Evolving Scrutiny in U.S. Merger Enforcement and its Impact on Dealmaking

By Jennifer T. Wisinski | October 6, 2022

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Antitrust regulatory risk for mergers and acquisitions in 2022 remains high: not only do proposed transactions continue to face heightened scrutiny, but the evolving enforcement standards from U.S. antitrust authorities may further increase deal uncertainty. Recent developments in antitrust cases, as well as congressional testimony and speeches by leaders from the Antitrust Division of the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") demonstrate the agencies' focus on aggressively challenging transactions that they perceive to be anticompetitive.

Potential merger parties should know that the agencies are not playing with the same playbook that has been used historically. In particular, the key changes include:

- The agencies are revising the Merger Guidelines and enhancing their toolkits for evaluating and challenging anticompetitive transactions;
- The agencies appear more willing to rely on structural presumptions of coordinated harm in highly concentrated markets;
- The agencies are pushing back on proposed structural remedies that do not adequately remedy the underlying competitive harm in transactions.

What does this mean for parties contemplating a transaction? Engaging antitrust counsel early in the transaction process is critical to evaluate the potential for challenges by the agencies and consider potential efforts to mitigate the risk. In addition, potential merger parties should take the risk into account in negotiating the merger agreement, from the covenants to closing conditions to termination rights and associated fees.

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