qualify as a director or officer."

From a practical standpoint, the Final Rule is far less burdensome to filing parties than the rule changes as originally proposed. But in preparing HSR filings, merging parties must now collect and submit documents from additional custodians that supervise the deal making process, as well as ordinary course documents provided to the company's executives. More important, it is imperative that buyers and sellers carefully manage not only how deal teams and outside advisors create transaction-specific documents but also how competitive analysis documents are created in the ordinary course of business, as these categories of documents will no longer be shielded from submission with HSR filings.

Additional descriptive information

The most significant changes to the regulations require that additional categories of descriptive information be submitted. These changes will increase the costs and time associated with preparing HSR filings, particularly for acquiring parties.

First, the Agencies will now require the submission of an "overlap description" and a "supply relationships narrative" under a section on the HSR form labeled "Competition Descriptions." The Agencies have

historically relied upon North American Industry Classification System (NAICS) codes to identify areas of horizontal competition. However, the Final Rule also requires the submission of a narrative description that outlines the type of information a company "provides to customers, suppliers, investors, or the public for purposes other than an antitrust analysis – to simply describe the products or services it offers for sale." Likewise, it will require filers to submit information about existing or potential purchase or supply relationships, including a description of "each product, service or asset (including data) that the filer sold, licensed or otherwise supplied to the other party or to any other business that, to the filer's knowledge or belief, uses its product, service, or asset to compete with the other party's products or services, or as an input for a product or service that competes with the other party's products or services." Critically, the final instruction contains a statement that parties should not exchange information for purposes of responding to the overlap or supply relationships descriptions. This is notable, as filers typically coordinate on the identification of NAICS codes and may implicate additional clean room requirements.

Second, the Final Rule will require filers to provide a description of the ownership structure of the acquiring entity. If a fund or master limited partnership is the ultimate parent entity (UPE), a company must file any existing organizational chart that shows the relationship of any entities that are affiliates or associates. If no such chart exists, there is no obligation to create one.

Third, with the exception of certain non-negotiated transactions, such as tender offers or open market purchases (known as Rule 801.30 transactions), the Agencies will expect companies to identify and explain "each strategic rationale" for the transaction that was discussed or contemplated by its officers, directors or employees. If the rationale of the acquiring entity is different from the UPE, both rationales must be submitted. This change further requires companies to identify every document produced in the filing that confirms or discusses the stated rationale(s), including by providing citations to the specific page(s) of the document that discuss the stated rationale(s).

Fourth, with respect to any transaction involving the formation of a joint venture or an unincorporated entity, the Final Rule will require the filing parties to submit a general description of the business in which the joint venture or unincorporated entity will engage, including principal types of products or activities and the geographic areas in which it will do business.

Fifth, filing parties will need to submit additional information about minority shareholders or interest holders, as well as officers and directors from the acquiring person. These rules target what the Agencies characterize as a "blind spot" that has prevented thorough premerger screening for transactions involving complex corporate structures and investment vehicles. The FTC deems these rules necessary to identify additional areas of competitive concern created by minority stakeholders or "influential decision-makers" who have existing relationships with entities that are related to the target of the acquisition. With the Agencies' eyes on private equity and similarly structured entities, this requirement comes as no surprise. The Final Rule is

limited, however, and does not adopt proposed requirements that would have required filing parties to identify board observers, creditors, holders of non-voting securities or entities with management agreements.

Further, in conjunction with requiring parties to submit more comprehensive descriptions of the transaction, the Agencies plan to launch a new online portal that invites and makes it easier for the public to submit information and complaints on proposed transactions and to show how they might affect competition. The open invitation for comments from various stakeholders, such as consumers, workers or competitors, signals the Agencies' intention to analyze other "blind spots" missed by traditional HSR review, such as impacts on the labor market and concerns from other advocates.

What do the additional descriptive requirements mean for buyers and sellers?

Although the Agencies assert that they do not seek to require parties to submit "an antitrust analysis akin to a 'white paper'" or hire experts to delineate the relevant area of competition, the overlap and supply relationships descriptions **require** parties to carefully consider what facts they proffer about their products, services and common supply relationships, and how those narrative descriptions may be interpreted by regulators. That is a cumbersome task not currently mandated by the HSR rules. The requirement that parties identify strategic rationales for the merger and pinpoint documents reflecting these strategic rationales will significantly increase the preparation time, cost and administrative burdens for filers. It is likely that parties will acutely feel those burdens in large, cross-border transactions, given the array of strategic considerations raised by such transactions across a company's global supply chain. Moreover, the requirements to submit charts reflecting companies' ownership structure and to identify certain officers and directors not only presents new burdens of production in merger clearance but also presents risk by "unmasking" the corporate relationships between affiliated entities to a higher degree than the previous rules.

Detailed letters of intent, draft agreements or term sheets

Under the Final Rules, filers that have not executed a definitive transaction agreement will be required to submit a document that provides "sufficient detail" about the scope of the transaction, such as a draft agreement or term sheet. Although filers may currently submit preliminary agreements – such as an indication of interest, letter of intent or agreement in principle – the Agencies contend that a "small but significant minority" of filings made on the basis of such preliminary agreements do not contain enough detail to enable an accurate analysis of whether the proposed deal violates the antitrust laws. The Agencies further conclude that this change is necessary to ensure that filings are not made prematurely – i.e., "before the scope of the transaction has been sufficiently determined" and prior to the parties undertaking due diligence "such that consummation is not merely hypothetical." The Final Rule, however, does not specifically require parties to submit term sheets or draft agreements for all transactions in which a definitive agreement has yet to be executed. In response to numerous comments focused on the increased burden and delay for filing parties of the proposed regulation, the Agencies have charted a middle course.

Going forward, filers will continue to be required to submit an executed agreement. But if that agreement, in the Agencies' view, does not describe with specificity the scope of the transaction, filers must also submit an additional dated document (such as a term sheet or a draft definitive agreement) that contains more detail about the transaction. The Agencies emphasize that simply submitting a term sheet or draft agreement is not dispositive; what matters is the degree of detail about the transaction supplied on the face of the document. In this respect, the revised instructions clarify that the definitive agreement or supplemental document should contain some combination of the following terms: "the identity of the parties; the structure of the transaction; the scope of what is being acquired; calculation of the purchase price; an estimated closing timeline; employee retention policies, including with respect to key personnel; post-closing governance; and transaction expenses or other material terms." Although the Agencies have indicated that less than 10 percent of transactions submitted in 2021 would have failed to provide the requisite degree of detail, this change may significantly impact the timing of premerger filings under the HSR Act, mandating that companies must have **meaningfully negotiated key terms** prior to filing on the basis of an executed letter of intent or other non-definitive agreement.

Areas of future competition and emerging rivals

The Agencies have taken the position set forth in the 2023 Merger Guidelines that Section 7 of the Clayton Act mandates scrutiny over acquisitions that may eliminate emerging rivals or threaten competition in lines of products that are still in development. Changes to the HSR form will require information about products and services under development that are not yet generating revenues. For pre-revenue companies with innovative products, this information may raise the risk of a second request for information. In advocating for this change, the FTC specifically cites enforcement actions involving pipeline products still in early-stage development and markets for research and development, suggesting that the revised HSR form will "bolster these efforts." This signals that the Agencies intend to intensify their scrutiny of transactions involving emerging rivals or innovative products.

Identifying a greater range of prior acquisitions

The Agencies seek to prevent companies from strategically consolidating a market in piecemeal fashion. To that end, the Final Rule also includes changes designed to target "the rise of serial acquirers" – firms that engage in several strategic acquisitions in the same industry or "roll up" smaller competitors in the same or adjacent markets. Citing private equity firms and investors who have deployed roll-up strategies in housing and health care markets, in particular, the Agencies will now require companies to report prior acquisitions the company has made within the same lines of business, and both acquiring and acquired entities must provide information on certain acquisitions that closed within the previous five years. This historical analysis reflects a substantial change in enforcement and may lead to more second requests or enforcement actions on the basis of a company's strategic expansion in the same market.

International merger control

Particularly with respect to cross-border transactions, the Final Rule imposes a new requirement that acquiring persons identify whether a transaction is subject to merger control in a foreign jurisdiction. Currently, such disclosure is voluntary. Specifically, a filing entity must now compile and submit a listing of each jurisdiction in which it has already filed or is preparing notifications to be filed, as well as a list of the jurisdictions in which it has a good faith belief it will file. The change reflects a keen interest in inter-agency consultation in the event that ex-U.S. jurisdictions are evaluating the competitive impacts of a transaction. Although the requirement will only impact companies with international revenues, any cross-border transaction will now require closer coordination between U.S. antitrust counsel and foreign counterparts.

Looking ahead

The proposed Final Rule in many ways is an acknowledgement that some of the Agencies' most sweeping amendments would impose costs on merging parties that are not proportionate to the Agencies' interests in evaluating the competitive impact of a deal. The Agencies abandoned significant aspects of the proposed rule changes – including onerous requirements concerning information about a company's workforce to screen for potential impacts on labor markets – in response to feedback from industry stakeholders. But make no mistake: Massive changes are coming to U.S. merger control.

From a practical standpoint, it is important to understand that the HSR filing process will soon require the parties to expend far more effort than was required under the old rules. Merger control already consumes scarce resources in the transaction process. Now, parties will be required to devote substantially more resources over a longer time horizon. For frequent filers and businesses considering transactions in 2025, it is imperative to consult with antitrust counsel now to begin the process of compiling the information required under the Final Rule so as to minimize delays to transaction timelines when the Final Rule goes into effect in early 2025. Moreover, buyers and sellers should work with antitrust counsel to create and implement best practices for deal teams to manage risk at the outset of a transaction in light of the Final Rule – particularly with respect to document creation, given the broader criteria for responsive documents. At the same time, the Agencies plan to lift the temporary suspension on requests for early termination for filings in an effort to reduce the timeline to approval for transactions that present little competitive risk, citing the more comprehensive new requirements as providing sufficient information to quickly determine which transactions pass muster.

In this respect, it is important to remember that while the Final Rule "pares back some of the labor market requirements," in the words of FTC Chair Lina M. Khan, "the information required by the other provisions of the Final Rule will position the Agencies to identify transactions that threaten competition in labor markets." In other words, the new requirements to submit overlap and supply relationship descriptions and high-level business- and transaction-related documents are, in the Agencies' view, sufficient to address their concern about the competitive impacts of transactions on labor markets. How the Agencies use these new tools – and the associated burdens to filing parties – will present real risks to deals moving forward.

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6 August 2024 | Reed Smith Client Alerts

FTC and DOJ convene first meeting of Strike Force on Unfair and Illegal Pricing – more politics than substance?

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Key takeaways

- DOJ and FTC recently hosted first meeting of Biden administration's multiagency Strike Force on Unfair and Illegal Pricing
- Agencies touted various steps they've taken to reduce consumer prices and vowed to root out and take action against antitrust violations that raise them
- While the work of the Strike Force could be viewed as driven by both politics and policy, the meeting serves as reminder that clients should be vigilant about identifying and preventing potential antitrust violations in the current highly charged antitrust enforcement environment

Authors: **Edward B. Schwartz, Michelle A. Mantine, Christopher R. Brennan, William J. Sheridan, Courtney Bedell Averbach, Leah E. Hungerman, Caitlyn M. Holsopple**

On August 1, 2024, the Federal Trade Commission (FTC) and Department of Justice (DOJ) hosted the first meeting of the Strike Force on Unfair and Illegal Pricing (Strike Force), a multiagency initiative sitting at the intersection of antitrust and consumer protection enforcement. President Biden launched the Strike Force in March 2024, promising to "crack down on companies who break the law while keeping prices high for American consumers." The Strike Force, aiming to root out anticompetitive, unfair, deceptive and fraudulent business practices, also includes the Department of Agriculture (USDA), Department of Health and Human Services (HHS), Department of Transportation (DOT), Securities and Exchange Commission (SEC), Federal Communications Commission (FCC), and Consumer Financial Protection Bureau (CFPB). The public portion of the meeting featured remarks from senior officials from each agency, discussing enforcement actions and

rulemaking efforts intended to lower consumer pricing and combat inflation – expected to be a critical concern for American voters this November.

FTC Chair Lina Khan keyed into these concerns in her opening remarks, describing the FTC's "laser focus" on the effects felt by Americans from illegal pricing. Chair Khan called upon the FTC to open an inquiry into grocery store prices and noted the FTC's efforts to finalize the click-to-cancel rule that would simplify cancelling recurring subscription payments – two issues near and dear to consumers. Chair Khan also described the FTC's power to curtail a wide range of issues that can lead to higher prices, such as anticompetitive behavior and deceptive bait-and-switch tactics. Associate Attorney General Benjamin C. Mizer also weighed in, noting the importance of both the Antitrust Division and the Civil Division of the DOJ to the Strike Force. Assistant Attorney General for the Antitrust Division Jonathan Kanter agreed, noting the DOJ's intention to hold corporations accountable for illegal behaviors that "rip off Americans."

Member agencies noted their recent accomplishments and previewed future priorities, including:

- USDA making investments aimed at increasing competition in the food supply chain
- HHS working to reduce prices for prescription drugs
- DOT proposing a rule aimed at banning fees for parents traveling with young children
- SEC looking to hold AI companies responsible for the models they deploy
- FCC lowering costs associated with using prison pay phones by 90 percent
- CFPB working to end "junk fees" and credit card collusion

Conclusions

The Strike Force is a strong reminder of the increased cross-agency collaboration in antitrust enforcement. Undoubtedly, these agencies agencies will continue to use the tools available to them to constrain inflation and, where possible, to lower consumer prices. Yet, while the agency officials' comments touted a large and diverse toolbox to address high prices, the reality remains that those tools are limited by the scope of the agencies' powers and that consumer prices are largely dictated by macroeconomic trends and policy (e.g., trade and Federal Reserve policy). Thus, while Assistant Attorney General Kanter touted that "antitrust enforcement is one of [the] best and most effective tools to lower prices, spur innovation and promote sound business practices," those tools can be brought to bear only to curb **anticompetitive** business practices and transactions that violate the antitrust laws. While no one can doubt the Administration's desire and efforts to stabilize and, where possible, lower consumer prices, including through antitrust enforcement, the work of the Strike Force could be fairly viewed as largely old wine in a new bottle.

Still, the Strike Force has just been launched, and should it extend into the next Administration, we can expect that the agency members will continue to hunt aggressively for ways to stabilize and lower consumer prices across a wide range of industries, including pharmaceuticals, communications, transportation and financial services, and to coordinate their efforts to do so. What remains to be seen is whether the efforts of the DOJ and FTC to expand the scope of antitrust laws and enforcement will continue past November. In the meantime, companies should be reminded that they face an aggressive antitrust enforcement environment today and that the need to carefully evaluate their business practices and transactions to assess antitrust risk – with the help of a robust antitrust compliance policy – is more important than ever.

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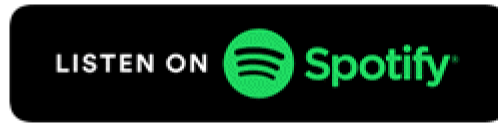

Authors: **Mark S. Goldstein, Cindy Schmitt Minniti, Michelle A. Mantine**

In this episode of Dealmaker Insights, Reed Smith partners Mark Goldstein, Cindy Minniti, and Michelle Mantine come together to break down the Federal Trade Commission's final rule on non-compete agreements and how it may affect U.S. businesses.

Transcript:

Intro: Hello, and welcome to Dealmaker Insights, a podcast brought to you by Reed Smith's corporate and finance lawyers from around the globe. In this podcast series, we explore the various legal and financial issues impacting your deals. Should you have any questions on any of the content, please contact our speakers.

Mark: Welcome back, everyone, to Dealmaker Insights. My name is Mark Goldstein. I'm a partner in Reed Smith and Labor and Employment Group, and I'm joined by my colleagues, Cindy Minniti and Michelle Mantine, both partners as well at the firm. Today's topic is non-compete agreements. Been all over the news lately. Non-compete agreements have long been used by businesses to bar key employees from leaving their business and going and setting up shop across the street the next day. There are a whole host of reasons why businesses may want to impose a non-compete agreement on an employee. However, over the past several years, state legislators have worked increasingly scrutinized the use of non-compete agreements that passed a whole host of legislation. And finally, the U.S. Federal Trade Commission in April 2024 issued a final rule that if it takes effect, would prohibit virtually all pre-existing and future non-compete agreements across the U.S. So I'd like to turn it over to my colleagues today, Cindy and Michelle, and together we'll break down what the Federal Trade Commission's final rule says and how it may impact U.S. businesses. So, Cindy, let me start with you. Can you tell us a little bit about the background to the rule?

Cindy: Sure. Thanks, Mark. Like you said, there have been a lot of state legislation recently over the last couple of years, really trying to limit the use of non-compete agreements. And President Biden in July of 2021 directed the Federal Trade Commission to come up with some federal legislation really limiting the use of non-compete agreements. In an effort to really be wide sweeping in January of 2023, the FTC put out a proposed rule, which got a lot of attention from businesses and a lot of people commented on the proposed rule during the comment period. There were about 26,000 comments to the proposed legislation. And then ultimately, the proposed rule is now out as of May of this year, it was published in the Federal Register. And like you said, if it does go into It will go into effect in September. But it really is an absolute ban to non-compete agreements. There are very, very limited exceptions, but this is really an absolute ban on current and future non-compete agreements for virtually everyone. There's a small exclusion for senior executives and some other minor exclusions, but really this is an effort to really stop people from really enforcing non-competes on their workforce, really open up people and to be able to go to competitors. It's also interesting that it's not just for employees. The proposed rule is for anyone that's really doing work. So So employees, contractors, anybody that's got any kind of a relationship. So independent contractors, interns, it's really very broad sweeping.

Mark: That's a great point, Cindy. And the definitions within the final rule are really key and are extremely broad. The definition of worker, as you said, the definition of non-compete clause is quite broad. Michelle, let

me ask you, because I know that this is a question a lot of our clients have asked. We understand that future non-compete agreements after the rule takes effect, if it takes effect in September as the currently scheduled effective date, those would not be above board. But what about pre-existing non-compete agreements? I know Cindy alluded to it, but how does the final rule adjust pre-existing non-competes?

Michelle: No, it's a great question, Mark. And as Cindy said, it's pretty broad sweeping. Yes, the final rule absolutely applies to pre-existing non-compete agreements. There is sort of or are limited exceptions. The exception that I would note here in particular is for pre-existing non-compete agreements entered into with senior executives. And that term, like so many of the other definitions that accompany this rule, is defined very carefully and specifically in terms of what it means to be a senior executive. And if you fall outside of that category, the ban does apply. With respect to those other pre-existing non-compete agreements, those not with senior executives, I mean, the ban is saying, as Cindy pointed out, that the agreements will not be enforced. First, they are illegal, and that would be after the final rule's effective date, which currently absent any changes from it based on litigation is September 4th. The FTC is also saying as part of this guidance that the employer must provide clear and conspicuous notice to the worker of these sort of factors to make it very clear to the worker that if they have this pre-existing non-compete agreement, it's going away very soon. So the exceptions are extremely narrow. And again, something that if you're looking on relying on an exception for the senior employees, the senior executive employees, or in another context, you really need to look closely at the definitions to make sure you're in a safe spot.

Cindy: Michelle, that's a great point about the definitions. Another question we get a lot is when you talk about non-compete, what about competitive activity during employment? And I think it's important to note that this is a broad sweeping regulation for post-employment restrictions. So we still are able to have employers banning current employees from having any sort of competitive activity during their employment, that this is really post-employment competitive activity that we're talking about. And I think it's just important to note.

Michelle: Great point, Cindy. Let me ask, are there any exceptions? I know, obviously, we have the carve out for pre-existing agreements with senior executives, which from a high-level perspective, the rule essentially defines as someone making at least $151,000 a year and in a policymaking position. Besides that, are there any, Cindy, let me ask you, are there any exceptions to the rule? Some state legislatures, like in California and Minnesota, who have adopted all-out bans on restrictive covenants, do still include a carve-out, for instance, in the sale of business context.

Cindy: Yeah. So I think that's probably one of the most talked about things right here is it's a bona fide sale of business is an exception. And there was a lot of discussion about what is a bona fide sale of business and are there percentages or a threshold that should be considered. Considered, and that was a lot of the comments and a lot of the consideration, but this final rule does have a carve-out for bona fide sale of the business so that you could have a restriction there because there are other interests at stake. And there are two other sort of litigation exceptions as well. So if there was litigation or if there was some interest in enforcing the non-

compete before the rule goes into effect, or if there's a good faith belief that the rule is inapplicable. So, you know, I guess if you're arguing, is someone really a senior executive, or if you believe that they are a senior executive, something like that. But so those are the two sort of litigation exceptions. But I think really, the sale of the business is probably the one that we're going to see the most. Mark, did you have any thoughts on the sale of business and all of the discussion and back and forth, you know, before the final rule was proposed?

Mark: Yeah. So I think that the sale of business exception probably is the biggest change between the proposed rule and the final rule. Generally speaking, the proposed rule that came out in January 23 is conceptually the same as the final rule that came out in April, May of 2024. Some of the language was tweaked, but the underlying concepts are the same. But the sale of business exception changed substantially. And the reason for that is because in the proposed rule, the FTC said that this carve out for the sale of business would only apply if the person that you're trying to bound by a non-compete is purchasing or owns 25% or more of an ownership interest in the entity at issue. So if somebody had a 12.5% ownership interest, the sale of business exception would not apply and they could not be bound by a non-compete. So in the final rule, the FTC dropped that 25% requirement, really conceding that there was no specific underpinning or justification for that metric. However, the FTC has said that despite this, they do anticipate rigorously looking at transaction to make sure that folks aren't entering into what they call sham deals. So essentially make sure there's a genuine bona fide sale at issue, not some sort of attempt to evade the FTC's non-compete ban.

Cindy: I'm going to jump in on that. I think that's really important because we were hearing a lot of questions when we saw the proposed rule about what really is a sale and what if there are some corporate maneuvers that can happen, would we still have the enforceability of these restrictions? And I think that the comments and the commentary took a long, hard look at that and tried to make this as broad as possible.

Mark: Yeah, that's exactly right. And the FTC even calls out things like repurchase rights or mandatory stock redemption programs and makes clear that those are not bona fide sales transactions, so they would not be subject to the exception. Obviously, particularly in the private equity space, businesses will be looking to capitalize and see if there are transactions that can be deemed bona fide that perhaps are broader than the scope initially contemplated by the FTC based on the language in the final rule. And that's obviously something you'd want to consult with counsel about to see if you're able to exercise and invoke the sale of business exception. Michelle, let me ask you, because I know that I've gotten this question a whole lot. But if you put a non-compete into a document other than an employment agreement or restrictive covenant agreement, some other sort of agreement could be an equity incentive, equity agreement, does that matter at all to the FTC?

Michelle: It does not. And I have gotten that question a lot as well, Mark. People are trying to think of ways in which perhaps the non-compete has legs. And I don't say that in a nefarious way. I think people are thinking about ways in which to protect their trade secrets, their technology, things that they have concerns about sort of walking out the door. What will happen to it if that employee leaves? Are they adequately protected? And the FTC has said that, you know, this non-compete ban covers all terms of employment that meet the definition of

a non-compete clause, regardless of whether that terms in something characterized as an employment agreement, an incentive equity award agreement, or some sort of separate restrictive covenant agreement, separation agreement, employee handbook, whatever document it is, you have to, again, go back to those definitions and say, is this a non-compete clause? And then is there any narrowly tailored or limited exemption that might apply here, right? So they really are saying they want these gone. Interestingly, the FTC had sort of a follow-up to the final rule release in April that they did on May 14th of 2024, sort of talking about how do you comply with the new rule. Interestingly, they didn't provide, at least from my perspective, they didn't provide a whole lot of concrete, specific guidance. But they certainly hammered home this point that if it's a non-compete, it doesn't matter what kind of document it sits in. We're saying this rule is saying get rid of them. And they even said, if you're an organization that's perhaps not under the purview of being regulated by the FTC, that the FTC would encourage you to get rid of non-competes because of the damages that, in its view, non-competes have had on the working environment. So definitely broad sweeping, to say the least.

Mark: And I want to ask you something, Michelle, and it relates to something Cindy said earlier. Cindy mentioned this covers post-employment non-compete agreements. So non-competes during employment are still permissible. I want to ask you about what we call garden leave agreements. And these are very common in the UK and in the US are fairly common in the financial sector. And essentially, a garden leave agreement is an agreement where for a certain period of time, often somewhere between 90 and 180 days, when individuals still remain employed by a business, they'll still be getting paid their salary, but they won't perform any active duties. They often won't come into the office. But again, they'll still technically remain an active employee. Does the FTC weighed in on garden leave agreements?

Michelle: They have, and the final rule does not apply to these agreements. I mean, as you pointed out, sort of the structure of them, they're also common in different sectors like financial services, for example. I think that the idea that garden leave agreements are sort of outside the scope is consistent with what Cindy mentioned before about this being a post-employment rule. The final rule commentary actually specifies that an agreement whereby the worker is still employed and receiving the same total annual compensation and benefits on a pro rata basis would not be a non-compete clause under the definition because such an agreement is not a post-employment restriction. So they're looking at it in that circumstance as the worker continues to be employed, even though the worker's job duties, their access to colleagues or the workplace has been significantly changed or perhaps it's gone away entirely. You know, so it's a really interesting sort of take on things and makes you think that perhaps we'll be seeing more employers use these garden leave agreements as it seems like one of the only, if not the only, option for a business that has concerns about, you know, sort of how workers may compete post-employment with them. Can this garden leave provision provide them with any protection or benefit?

Cindy: Michelle, I think that's a great point on garden leave and looking at garden leave and is that an opportunity for employers to protect interests that they want to protect while employees are They're still getting compensation, so they're not being penalized in some way. And I do think that we might see garden

leave becoming a little bit more commonplace moving forward. The one thing that I would encourage everyone to do is just really take a look at garden leave and make sure that it's not having unintended consequences. Make sure that your benefit plans are protecting people that we think it's going to protect and make sure that there's no other agreements or anything else that we need to look at. So we want to make sure we're not solving for one issue, but creating others. So look at that closely. Great point. Mark, I think we were just going to turn and I think it would be interesting if you want to talk about non-exempt status and what does that do with this rule?

Mark: Yeah. So a lot of chatter has been around what types of organizations are exempt from the purview of the FTC's rule, because Section 5 of the FTC Act does not apply to every single entity in the US. For one thing, certain banks are exempted from Section 5 of the FTC Act. Another type of business that has traditionally been thought of as being exempt are nonprofits. And the FTC acknowledges, therefore, in the commentary on the final rule, that on its face, a true nonprofit is not subject to the final rule and therefore is not banned from having non-compete agreements with its employees. Though, you know, I think it's probably fair to say that non-compete agreements are less common in the nonprofit sector than they are in the for-profit sector. But the FTC then goes on and cautions entities that are claiming tax exempt status as nonprofits and says, you know, just merely claiming tax exempt status does not mean that you are truly outside of the purview of the FTC Act. The agency says, you know, what we look to is really that there be an adequate nexus between an organization's activities and its public purposes, and also that its net proceeds be properly devoted to recognize public as opposed to private interests. So the FTC uses a two-part test to determine whether or not an entity truly meets the test for being a nonprofit, regardless of what's claimed on a tax form. So an entity theoretically could be claiming tax-exempt status, but for purposes of final rule, the FTC might not consider that to be a nonprofit. And thereby the entity would be subject to the final rule. So if you're a business that is claiming tactical gun status as a nonprofit and still want to be able to use non-competes going forward, it would certainly make sense to review with counsel, you know, whether or not, you know, you definitely squarely fit within, you know, the law's definition of a nonprofit.

Michelle: Mark, just two points on that. At the May 14th discussion by the FTC on how to comply with the non-compete ban, they actually mentioned this scenario in particular. And the FTC encouraged entities that are truly nonprofits to also get rid of their non-competes. It was quite an interesting take, in my view, that they were sort of acknowledging, yes, some of you might be outside of the span and outside of our purview of Section 5, but that we're strongly encouraging you to get rid of these provisions that we think are just not good. The other point on that, I just want to flag for everyone, if you haven't read it, if you're thinking about relying on nonprofit status or anything else to say to keep yourselves out of the purview of Section 5, take a minute to read the FTC's statement from November of 2022 on sort of the scope as the current administrators, the current agencies who see the scope of Section 5 of the FTC Act. They are interpreting it more broadly than ever. Specifically, they've said in that statement and in other public forum that the FTC Act really is designed to go after conduct that doesn't otherwise violate the antitrust law. So it might not be a violation of the antitrust laws, but they still think it sort of looks and smells like it could be a violation. It is extremely broad right now in the

territory that sort of is being caught within Section 5. So you want to be really careful about sort of what you're doing and whether or not you could get caught up in a Section 5 investigation.

Mark: That makes sense. Thanks, Michelle. Before we turn to what the future holds, Cindy, I just want to confirm with you, outside of non-compete agreements, that's just one type of restriction or contractual clause that businesses may use to make sure that employees don't improperly compete with them. They may use things like employee or customer non-falsific clauses, confidentiality clauses. Are those referenced by the final rule?

Cindy: So that's a great point. So yes, employers can still use non-disclosure agreements. We can still have non-solicitation agreements. We can still have confidentiality clauses, again, subject to other restrictions and other guidance that's already out there and in place. But that's all permissible. Here, we're really talking about non-compete, so stopping somebody from competing with the employer. So, as long as you're complying with applicable state law and other federal laws, these other agreements are permissible.

Michelle: Probably a good time to take a look at those NDAs that you're using and those confidentiality agreements to make sure that they have the protections that you really need here. Because I think in the past, right, we've relied or some businesses may have relied on the non-compete and they're going to have to rely more heavily on the NDA and that confidentiality agreement.

Cindy: So that's a great point, because not only do we want to make sure that the other agreements are in place and that they're drafted appropriately, but in practice, employers should be really making sure that they're doing what they need to do to really protect things that they're saying are protectable. So, you know, if you've got confidentiality agreements in place, you want to really make sure that you are treating that information as confidential and that if there's a challenge, that you can really show why you don't want that information getting out. So really looking not only at your documents, but your practices.

Michelle: That's a great point.

Mark: So I want to ask you both in closing, what you think employers should do in the near term and potentially in the long term. And just to give everyone a status update, the U.S. Chamber of Commerce has filed a lawsuit that has been consolidated effectively with another lawsuit in Texas federal court challenging the final rule on a host of grounds, including that the FTC doesn't have the authority to issue a rule like this. The Chamber of Commerce has made a motion to essentially ask the court to nullify or validate the rule. There's been no ruling on that yet, but since we have until at least September 4th before the final rule will take effect, there's plenty of time for the court to rule and for there potentially to be appeals. I think it's fair to say a lot of people from the business community think that there's at least a reasonable likelihood that the final rule will not take effect, at least as planned, understand either in whole or in part, and that some of the arguments put forth against the rule do hold water. So let me ask each of you, Michelle, I'll start with you. What would

you say for the business community in the US right now, who's kind of bit of a limbo period, how they should proceed?

Michelle: Mark, it's a great question because we're really in sort of this limbo period, right? I think the biggest thing I would recommend right now is not to panic, to use this time, as we were just discussing, to take a look at, sort of take inventory of your agreements, your NDAs, your confidentiality agreements, how many workers you have that have a non-compete, how many of those might fall into the senior executive category, sort of looking at, okay, what's our exposure if this rule goes into effect, if this ban goes into effect? And then you need to sort of take, I think, a measured approach and sort of evaluating, okay, if it goes into effect, when we get rid of these, how do we protect ourselves from what we otherwise saw that nothing could protect us? Protecting our business interests post-employment and thinking of practical ways to do that with other agreements. I wouldn't suggest doing anything rash at this point, Mark, because of the good points you made with this pending litigation. I would expect the court to move rather quickly here and within the next couple of months, knowing that this proposed ban goes into effect on September 4th. And I do think there are some excellent, excellent legal arguments as to how the rule is just outside of the FTC's domain here and is really stepping on what is otherwise within our state law purview. you. That being said, again, with the state laws, those have also been developing quite often and they're changing. So keeping an eye on those, if you do have non-competes, making sure that the ones you have, that you are okay from a state law perspective as well. I think it's a really good time to look at that as well. So that's just a few tidbits. I'm sure Cindy can add to that.

Cindy: No, Michelle, that was a great answer. I think that's right. I think you should be taking stock right now of what agreements you have in place and what do you actually need, looking at what you want to protect and is there another better way to do that? And even making sure that the agreements, you know, whether this goes forward or is changed in some way or, you know, we really have to be mindful that there are state laws out there and there are other restrictions. So really want to make sure that we're looking at that. So I think take the summer, let's enjoy ourselves and look at all of our non-compete agreements and policies and practices and make sure that we're We're really protecting what we need to and so that you're ready if this does go into effect, but you're ready nonetheless for the state laws or other changes that may come along the way if it's not this one.

Mark: Awesome. Thank you, Cindy. Thank you, Michelle. And thank you, everybody, to listening to the Dealmaker Insights podcast brought to you by Reed Smith. And we thank you very much.

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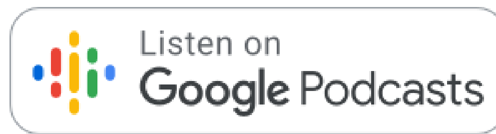

Authors: **Anatoliy Rozental, Edward B. Schwartz**

With the recent explosion of antitrust developments in the United States, members of our Corporate and Antitrust & Competition teams have come together to produce a three-part series that discusses the practical impact of these developments for our clients. In this third and final episode, Reed Smith partners Anatoliy Rozental and Ed Schwartz team up to talk about merger planning during these times of uncertainty.

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Intro: Hello and welcome to Dealmaker Insights, a podcast brought to you by Reed Smith's corporate and finance lawyers from around the globe. In this podcast series, we explore the various legal and financial issues impacting your deals. Should you have any questions on any of the content please contact our speakers.

Anatoliy: Hi, everyone and welcome back to Reed Smith's podcast series, Dealmaker Insights. I'm Anatoliy Rozental, Private Equity M&A partner based in our New York office. With the explosion of developments in the U.S. antitrust space. I’ve teamed up with our antitrust and competition team to chair a three part series where we will be discussing the practical impact of recent developments and key priorities for our clients. Our third and final episode, I'm honored to be joined by my partner Ed Schwartz, who was a member of the global antitrust competition team and who is at the forefront of some of these antitrust battles. Ed, thank you so much for joining me today.

Ed: It's a pleasure to be with you today. Anatoliy.

Anatoliy: Thank you, Ed. So let's dive right in. We've all heard and read so much about the changes in antitrust enforcement under President Biden, especially when it comes to mergers. We've also heard that these

changes have made it more difficult to get deals through both the DOJ and the FTC. So do merging parties really need to approach the merger enforcement process differently today than they did even four years ago?

Ed: I think they do Anatoliy. Look, we all know that President Biden came into office with a mandate which I think can more accurately be described as a dictate from the progressive wing of the Democratic party to bolster antitrust enforcement, especially with regard to mergers and beginning with the appointment of Lina Khan to chair the FTC and the appointment of Jonathan Kanter at the antitrust division. We've seen the White House act on that mandate. And each of them Khan and Kanter has implemented changes at their respective agencies that have made getting many deals through the agencies more challenging. Now, the good news is that we have not seen a dramatic increase in the number of cases being investigated through a second request or being challenged in court. And that was expected by many of us. We've seen fewer in fact, particularly at the FTC. And there are a lot of reasons for that, that I don't really have time to get into, but still for parties who are trying to navigate the merger enforcement process deals that potentially raise anti-competitive concerns. And I'm talking about deals where there is a significant horizontal overlap between the parties or maybe because it's a vertical transaction which could be seen as potentially threatening to rivals of either the buyer or the seller. These parties do need to adjust their strategies for dealing with the antitrust agencies to adapt to the changes that we've seen.

Anatoliy: So, what do you think are the biggest changes in merger enforcement that you've witnessed that are impacting parties today? They're trying to navigate the merger enforcement process?

Ed: Well, it's a lot, but maybe I can speak first in broad strokes. Uh I think the changes made by the agencies fall into three broad categories. First, the agencies have broadened the scope of deals that the agencies consider to be potentially anti-competitive. Second, they've implemented changes that couldn't make getting a deal through more difficult and take longer if the agency decides to investigate. And three, the agencies have also made negotiating remedies for a challenge deal in order to win approval more difficult. Now, let me take those one at a time. So with respect to broadening the scope of deals, the agencies may find to be anti-competitive. Let's take a look at the recent revisions to the horizontal merger guidelines, which in a number of ways, they really both broaden the scope of deals that may be subject to investigation and a suit to block and at the same time, lowered the bar for merger challenges. So for example, and really importantly, the revised guidelines state that a proposed transaction will be viewed as presumptively unlawful if it results in a post merger combined fare of 30% that is a market share of 30% by the merge firm or in HHI of 1800. These are significantly lower thresholds than we saw in prior guidelines and they're really much lower than the thresholds the courts have generally viewed as raising anti-competitive concerns. So those are two examples both coming out of the revised horizontal merger guidelines. Um Second, though the agencies have now stated that a vertical merger will be viewed as presumptively illegal if either party has at least a 50% market share. This is new. And it's also consistent with the fact that we have seen notable challenges to vertical mergers in the last few years such as the FTC suit to block the aluminum rail transaction. And that by the way is a case that the FTC lost before the FTC administrative law judge. I think we also have to look beyond what the FTC

has said in the revised horizontal merger guidelines because the FTC has issued other notable policy statements including a broad general statement of enforcement policy that addressed merger enforcement policy. And there the commission said that mergers that don't violate Clayton Act Section 7, which is the federal law establishing the standard for merger enforcement, could still violate Section 5 of the FTC Act. That's a radical statement. So what the FTC is saying is that even if under the body of case law that's developed over the last many, many, many decades and under FTC policy, a merger would be deemed to be legal that they still may challenge it under Section 5. The FTC has also said that it is abandon the consumer welfare standard in analyzing mergers even though this has been the touchstone for merger analysis for decades. Now because the FTC hasn't, hasn't provided much in the way of guidance as to just how they analyze deals. We're really left with the commission pretty much saying we can't really tell you what the standards are, but we'll know in anti-competitive merger when we see it and that's really not much of an exaggeration. So let me turn now to getting the deal through once an investigation has been opened. And what we're seeing there is more of a practice than a stated policy by the agency. The investigations that are launched are taking longer and the burdens on merging parties in navigating the investigation process is generally greater. So, put another way what we're seeing in many cases is the agencies using their discretion more often to be less flexible in negotiating the scope of second request and overall taking more time to conduct the investigation. And this of course, can imposed an enormous toll on the parties and in some cases threatened or even kill the deal. Lastly, remedies. Both the FTC and the Antitrust division have expressed deep skepticism about the effectiveness of merger remedies in fixing the problems they see arising from problematic mergers. This is also significant because if the agency isn't willing to negotiate a remedy, the only remaining options are to litigate or abandon the transaction.

Anatoliy: So given all of that, how can merging parties adapt? What, what should they be doing differently today than they were doing four years ago? What, what are we supposed to be telling our clients?

Ed: Well, that's really a $60,000 question, isn't it? And I would highlight three things. The first, I think parties need to take into account the risk of a long investigation. And I'm talking potentially as long as 18 or even 24 months in the parties' deal documents if you would think an investigation is likely. And I'll add that this is especially true if the deal may be investigated in other countries. In which case, the U.S. agency may slow roll the investigation even more. Also, given the greater risk, parties need to be especially thoughtful. And I think even creative in thinking about clearance risk allocation between the parties and possible outcomes when negotiating the deal documents. The second thing that I think parties need to focus on arises from the following reality and that is that the agencies hold most of the cards in a merger investigation. They really do. But there is one card that the parties can play and that is a willingness and ability to litigate. So what that means is that if an agency is jamming the deal up, the most effective thing the parties can do is to when they get to that point, certify substantial compliance with the second request. Now, the agency may say they don't agree. You haven't, you haven't complied. But the parties can say as far as we're concerned, we have complied. Tell them that, tell the agency that the parties plan to close and that they can sue if they want. But, that means the parties have to be prepared to litigate. And that what that means is that they should develop an effective

litigation strategy early in the planning process. This is an important change, but it is the reality of navigating the merger clearance process today. Ultimately taking the dispute to a federal court means the agency has to prove its case under the enormous body of merger law that's developed and that's where the parties get leverage, even the threat of litigation and demonstrating a willingness to do it. That's what gives the party much greater leverage in an investigation. Importantly, here, remember the, if the agency sues to block a deal, they bear the burden. Also notable is the fact that the agencies have a string of losses in the courts and merger cases. So again, the parties can and should use what they have. There are only so many cases the agencies can litigate and their track record hasn't been very good. So the key takeaway here is a willingness and ability to litigate is the leverage parties have. They should use it when necessary and be prepared to do so. Third, let me get back to remedies. Um I think what parties need to be doing on that score is to be prepared early on to advise the agency, what the parties are willing to do to get the deal through. So the party should begin this process early in the planning. What is the buyer prepared to give to get the deal through? It is often in the party's interest to consider that up front, especially if you're, if you're representing the buyer. Look, the agencies know that if the parties have put an effective remedy offer on the table, the agency's chances of losing in court has just gone up and it may deter them from simply laying down the gauntlet and saying we're not willing to negotiate, you can walk away or will sue you. And so this is why we've seen the agencies more willing to negotiate remedies than their words would indicate. And also then if litigation ensues the parties are in a much better place, if they can argue to the court that even if the deal does reduce competition, the proposed remedy effectively restores it and that the agency shouldn't and can't get any more than the parties have offered. Now, let me add one last point about strategy in dealing with the new merger world we're in and it's what I wouldn't do. What I wouldn't do is to change the arguments I would make to the agencies in fundamental ways. And that's even before the FTC, despite the policy statements that they've made about abandoning the consumer welfare standard and everything else, and this goes back to my second point, the agencies ultimately need to prove their cases in court if the parties are willing to litigate. So, while the FTC might say we've abandoned the consumer welfare standard and we're doing things completely differently today because the old order doesn't work. They still have to prove their case before a court of law if the parties are willing to litigate and the consumer welfare standard is still the Touchstone for merger analysis in the courts and it probably will be for a long time to come. So I think the bottom line here is that just because the agency have veered left, that doesn't mean that the courts aren't still driving straight down the middle of the road.

Anatoliy: So Ed, and we, we, of course, that's the current state of the world. Of course, we have an election coming up. So I will ask you to look into your crystal ball and tell us what you expect to happen in connection with the election. So do you see changes happening with the type of president that is elected or with an incumbent retaining its seat in office?

Ed: Yeah. Well, that's a very good and timely question. We're not that far away from an election and possibly a change of administration. So the short answer is yes, we will see changes and it of course, depends on what happens in November. Look, I think first if Trump is elected, I think we will see rollbacks of many of the changes we've seen in the last three years. And also just, you know, gazing a little more deeply into my crystal

ball, if Trump is elected, I won't be surprised to see merger review with the antitrust division and maybe even at the FTC to become more politicized. And that could be a wild card for merging parties. And you know, if Biden's re-elected, I still think that we're going to see some changes, especially at the FTC. I wouldn't be surprised to see more of an institutionalist at the helm, appointed as chair of the FTC. I think the White House might want to see someone who is viewed as more able to get things done than the current chair. And you know, I think who ends up in control of Congress, both the House and the Senate could also affect merger enforcement, especially if the Democrats lose the Senate and Biden is reelected. Look, you know, he's gonna have to get his, his appointments through his nominees through Senate confirmation and that could have an impact and look if the Republicans control both chambers, they, they control the budget and that could also have an impact as well. So either way we're going to see some changes, I fully expect that exactly what those changes will be. I guess we'll just have to wait and see.

Anatoliy: Thank you, Ed. That's all the time we have for today's episode. And thank you to everyone for tuning in. This is the last episode of the series and we hope that everyone has enjoyed it. If you have any further questions or comments, or like to reach out to any of the speakers. You can please find all of our bios on the Reed Smith website. We look forward to staying in touch about these topics or any future topics until next time. Thank you so much.

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Authors: **Anatoliy Rozental, Christopher R. Brennan**

With the recent explosion of antitrust developments in the United States, members of our Corporate and Antitrust & Competition teams have come together to produce a three-part series that discusses the practical impact of these developments for our clients. In this episode, Reed Smith partners Anatoliy Rozental and Chris Brennan discuss new U.S. merger guidelines.

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Intro: Hello, welcome to Dealmaker Insights, a podcast brought to you by Reed Smith's corporate and finance lawyers from around the globe. In this podcast series, we explore the various legal and financial issues impacting your deals. Should you have any questions on any of the content through this series, please contact our speakers.

Anatoliy: Hi, everyone and welcome back to Reed Smith's podcast series, Dealmaker Insights. I'm Anatoliy Rosental, private equity and M&A partner based in our New York office with the explosion of developments in the US antitrust space. I've teamed up with some of our antitrust and competition team to chair a three-part series where we'll be discussing the practical impact of recent developments and key priorities for some of our clients. For our second episode, I'm joined by Chris Brennan, who is a partner in Reed Smith's global antitrust and competition team and whose practice is at the forefront of these antitrust battles. Chris, thank you so much for joining me today.

Chris: Thanks, Anatoliy. Always good to work with you and especially for today's discussion which focuses on a major development on how our clients evaluate and plan for merger clearance issues in the US.

Anatoliy: So let's, let's jump right in. You know, this episode is focused on the US Department of Justice and the Federal Trade Commission's 2023 merger guidelines. So to start at the beginning for our listeners who may not be familiar with the history, you know, I understand that the first guidelines were issued way back in 1968 and there have been several iterations since then. The 2023 guidelines consolidate, revise, replace the various versions of the merger guidelines issued by the FTC and DOJ. And can you give us a brief background of what these guidelines represent?

Chris: So, the stated purpose of these guidelines is to help the public business leaders, practitioners that would be you and I and courts understand how the agencies consider certain issues when investigating mergers. The ideas is that they reflect the agency's current approach to merger enforcement and provide you and me and the larger community insights into how those mergers are going to be analyzed at least for the current agency leadership. And just so we're all on the same page. US law requires companies to file a notification that's known as an HSR filing to the FTC and DOJ for a proposed merger that at least for this year in 2024 is valued at or above 119.5 million. Once that filing is submitted, the agencies have 30 days to decide if they want to further investigate and potentially challenge the merger and critically the parties cannot close the deal while that process is playing out. So while these guidelines are non binding, you should think of them as the playbook for DOJ and FTC personnel that review those filings and that playbook is how agency leadership expects them to analyze a merger during the 30 day review period, and whether to let that deal close or to pump the brakes and investigate further.

Anatoliy: Got it. So are the 2023 guidelines, another incremental change or is this something more groundbreaking?

Chris: So it's definitely groundbreaking, but potentially not in the normal sense of that phrase. The agencies have touted these guidelines as necessary to address quote unquote the modern economy. Yet many of the legal authorities that the agencies rely on for significant changes in these guidelines are based on pre 1980’s case law and many of those authorities have been ignored or rejected by courts over the last 40 years as modern economic theory has shifted our view of how mergers affect markets and outcomes for market participants. Critics of these new guidelines have noted that there's an obvious tension between claiming to update the guidelines for a modern economy while seeming to adopt the pre economics era of antitrust enforcement. But if you take a step back, that approach makes perfect sense, if you think about the Biden administration's view of today's modern economy, and they've characterized that as one marked by excessive corporate consolidation and a need for enhanced merger enforcement. Consistent with that view, these 2023 merger guidelines clearly signal an appetite for stronger enforcement, more theories of potential harm to competition and likely longer investigation periods for our clients.

Anatoliy: Ok. So in light of this new approach, can you walk our listeners through the major changes and how the DOJ and FTC are analyzing mergers for potential competition concerns?

Chris: Sure, I should be clear that there's a lot in these guidelines but for purposes of today's episode and for our listeners, I want to talk about three of the most widely applicable changes. First, the guidelines significantly lower the threshold that agencies use to assess whether a merger is presumptively anti competitive. Generally, a merger that creates a firm with a market share of greater than 30% is likely presumed to be an anti competitive under these new guidelines. And so these guidelines are going to make an entirely greater class of mergers presumptively anti competitive. The guidelines also substantially reduce the presumption thresholds for the Herfindahl–Hirschman Index which is known as the HHI index which analyzes the change in concentration of market shares across all the competitors in a relevant market. I don't want to get too deep into the numbers of that analysis, but one way to think about it is that these revisions place far greater scrutiny on what we call a 6 to 5 merger where you start with six competitors, there's a merger and now you're left with five. Before these guidelines, those mergers were less likely to raise anti competitive concerns. And certainly under this new approach, anything more concentrated such as a 5 to 4 merger is absolutely gonna trip the new guidelines. I should note that this is a rebuttable presumption. And the agency has made clear in the final version of these guidelines that it's a rebuttable presumption, but they're saying it's rebuttable while at the same time saying you're gonna need really good arguments to get over that presumption. And if you're in a significantly higher market share above 30% or substantially below the thresholds for the HHI index, that's really gonna be an uphill battle. You're gonna have to fight really hard and potentially go to the courts if you wanna push that deal through. So second, I wanna talk about vertical mergers and obviously by that, I mean, a merger that's not between direct competitors, but something like a merger between a supplier and a manufacturer. The guidelines now suggest, don't declare but suggest the presumption against mergers in which there's going to be a market share of 50% or greater in the related product. And that's the product by which you could use to foreclose other rivals access to the market. This is an area where the agencies are clearly departing from case law because there's never been a presumption that a 50% share would make a merger unlawful. And I think they're gonna have a really tough time pushing that through the courts. And it'll be interesting to see how much they try to push those cases and challenge those mergers uh to test this new approach. Third and finally, I wanna talk about deals that involve nascent or com or potential competitors. And this includes both actual potential competition where one of the merging parties has real plans to enter a market as well as perceived potential competition where current competitors are disciplined by a perception that one or more of the merging parties could enter the market. The guidelines claim that and I'm quoting here in general expansion into a concentrated market via internal growth rather than via acquisition benefits competition. In other words, they don't want you to see, they don't want to see a entity buy its way into a market. They wanna see it build its way into the market. And we've seen this theory in the fintech space, in virtual reality. It's particularly applicable to emerging technologies and I'm sure we'll see it in acquisitions related to artificial intelligence. My view is these challenges are gonna rise and fall on the specific facts and players and that's consistent with the agency's mixed record in challenging these deals to date.

Anatoliy: Generally sounds like scrutiny is increasing across the board. But are there any potential industries or types of entities that are specifically targeted in these new merger guidelines?

Chris: There are and we should begin with a shout out to your first episode with my colleague Michelle Mantine because private equity is definitely in the crosshairs of these new guidelines. And I know you and her talked about that issue in detail. So if you're listening and that's applicable to your world, then please go back and check out that episode. Let's also talk about two other subgroups and that's platforms and labor markets. A multi sided platform is defined as a product or service in which participants provide or use distinct products which contribute to the attractiveness and use of the platform overall. Just for some examples, think about companies offering digital services like app stores, buyer and seller platforms and social media companies. The agencies make clear that the guidelines will apply even if the competitive concerns do not arise on all sides of the proposed market. And they'll consider competition between platforms, competition on the platform, and competition to displace the platform. My view and it's sort of reading the tea leaves here is that platforms are gonna play an increasingly important role in a lot of industries as technology and software continue to infiltrate all aspects of our lives and the agencies are sort of ahead of that shift, ensuring they have a very flexible approach on when those acquisitions are up for review. Second, let's think about labor markets. Unlike the prior merger guidelines, the 2023 edition include extensive discussion of possible harm in labor markets resulting from combinations of employers, they compete for talent. We've seen this and I'm sure you're familiar with an increasing focus on labor markets in all contexts including outside the merger world. And the guidelines confirm that agencies will be reviewing deals for a number of possible effects to labor including lower wages, slower wage growth, the degradation of workplace quality and forcing workers to be pushed into the job market. In response, merging parties should consider how they would respond inquiries on labor issues. And in particular should think very hard about how efficiencies related to head count are addressed in their internal analysis and the calculations of potential synergies.

Anatoliy: So let's now talk about impact. Do these guidelines prevent our clients from considering certain acquisitions or exit strategies?

Chris: So I noted at the beginning that these guidelines aren't binding on the on the agencies and I should also clarify that the guidelines have no legally binding effect on courts. And it may be a really tough sell for many judges given that these guidelines depart from existing and widely accepted principles of merger analysis. So again, the law is not changing here. Moreover, these guidelines are generally seen by antitrust practitioners as essentially memorializing an enforcement strategy that has been in effect since this current administration took over in 2021. And in large part, that approach has failed to produce results in merger litigation. The agencies have lost most of their efforts to enforce the more novel theories in these guidelines. And there's really little reason to think that that's going to change simply because the agencies have published their playbook. That said, defeating the FTC or DOJ in a merger challenge is a massive undertaking. And the agency's track record has not deterred them from being exceedingly aggressive in enforcement efforts. I'll leave you with two perspectives on impact. One clients shouldn't slam the brakes on deal activity just because the temperature in the room has increased. At the end of the day, the vast majority of deals go unchallenged in large part because agencies only have so many staff members to do the work. So work with your antitrust counsel to get a deal specific assessment of where you fall across the potential enforcement spectrum. But second, there's no doubt

that this administration has adopted a deep skepticism of large companies becoming larger. A draft version of these guidelines went so far as to claim that any merger by a company with at least a 30% share would be subject to heightened scrutiny. If you're in that universe, I think you need to factor into acquisition planning and should consider what deals are most likely to create real shareholder value over the next eight months of 2024.

Anatoliy: Is there anything our clients can do in response to these changes?

Chris: I think all the common and classic suggestions apply, right? And you and I have talked with clients about those all the time, right? Think about your documents, get planning early, prepare your arguments. But in light of these changes, I think the best thing you can do is actually integrate your antitrust counsel into the acquisition planning process. Not just after you have a potential target. I know I've had a number of clients reach out and say here are our goals and some potential ideas. What do you think? And the great thing about that approach is we're helping the key personnel at the company understand how to be proactive in developing short and long term acquisition strategies that are aligned with current enforcement attitudes. So we're avoiding a scenario where the board hears about this amazing opportunity. And then only later down the road hears about all the potential antitrust risks that can make it hard to push through if you can write size and right time your client's acquisition strategy, you're creating tremendous downstream efficiencies in how you'll subsequently defend that deal before the agencies. Similarly, I think client should be more willing to consider filing on a letter of intent versus fully signed Comprehensive Agreement. The HSR rules have always allowed both scenarios and I think there are certain deals where an lo I makes more sense because you can get the agency's reaction to the deal before you incur 100% of the due diligence burden to be sure you can't just send in a hypothetical deal and you have to certify that you have a good faith intention to consummate the transaction. But I think where you can get a seller on board, I think it's a really interesting approach for certain transactions.

Anatoliy: Definitely. And it's, it's certainly one that you've recommended for our clients on, on many transactions before and been successful approach that we've taken. All right, Chris, last question for you and I'm sure it's one that you're getting at a lot of cocktail parties these days, but with the close of the first quarter of 2024 and as we're barreling toward a presidential election in November, could the results of that election affect the lifespan of these guidelines?

Chris: So the short answer is yes and obviously neither you nor I have a crystal ball on how things are gonna play out. But uh let me give you a reason to think that's not just possible but potentially likely. The DOJ and FTC issued the vertical merger guidelines in 2020 under the Trump administration. Just about a year later. The FTC rescinded those 2020 guidelines after the Biden administration appointees took control. So we'll certainly be paying close attention to how there's discussion of monopolies as well as the economy at large on the campaign trail. And hopefully you can have me back for a follow up episode on how this election will impact the merger outlook for 2025.

Anatoliy: Perfect. That's all the time for today. Thank you to Chris for today's episode and thank you to everyone for tuning in. For part three, I'll be joined by my partner Ed Schwartz and we'll be discussing merger planning in the age of uncertainty, FTC Section 5 and beyond. We hope you can all join us then. Thank you so much.

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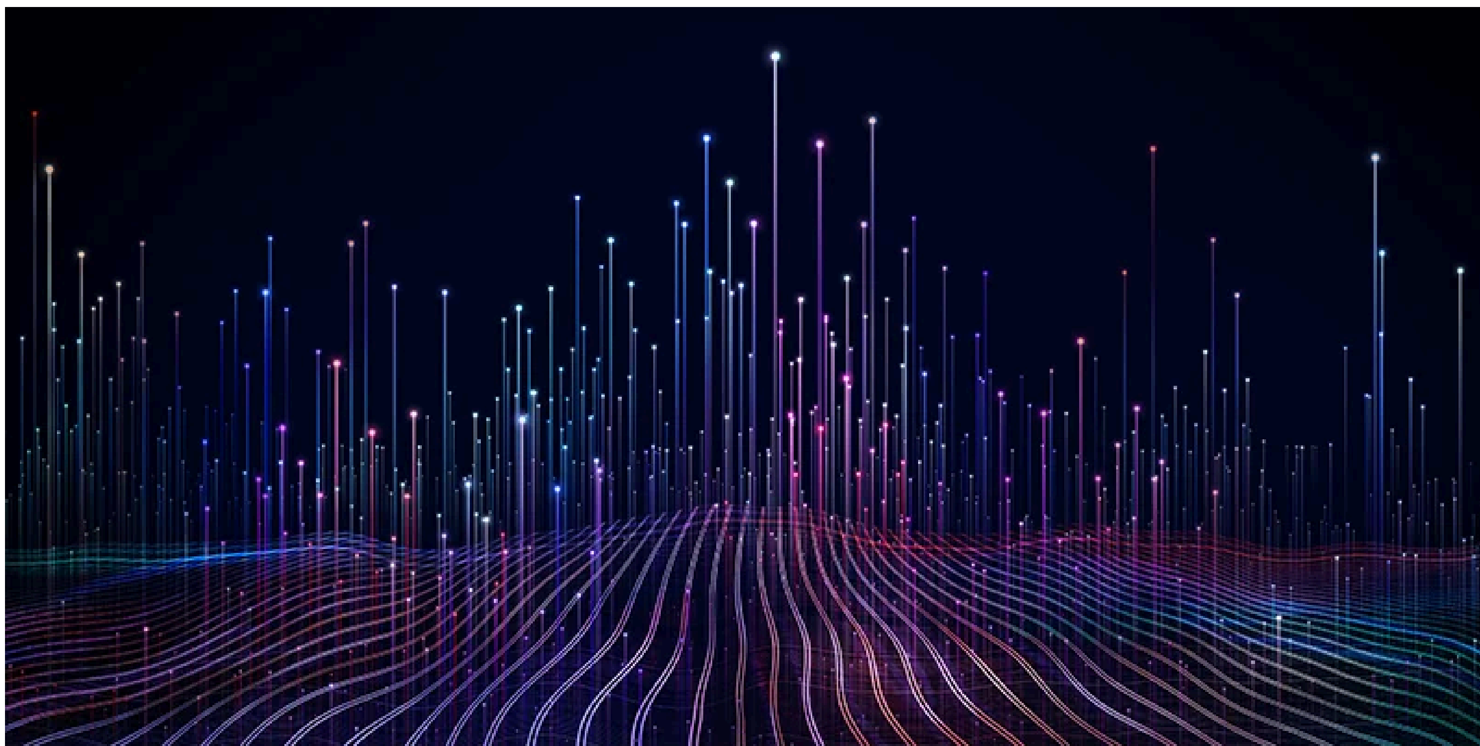

With the recent explosion of antitrust developments in the United States, members of our Corporate and Antitrust & Competition teams have come together to produce a three-part series that discusses the impact of these developments for our clients. In this first episode, Anatoliy Rozental, a private equity partner in the firm's Global Corporate Group, is joined by Michelle Mantine, chair of our global Antitrust & Competition team, to talk about recent developments at the intersection of private equity and antitrust law.

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Anatoliy: Hi, everyone and welcome back to Dealmaker Insights. I'm Anatoliy Rozental, private equity and M&A partner based in our New York office uh with the explosion of developments in the US Antitrust space. I've teamed up with our antitrust and competition team to chair a three part series where we'll be discussing the practical impact of recent developments and key priorities for our clients. For our first episode, I honored to be joined by my partner Michelle Mantine, who chairs our global antitrust and competition team and who is at the forefront of some of these antitrust models. So, let's dig right in, we are here to talk about recent developments at the intersection of private equity and antitrust law. What is happening that makes this conversation so important?

Michelle: Well, this month alone, the federal agencies that enforce the antitrust laws signaled an intensified look into the purported financialization of health care markets. Citing concerns regarding health care consolidation and private equities role in the marketplace. Specifically on March 5th, regulators hosted a public workshop, private capital, public Impact an FTC workshop on private equity and health care. And during that workshop, the agencies announced a cross government inquiry into the impact of private equity investment and other forms of what they refer to as corporate greed in the health care sector. Speakers from the agencies touted enforcers recent enhanced scrutinizing of private equity firms and their involvement in health care. The workshop featured remarks from agency officials as well as panels of economists, academics and health care workers. Now across the board, the speakers denounced private equity's role in health care leaving little room for discussion of the possible benefits, clinical or otherwise of private capital investments in the health care market. Now that very same day, just before that workshop began, the agencies issued a request for information or RFI looking for information regarding consolidation in health care markets. Again, citing concerns that acquisitions in this space may generate profits for private equity firms at the expense of patient care and worker safety. As the Federal Trade Commission's chair, Lina Khan, expressly noted private equity companies should be on notice of these efforts by the antitrust agencies specifically that the agencies are on the lookout for strategies and things that they see that could be problematic under the antitrust laws. They're focused on, in their words, protecting the American public from anti competitive and unlawful tactics.

Anatoliy: Certainly worrying for some of my um private equity clients in this space, aside from Lina Khan and the FTC, what other agencies are involved and how are they going to work together to, to regulate private equity firms?

Michelle: Yeah, beyond Lina Khan and the FTC, the antitrust division of the Department of Justice, the DOJ is really uh sort of alongside the FTC spearheading this effort. Now, both of those agencies, the FTC and DOJ are in charge of enforcing the federal antitrust laws, generally. In this particular effort, those agencies were joined by the Department of Health and Human Services, HHS, with support from the Center for Medicare and Medicaid Services, CMS. HHS is charged with protecting the health of American citizens while CMS works within HHS to administer government funded health care through the Medicare and Medicaid programs. Now, the FTC has undoubtedly focused on private equities involvement in health care. As of late, you know, they instituted a civil suit against a private equity investor, Welsh Carson and its portfolio company US Anesthesia Partners challenging its serial acquisitions with which the FTC alleges allowed the firm to monopolize the market at issue in that case. Now, corporate involvement in health care has been a consistent priority for this administration and it will likely continue well beyond this workshop. The DOJ also has plans to investigate for this discussion on March 5th, whether private equity investments in health care entities violate state corporate practice of medicine. CPOM laws. Now, HHS has a slightly different focus. It plans to focus its efforts more on monetary transparency and accountability regarding the use of government funds. Similarly, CMS plans to implement additional oversight into ownership of healthcare entities by exploring stronger standards to oversee the quality and execution of Medicare and Medicaid programs. Now, these agencies have agreed upon information sharing between and among them allowing information gathered by one agency to be used in

potential investigations by the other agencies. Beyond these agencies, state regulators have been taking on similar cases under the state antitrust laws, scrutinizing investing and challenging private equity transactions in this space. In addition to proposing their own state legislation that will make it more challenging for private equity companies to engage in transactions purely in health care, but also beyond state antitrust rules are also becoming increasingly common as a method for inquiring against these types of actions. So for example, the Colorado Attorney General just settled lawsuits against the entity I named earlier Us Anesthesia Partners requiring that group which is private equity backed to sever exclusive contracts with five hospitals and dissolve any of its doctors non-compete agreements. Similarly, the Massachusetts Attorney General imposed conditions on a hospital acquisition by a private equity owned firm within the last few years. Multiple states have implemented transaction notification statutes that are often referred to as baby HSR statutes which are requiring transactions within the health care sector or ones involving hospitals or insurers to report transactions to state authorities before closing it. So it's really critical that, you know, the state players are factored into overall legal risk analysis and evaluation and assessment of transactions.

Anatoliy: Michelle. We're, we're talking a lot about health care. It does this mean that our PE clients that are not investing in the PE space don't have to be concerned about additional antitrust scrutiny from the government?

Michelle: It's a great question and I told you the short answer is no. While the examples you are seeing right now are focused on health care, it goes beyond that and the agencies have taken the opportunity to say that in the March 5th discussion and otherwise in their commentary. So just for a few examples, if you look back in August of 2022 the FTC challenged a private equities firms acquisition in the veterinary services space albeit health care adjacent, right? That challenge was settled. But though the parties are subject to numerous limitations on future acquisitions including prior approval and notice requirements on any purchase of their specialty or emergency veterinarian clinics within certain geographic areas. Similarly, alongside of these sort of changes and discussions on private equity and antitrust in June of 2023 the FTC announced upcoming changes to the information that will be required for merger control notifications under the Hart-Scott Rodindo Act. These proposed changes include requiring significantly more information regarding minority investors, officer director, relationships, board advisors, as well as a broader scope of internal documents to be submitted with the HSR filings. Private equity buyers will be particularly impacted by these requests for more information assuming that these proposed rules become final, particularly the information request seeking information about disclosure prior acquisitions that occurred within the past 10 years. That's quite a long time. Now, alongside those proposed HSR changes in July of 2023. The FTC and DOJ had released draft merger guidelines which were finalized in December of 2023. And those guidelines call for heightened scrutiny of private equity activity across all industries not just limited to health care. The guidelines expressly note that the agencies will investigate broad strategies of serial acquisitions even if no single acquisition on its own would substantially lessen competition or tend to create a monopoly. In addition, the guidelines note that the agencies will consider how minority interests may impact competitive decision making suggesting that that might even expand as far as non voting minority interests. Now last but not least in November of 2022, the FTC issued a

policy statement describing the types of conduct that it considers to be an unfair method of competition even if that conduct does not violate the traditional antitrust laws such as the Sherman Act and the Clayton Act. The policy statement defines roll up transactions specifically as a series of transactions that tend to bring about harms that the antitrust laws were designed to prevent but individually may not have violated the antitrust laws. Now, since that time, the release of that statement in November of 2022 the FTC has increased its activity issuing civil investigative demands to PE firms under requests per section five of the FTC Act. Last but not least, both the DOJ and FTC have continued to enforce section eight of the Clayton Act which prohibits interlocking directorates between companies that cross certain thresholds, particularly in the case of private equity in August of last year. For example, the FTC announced an action to prevent an interlocking directorate arrangement, marking the first time that the FTC applied section eight enforcement to a non corporate entity. So far because of the DOJ's recent efforts, 15 interlocking directors have resigned from 11 different corporate boards across various industries. That might not sound a lot, but that's a lot, a lot more than what was prevented in the past. And the antitrust agencies have stated that they are continually looking for interlocking directorates imposed by private equity venture capital and corporate venture capital firms among others.

Anatoliy: Certainly seems like there's a a new regime here. So, so what can private equity firms do to mitigate their antitrust risk as they do transactions?

Michelle: Yes, they, this is the time really to take stock of your operations entities in this area should exercise caution and work with their antitrust lawyers to evaluate the effects, both procompetitive and anti competitive of their strategic business decisions. So regular audits compliance efforts, ongoing counseling discussions with Council can really help navigate the impact of new policies and regulations. I think the big thing here is to really make sure that as a, as a private equity firm or corporate client that you're in the know, right? And part of that is appreciating a, we expect that there will be continued scrutiny in this area. Antitrust agencies are focused on private equity and financial sponsors. So we need to just know going into the deal that we may get more questions than we have in the past and be prepared to answer them. And we need to think about that even in the context of minority interests because they're starting to garner much more attention that they had in the past. I mean, the FTC is expected to assess even the minority interest from PE firms and financial advisors in looking at these transactions much more than they did before. Even just looking at how a board member or advisor position might influence the strategic and commercial decision making of an entity. Clients should also anticipate potential enforcement outside of the merger clearance process. Whether it be through a civil investigative demand or other subpoena like document, they should expect that agencies will take a critical view towards series of acquisitions concentrated within any single sector or related sectors over a more expansive multiyear time frame. And last but certainly not least being mindful of the documents you create in your retention policies. You know, there's a tendency by companies to hold on to documents and information longer than they should now is the time to look at those retention policies and to see how long you really need to hold tight on those materials. Similarly, what kind of documents are you creating? And do you need them? Not only do you need them, what do they say and how might they be interpreted by a regulator or completely

out of context? Five years later, working with your lawyers to make sure that your language is very careful and strategic to the points you're trying to make is all the more critical really now, more than ever.

Anatoliy: Michelle. That's all the time we have today. Thank you so much for your time and thank you to everybody for tuning in. For part two I'll be joined by my partner Chris Brennan and we'll be discussing the impact of the new merger guidelines. We hope you can all join us.

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13 May 2024 | Reed Smith Client Alerts

DOJ antitrust enforcers launch new task force in crackdown on health care consolidation

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Key takeaways

- The Antitrust Division of the Department of Justice launched a new Task Force on Health Care Monopolies and Collusion to guide the Division's antitrust policy, investigations, and enforcement activity in the health care sector.
- The Task Force is broad in scope, targeting participants at all levels of health care markets, and comes on the heels of other efforts by antitrust regulators to curtail purportedly anticompetitive conduct in the health care sector.
- In particular, vertically integrated "payviders" should consider the competitive effects and potential antitrust risk of their strategic business decisions and prepare for increased regulatory activity.

Authors: **Michelle A. Mantine, William J. Sheridan, Courtney Bedell Averbach, Leah E. Hungerman, Nicole L. Kaplan, Christopher R. Brennan, Edward B. Schwartz**

Antitrust enforcers once again have ramped up their efforts to target the health care industry with the Department of Justice's (DOJ) launch of the Antitrust Division's (the Division) Task Force on Health Care Monopolies and Collusion (the Task Force). This announcement comes on the heels of other ongoing initiatives focused on purportedly anticompetitive conduct in the health care sector, including a joint public workshop denouncing "corporate greed" in health care markets, a request for information seeking comments regarding the effect of transactions involving health care providers, and the launch of a portal to facilitate reporting of complaints about potentially unfair and anticompetitive health care practices. In the current enforcement environment, it is imperative that participants in health care markets – including but not limited to

managed care organizations, providers, investors, technology, and data companies – consider the competitive effects and potential antitrust risk of their strategic business decisions.

Task Force overview

The Task Force will guide the DOJ's enforcement strategy and policy relating to health care, including policy advocacy, investigations, and civil and criminal enforcement in health care markets. Specifically, the Task Force will target a wide range of competition concerns that the Division says are shared by patients, health care professionals, businesses, and entrepreneurs, including "payer-provider consolidation, serial acquisitions, labor and quality of care, medical billing, health care IT services, access to and misuse of health care data and more." Katrina Rouse, an antitrust prosecutor who joined the Division in 2011 and who previously served as Chief of the Division's Defense, Industrials, and Aerospace Section and as a trial attorney in the Division's Health Care and Consumer Products Section, will direct the Task Force.

DOJ remarks on Task Force

During the announcement of the Task Force on May 9, 2024, Assistant Attorney General Jonathan Kanter said that the Division is "upping our game" on health care enforcement and laid out three "animating principles" at the core of the Task Force:

1. **Need for antitrust enforcement to adjust to market realities of health care in a post-industrial economy:** Kanter underscored that "heath care in a post-industrial economy is different than it used to be," referring to the "platformization of health care" today that has resulted in "multi-sided giants and intermediaries that are accumulating assets at an alarming rate," including payors, providers, PBMs, claims processors, and banks. At the heart of the Task Force is the DOJ's belief that the trillions of dollars that Americans spend on health care are "being gobbled up by a small number of payers, providers and dominant intermediaries that have consolidated their way to power in communities across the country." As an example, Kanter pointed to insurance companies buying up health care providers "at an extraordinary clip." The Task Force will "identify and root out monopolies and collusive practices that increase costs, decrease quality and create single points of failure in the health care industry," including taking a hard look at these "multi-sided giants and intermediaries" that Kanter describes as the "gatekeepers" of the American health care system.

2. **Government resources and tools:** Next, Kanter noted that Task Force will exploit the Division's "deep bench" of resources and tools, including civil and criminal prosecutors, economists, health care industry experts, technologists, data scientists, investigators, and policy advisors from across the Division's civil, criminal, litigation, and policy programs, and the Expert Analysis Group, to identify and address pressing antitrust problems in health care markets.

3. **A “strong policy voice”:** Kanter emphasized that the creation of the Task Force builds on the Biden administration’s “whole-of-government” approach to antitrust enforcement, encouraging various agencies and departments across the federal government to work together to target antitrust violations. He stated that the Task Force “elevates the importance of antitrust enforcement” which is among the government’s “highest priorities.”

Looking forward

As emphasized by Assistant Attorney General Kanter’s remarks, the creation of the Task Force is another example of increased antitrust scrutiny of the health care industry in the Biden era, consistent with other recent initiatives targeting consolidation in and the purported "financialization" of the health care sector. The announcement’s specific reference to “payer-provider consolidation” warrants particular attention by “payviders” – vertically integrated companies operating as both payors and providers. Moreover, the Task Force seemingly formalizes a shift in the DOJ’s enforcement priorities. For the most part, the FTC has played a larger role in enforcing federal antitrust law in health care provider markets, while the DOJ has typically overseen insurance markets. In fact, in 2001 the Division dismantled a prior iteration of a health care task force and announced that it would generally refer cases involving providers to the FTC. The breadth of the new Task Force suggests that the agencies’ historical division of authority is a thing of the past, and that all facets of health care markets are fair game for DOJ antitrust enforcement.

While it remains to be seen whether the Task Force will make significant inroads in curtailing further consolidation in health care markets, there is no doubt that participants in health care markets need to scrutinize the competitive effects of their strategic business decisions to minimize risk.

Client Alert 2024-104

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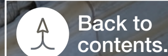
Legal and regulatory challenges



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Antitrust developments in 2024 that will impact managed care

Takeaways

- Consolidation by providers and managed care companies, is being insistently scrutinized.
- Contracting practices of dominant providers have drawn challenges from enforcers and private plaintiffs.
- Certain states are passing laws enabling them to review smaller deals.

Efforts by private plaintiffs and both federal and state governments to enforce the antitrust laws show no signs of slowing down in 2024. The Biden administration has consistently made antitrust enforcement in the health care sector a priority, and that was reflected in federal antitrust enforcers' efforts to address allegedly anticompetitive conduct and mergers in 2023. Similarly, 2023 saw private antitrust plaintiffs pressing cases against allegedly dominant providers and payors. Finally, fourteen states (so far) have now enacted premerger filing and clearance statutes specifically governing even small health care transactions. These developments, including new actions filed at the end of 2023, will continue into 2024 and hold implications for managed care entities.

In 2024, government enforcers and private plaintiffs will continue to use the antitrust laws to curb provider power. These efforts will involve evidence developed from managed care entities and will impact the managed care sector directly. As a prime example, in a case filed in late September 2023, the Federal Trade Commission (FTC)

took direct aim at a private equity firm, Welsh Carson, that consolidated anesthesia practices in certain markets in Texas to develop U.S. Anesthesia Partner, Inc. (USAP) into a dominant anesthesia provider. The FTC alleges that USAP and Welsh Carson engaged in a rollup of major anesthesia practices in Texas starting in 2012 and involving more than a dozen practices, 1,000 doctors and 750 nurses. According to the FTC, the rollup strategy and resulting market power have led to higher prices and USAP has engaged in unlawful price setting and market allocation agreements with competitors. On November 20, 2023, USAP and Welsh Carson moved to dismiss, arguing, among other things, that the FTC's lawsuit exceeds its contractual and statutory authority and fails to allege a relevant market, monopoly power or exclusionary conduct plausibly. On the same day that the defendants moved to dismiss the FTC's case, a putative class action addressing the same conduct was filed by union employee benefit plans.

The USAP case is of a piece with government and private actions to constrain the power of dominant hospital systems. Private plaintiffs successfully survived a motion to dismiss a putative antitrust class action brought by commercial and Medicaid health plan members against Hartford Healthcare in Connecticut. The allegations are that the defendant hospital system has monopoly power and uses anticompetitive tactics to maintain and grow it. The core anticompetitive tactic alleged is the use of "all-or-nothing" contracting – meaning that Hartford won't enter agreements with insurers for hospitals in which it has a monopoly and for which there are no alternatives unless the insurers also contract with Hartford's other hospitals. This case is much like the California attorney general and private plaintiffs' case against Sutter Health that resulted in a $575 million settlement in 2019 but also in a trial loss for one set of private plaintiffs in 2022. In similar cases against HCA Healthcare and others, all-or-nothing contract terms and anti-steering and anti-tiering provisions are at the heart of the allegations of anticompetitive conduct.

In the hospital merger space, states in the South have continued to pass Certificate of Public Advantage (COPA) laws to provide immunity to merging hospitals from federal antitrust scrutiny. Mississippi passed a COPA law in 2023, North Carolina is considering one for the UNC system and Louisiana passed a COPA for a $150 million hospital merger that sparked a challenge from the FTC. On September 27, 2023, the federal district court in Louisiana concluded that the merger was subject to the state action doctrine – because it was covered by the state COPA review process – and thus immune from the federal antitrust merger enforcement process. Under the state action doctrine, federal antitrust laws do not apply to anticompetitive restraints imposed by states as an act of government.

In 2023, countering that trend in Southern states, each of California, New York, Minnesota and Illinois joined 10 other states (Colorado, Connecticut, Hawaii, Massachusetts, Nevada, New Hampshire, Oregon, Rhode Island, Vermont and Washington) that previously had required advance notice and an opportunity to investigate even quite small transactions (e.g., as small as $10 million in revenues).

This year may also bring challenges to consolidation on the payor side of the market. In December 2023, Cigna and Humana announced (then quickly pulled back from) a possible merger that likely would have drawn an investigation and, potentially, a challenge, as proposed mergers of Anthem and Cigna, and Aetna and Humana did in 2017.

The very extent to which there are "provider" and "payor" sides of the market for antitrust purposes will also be subject to scrutiny in 2024. One aspect of antitrust in health care markets that remains to be tested is the extent to which managed care entities operate a two-sided platform as described in *Ohio v. American Express*, 138 S. Ct. 2274, 2283 (2018), such that any anticompetitive effects must be evaluated collectively in both the payor and provider side of the market. In 2020, in *In re Delta Dental Antitrust Litig., 484 F. Supp. 3d 627, 637 (N.D. Ill. 2020)*, the Northern District of Illinois addressed whether a dental insurer, Delta Dental, operated a two-sided platform at the motion to dismiss phase. The court concluded that the insurer was not a two-sided platform, as it lacked the "simultaneity of the exchange" of the credit card transactions at issue in *Ohio v. American Express*. However, the court noted that a two-sided market analysis could be used to evaluate indirect network effects, deferring the issue until after discovery. Defendants appear poised to test this theory in 2024 with a fuller record as the case moves out of discovery and into the class certification phase.

For more information on this article, please contact Will Sheridan, Daniel Booker and Leah Hungerman

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FTC announces adjusted HSR and interlocking directorate thresholds for 2024

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Key takeaways

- The FTC's annual threshold adjustments are a good reminder for parties to work closely with outside counsel to determine whether a transaction will require an HSR filing based on the value of the transaction and the size of the parties.
- Even for nonreportable transactions, parties should consult with counsel regarding substantive antitrust issues because U.S. antitrust enforcers can and do scrutinize transactions that fall below HSR reporting thresholds.
- As the FTC's renewed interest in enforcing the laws against interlocking directorates and "unfair methods of competition" continues into 2024, the increased monetary thresholds for interlocking directorate enforcement and higher civil penalties for Section 5 violations will be all the more relevant in the coming year.

Authors: **Courtney Bedell Averbach, Daniel I. Booker, Christopher R. Brennan, Nicole L. Kaplan, Caitlyn M. Holsopple, Leah E. Hungerman, Stephan B. Johansen, Michelle A. Mantine, Edward B. Schwartz, William J. Sheridan, Gregory D. Vose, Rafael Szmid**

On January 22, 2024, the Federal Trade Commission (FTC) announced the annual threshold adjustments for premerger filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (15 U.S.C. section 18a) (HSR Act). The FTC revises the thresholds annually based on the change in gross national product. The new thresholds have increased the dollar amounts required to trigger an HSR filing for both the size-of-transaction and the size-of-person tests. The revised HSR thresholds will apply to all transactions that close on or after the effective date of 30 days after publication in the *Federal Register*.

Adjusted threshold for the size-of-transaction test

The minimum value of a transaction that could trigger an HSR filing will increase from $111.4 million to $119.5 million.

Value of transaction	HSR filing required?
$119.5 million or less	No
More than $119.5 million, up to $478 million	Only if size-of-person test is met (see below)
More than $478 million	Yes

For any agreement entered into prior to the effective date (30 days after publication in the *Federal Register*), the new thresholds will apply so long as the transaction is closed on or after the effective date.

Adjusted thresholds for the size-of-person test

The following table reflects the new annual thresholds for the size-of-person test. For transactions valued at more than $119.5 million and up to $478 million, an HSR filing is only required if the size-of-person test is met.

	Original threshold	2024 indexed threshold
Total assets or annual net sales of acquiring/acquired person	$100 million	$239 million
Total assets or annual net sales of other person	$10 million	$23.9 million

Filing fee thresholds

Additionally, the FTC approved changes to the HSR filing fee structure, which will become effective 30 days after publication in the Federal Register. For transactions that are imminent or currently underway, the applicable filing fee thresholds are those in effect at the time of filing notification.

Value of transaction	Filing fee
Less than $173.3 million	$30,000
$173.3 million or more but less than $536.5 million	$105,000
$536.5 million or more but less than $1.073 billion	$260,000
$1.073 billion or more but less than $2.146 billion	$415,000
$2.146 billion or more but less than $5.365 billion	$830,000
$5.365 billion or more	$2,335,000

Interlocking directorate thresholds

The FTC also recently announced revised thresholds that trigger prohibitions on certain interlocking memberships on competing corporate boards of directors. As of January 12, 2024, this prohibition does not apply if either competitor corporation has capital, surplus, and undivided profits totaling below $48,559,000, or if the competitive sales of either corporation are less than $4,855,900, among other exceptions.

Civil penalties

On January 11, 2024, the FTC announced that the maximum civil penalty amount for violations of the HSR Act and Section 5 of the FTC Act (prohibiting "unfair methods of competition") will increase from $50,120 to $51,744 per day. The changes are effective as of the date of publication in the Federal Register (January 10, 2024).

Nonreportable and cleared transactions

While noncompliance with the HSR Act carries serious penalties, the fact that a transaction does not meet HSR filing thresholds or has already received HSR clearance to close does not mean that such a transaction is immune from scrutiny by antitrust enforcers. The Antitrust Division of the Department of Justice and the FTC have previously filed suits seeking to unwind consummated mergers, including mergers that had received clearance following antitrust review. Enforcers have also challenged transactions well below the threshold for the size-of-transaction test, including those with a purchase price of less than $10 million. Additionally, the FTC's renewed interest in Section 5 of the FTC Act signals the agency's intention to investigate nonreportable transactions (or a series of nonreportable transactions) that it views as constituting an "unfair method of competition."

Given that the FTC has dramatically increased its enforcement of the antitrust laws in recent years, and the complexities and nuances in this particular area of the law, it is always wise to consult with experienced antitrust counsel regarding HSR filing obligations and substantive antitrust issues in connection with transactions of all sizes. To learn more about our experience, please contact any of the authors listed below or the Reed Smith lawyer with whom you regularly work.

Client Alert 2024-018

11 January 2024 | Reed Smith In-depth

U.S. Antitrust Merger Enforcement: What to Expect in 2024

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Key takeaways

- The past three years of the Biden Administration have significantly altered the antitrust merger enforcement landscape in the United States.
- Between the anticipated revised HSR rules and the evolving investigations landscape, it will be even more important for parties expecting to be before the antitrust agencies this year to begin planning for a potential investigation well in advance of a filing.

Authors: **Nicole L. Kaplan, Edward B. Schwartz, Michelle A. Mantine, Christopher R. Brennan, Leah E. Hungerman, Caitlyn M. Holsopple, Daniel I. Booker, William J. Sheridan, Courtney Bedell Averbach, Stephan B. Johansen, Gregory D. Vose, Rafael Szmid**

As the administration and its key antitrust enforcers enter the final year of this term, we look back at the biggest developments in 2023 and discuss what to expect in 2024.

Background

The Biden administration moved swiftly to set the tone for antitrust and competition policy during this term. In July 2021, President Biden issued Executive Order 14036, "Promoting Competition in the American Economy," setting forth 72 initiatives designed to address competition issues within the U.S. economy. The message was clear: U.S. antitrust enforcement was going to increase significantly and break new ground on combinations alleged to harm competition. The President encouraged the newly appointed leadership within the Department of Justice (DOJ) and the Federal Trade Commission (FTC) (together, the Agencies) to review the existing merger guidelines and consider revising them to "address the consolidation of industry in many markets across the economy." Accordingly, FTC Chair Lina Khan entered office in June 2021 with the mandate to dramatically transform merger enforcement. The assistant attorney general of the DOJ's Antitrust

Division, Jonathan Kanter, a known critic of big tech, also entered office, in November 2021, as an advocate for significant reforms to the antitrust laws.

While the last two years have been one of the most rapid and dramatic shifts in U.S. antitrust merger enforcement that we have seen, the Agencies' record is mixed. In the last two years, the Agencies have released new merger guidelines, issued dramatic proposed changes to the Hart-Scott-Rodino Act (HSR) process, and undertaken a radical transformation of FTC policy. But we have also seen the lowest number of federal merger enforcement investigations and actions in the last 20 years. The resignation of both Republican FTC commissioners and the reported unprecedentedly low morale within the FTC may have contributed to these record low challenges.

High-profile merger challenges in the tech sector by the Agencies have occupied much of the Agencies' focus and resources. The Agencies (especially the FTC) have suffered major defeats and setbacks in this sector and others. While certainly unsuccessful in some respects, the DOJ and FTC's greatest impact on mergers over the last few years may have been in derailing deals – intentionally or not – as a result of lengthy and burdensome investigations. 2023 was no exception.

But despite numerous setbacks, agency leaders, especially Chair Khan, have continued to signal their intent to stem the tide of mergers that they claim has resulted in over-consolidation across a range of industries. With a general election looming, expect the DOJ and the FTC to do what they can in 2024 to make their mark.

HSR proposed rule changes

Looking back – 2023: In June 2023, the Agencies announced their proposed plans to expand and reorganize the HSR Form and Instructions as well as the premerger notification rules implementing the HSR Act. The proposed changes are detailed in a 133-page Notice of Proposed Rulemaking, which explains the Agencies' conclusion that the current HSR Form and process yield insufficient information to evaluate the potential competitive impact of a deal. The key proposals, detailed further here, include:

- Dramatically expanding the scope of documents that would need to be filed with the form to include a duty to share drafts, ordinary course business documents, and documents prepared by "supervisory deal leads";
- An obligation to provide detailed descriptions of the businesses of the filers, including with respect to any existing business relationships between the parties;
- An obligation to provide a detailed description of the transaction's rationale, with documentary support;
- A new requirement to provide detailed employee information, as well as a disclosure of any labor penalties or findings by a federal agency;

- An overhaul of revenue reporting that will place an additional burden on filers' businesses;
- A duty to report all acquisitions of any size going back 10 years; and
- Requesting additional information regarding the ultimate parent entity, the structure of all entities and associates involved, and specific details involving the transaction, agreements, and deal timeline.

Looking forward – 2024: We expect the proposed changes, if implemented, to take effect no sooner than the second half of 2024. As currently drafted, these changes will dramatically increase the burden on filing parties, as well as agency lawyers, in conducting initial HSR reviews. In addition, the proposed expansion of the HSR Form will likely lead to a much more tedious and time-intensive process for the parties leading up to filing. In particular, the new HSR Form may take an additional two to three months to complete, and parties contemplating a transaction should include antitrust counsel from deal inception to accommodate a longer and more intensive HSR review process.

Additionally, the early termination option under the HSR Act for mergers and acquisitions, which was temporarily suspended in February 2021, remains generally[1] unavailable for filing parties going into 2024. This option was previously available to quickly close transactions that posed no danger to competition. In the FY 2022 Annual Report (2022 Annual Report), the Agencies only reported granting five of 1,345 requests for early termination during the first full year without the early termination program. For HSR-reportable transactions, parties filing in 2024 should expect to observe the full applicable waiting period before closing can occur (generally, 30 days for most transactions and 15 days for cash tender offers or bankruptcies).

In addition, parties subject to investigations through second requests from the agencies following an HSR filing should expect more burdensome and lengthy investigations with an increase in the volume of documents and data sought. Parties should likewise expect an increase in the number of second requests issued, as well as an increase in instances where the Agencies seek more information about the transaction during the initial 30-day waiting period.

Merger Guidelines

Looking back – 2023: On July 19, 2023, the Agencies jointly released a draft update of the Merger Guidelines (Draft Guidelines). After months of public comments, on December 18, 2023, the FTC and DOJ collectively issued the final version of the 2023 Merger Guidelines (2023 Guidelines), which describe the Agencies' review process of potential mergers to determine compliance with federal antitrust laws. While the 2023 Guidelines in final form contain a few changes from the Draft Guidelines, the substance is largely unchanged. The 2023 Guidelines, which officially replace the 2010 Horizontal Merger Guidelines and 2020 Vertical Merger Guidelines, provide 11 principles that the Agencies will rely on to answer the question: How do firms in this industry compete, and does the merger threaten to substantially lessen competition or tend to create a monopoly?

The 2023 Guidelines further highlight characteristics of certain mergers that the Agencies will more heavily scrutinize, such as mergers that increase the risk of coordination, mergers in highly concentrated markets, and mergers that would further entrench a firm's dominant position. The 2023 Guidelines also call special attention to mergers in certain types of industries. Namely, Guideline 10, which focuses on mergers in the labor market, states that "[w]here a merger between employers may substantially lessen competition for workers, that reduction in labor market competition may lower wages or slow wage growth, worsen benefits or working conditions, or result in other degradations of workplace quality." Despite repeated losses by the FTC in wage-fixing and no-poach cases in 2023, the FTC will continue to aggressively enforce mergers in the labor market. Additionally, Guideline 8 has an eye toward roll-up acquisitions by private equity firms by stating that a firm that engages in "an anticompetitive pattern or strategy of multiple acquisitions in the same or related business lines" may violate antitrust laws. Further, Guideline 6 addresses whether a merger may entrench or extend an already dominant position and emphasizes the FTC's interest in transactions between a dominant firm and a "nascent competitor," defined as "a firm that could grow into a significant rival, facilitate other rivals' growth, or otherwise lead to a reduction in its power." It is clear that the FTC is focused on nascent competitors in the context of technology mergers by highlighting key factors such as "network effects, scale economies, or switching costs" and stating that nascent threats are "particularly likely to emerge during technological transitions."

The 2023 Guidelines also significantly alter the review of horizontal mergers by treating transactions between horizontal competitors with a combined market share of 30% or more as presumptively unlawful at the investigative stage, which is a major change from the 2010 Guidelines. The 2023 Guidelines also take a more modern approach to the analysis of vertical mergers by evaluating the "ability and incentive" of the merged firm to foreclose rivals from necessary inputs, which reflects the Agencies' interest in pursuing theories of competitive harm based on vertical relationships. The main takeaway from the 2023 Guidelines, and the 11 principles therein, is that the Agencies have historically expanded the scope of merger enforcement in the United States.

Looking forward – 2024: With the 2023 Guidelines in place, the Agencies are likely to bring a number of test cases in 2024 to establish the 2023 Guidelines' legitimacy before the courts. It is imperative for parties to certain mergers to understand how the 2023 Guidelines impact their transactions and the industry at large. Likewise, parties to mergers in certain industries, such as the private equity or labor market, should engage antitrust counsel early to fully evaluate the substantive antitrust risk of the transaction. Additionally, parties to horizontal mergers that will result in a combined market share of 30% or more should also engage antitrust counsel at the outset to assess the implications of the new presumption contained in the 2023 Guidelines.

FTC Section 5's part in increased merger enforcement

Looking back – 2023: Section 5 of the FTC Act made headlines in 2023 due to an FTC Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the FTC Act (Policy Statement),

issued on November 10, 2022, which penalizes "unfair methods of competition." In the Policy Statement, the FTC altered its decades-long approach to analyzing Section 5 cases by taking the position that Section 5 was designed to address competitive ills not reached by the Sherman Act or Clayton Act. It also abandoned the consumer welfare standard and rule of reason analysis, the touchstone of previous Section 5 analyses, allowing the FTC to bring Section 5 cases without alleging a relevant product market or market power.

Looking forward – 2024: In 2024, the FTC will likely pursue merger cases under Section 5 when the facts do not rise to a violation of the more rigorous standards of Section 7 of the Clayton Act. Merging parties, particularly in private equity and the health care industry, should consider evaluating conduct and transactions by viewing "unfair" competition from a wider perspective, looking at the broader impact of policies such as "roll-up acquisitions," collaborations with competitors, and information sharing.

Agency collaboration efforts fit into increased merger enforcement

Looking back – 2023: In 2023, the Agencies focused efforts on combatting unlawful information sharing and implementing reforms in health care policy that may affect transactions in the coming year. In February 2023, the DOJ withdrew three antitrust policy statements related to enforcement in the health care industry: Department of Justice and FTC Antitrust Enforcement Policy Statements in the Health Care Area (September 15, 1993); Statements of Antitrust Enforcement Policy in Health Care (August 1, 1996); and Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program (October 20, 2011). In July 2023, the FTC voted to withdraw from the same statements. The now defunct policy statements provided antitrust "safety zones" for certain transactions by health care entities, shielding them from agency scrutiny for certain hospital mergers and joint ventures.

The Antitrust Division described the statements as "outdated" and "overly permissive" on subjects such as information sharing between competitors, which may occur in pre-transaction due diligence. The Agencies noted that a "case-by-case approach" would better lead evaluation of transactions in health care markets and would more accurately "reflect modern market realities."

The Agencies' collaboration efforts in merger policy go beyond the information sharing and health care spheres. Notably, the DOJ is utilizing collaborative efforts to target anticompetitive behavior, such as filing amicus briefs in the FTC's civil suits under the Sherman Act. Further, the FTC and Department of Labor (DOL) signed a Memorandum of Understanding detailing coordination between the two agencies (and sometimes the DOJ), to investigate unfair labor practices that may have an effect on competition. This period of interagency referrals means that, when the agencies learn of possible rule violations through merger filings, they may refer the criminal or civil violations to another agency better equipped to deal with such matters.

The DOJ additionally recently announced a new Mergers & Acquisitions Safe Harbor Policy (Safe Harbor Policy) in October 2023. The policy protects acquiring companies that voluntarily and timely disclose criminal misconduct discovered during due diligence at an acquired company. If the acquiring company promptly

discloses the criminal misconduct, fully cooperates in the investigation, and provides remediation, restitution, and disgorgement of ill-gotten gains, the Safe Harbor Policy will apply to provide a presumption of declination from DOJ prosecution.

Looking forward – 2024: In 2024, health care and technology companies in particular must evaluate antitrust risk using previous enforcement actions and cases, while carefully considering the procompetitive benefits and potential anticompetitive effects of future mergers and conduct. Companies may also need to reconsider current operations or ventures that may have been developed in reliance on the former policy statements. Further, the policy statement withdrawal may impact industries outside of the health care sector, as other agency guidance such as the agencies' Antitrust Guidelines for Collaborations Among Competitors and Antitrust Guidance for Human Resource Professionals rely on the now withdrawn policy statements. Based on the agencies' recent enforcement in other areas regarding information sharing, such as challenging interlocking directorates and information exchanges, companies should expect increased scrutiny into conduct implicating potential sharing of competitively sensitive information. Increased referrals and collaboration between the DOJ, FTC, and DOL demonstrate that the agencies are willing to look beyond their own rules at conduct implicating other regulatory schemes, meaning that unlawful conduct discovered during merger investigations is fair game, even if seemingly unrelated to the merger itself. Additionally, transacting companies should engage in thorough due diligence with the newfound protection from the DOJ's Safe Harbor Policy.

How to manage the 2024 merger enforcement landscape

Merging parties can do several things in planning and implementing their merger plans in response to the changed, and still changing, merger enforcement landscape. These steps include:

> **First**, plan ahead. Between the anticipated revised HSR rules and the changed investigations landscape, it will be even more important for parties expecting to be before the antitrust agencies this year to get a head start on regulatory planning. This will need to include beginning early to gather the additional information that will likely be required under the new HSR rules, and developing a realistic strategy for responding to a potentially long and burdensome investigation.
>
> **Second**, do not overreact to the significant changes in policy, reflected in the new merger guidelines and elsewhere. Policy is not the law, and the agencies are still accountable to the courts and existing merger law.
>
> **Third**, part of being realistic about the prospect of a potentially lengthy, expensive, and otherwise burdensome investigation should include addressing risks realistically when negotiating the deal documents. For example, a longer investigation may raise greater costs and risks for the seller; this may need to be taken into account when considering, for example, break-up fees.

Fourth, being realistic may also require an upfront assessment of whether a challenge by one of the agencies is likely, and whether the parties are willing to litigate. The agencies' judicial bite has not at all matched their enforcement bark, and a willingness to litigate may ultimately be the parties' greatest leverage. It can be helpful to assess early in the process how far the parties are prepared to go to preserve their deal.

Overall for 2024, we expect the Agencies to continue to aggressively pursue mergers under various novel theories of competitive harm, particularly those in the private equity, big tech, and labor industries. At the same time, the Agencies will likely struggle to achieve their most ambitious enforcement plans as they stretch limited resources, particularly once the HSR rule changes increase burdens on staff charged with reviewing inflated submissions. The Agencies also may encounter roadblocks if parties to mergers wait to pursue a transaction until after the 2024 election in hopes that a new administration might halt the Agencies' antitrust initiatives. With many changes behind us but still some looming ahead, 2024 promises to be a crucial turning point for U.S. merger enforcement.

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1. On March 12, 2021, the Agencies clarified that the early termination suspension does not apply in two circumstances, each involving a grant of early termination after the investigating agency has issued a second request. Specifically, the Agencies can grant early termination where the reviewing agency has resolved its competitive concerns through an investigation or where the parties enter into a consent agreement.

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