2023 REGULATORY FORECAST

McDermott Will & Emery

ANTITRUST & COMPETITION: MERGER CONTROL

The Biden administration prioritized aggressive antitrust merger enforcement in 2022, especially in the healthcare, labor, consumer and technology sectors. This trend will continue in 2023 as the Federal Trade Commission (FTC) and US Department of Justice (DOJ) expand their toolbox to challenge transactions.

DRAMATIC POLICY AND PROCESS CHANGES

Recent policy and process changes include suspension of early termination, issuance of "close at your own risk" letters, inclusion of non-competition topics in "second requests," and changing interpretations of Hart-Scott-Rodino Act (HSR) reportability analysis.

WHAT TO WATCH: Early in 2023, HSR filing fees will substantially increase for deals greater than $1 billion. Fees will increase 150% for deals up to $2 billion, 250% for deals up to $5 billion, and 800% for deals greater than $5 billion in value.

Notably and perhaps more significantly, FTC Chair Lina Khan indicated that the agencies also are working on revisions to the HSR rules that will require more substantive information disclosures with the initial HSR filing to assist in the agencies' review process.

INCREASED MERGER LITIGATION

More mergers are entangled in US antitrust litigation now than at any point in the last 25 years, in large part, because of the agencies' advancement of novel theories of harm that may not be supported by legal precedent and reluctance to negotiate settlements. Merging parties will increasingly project a willingness to litigate because of several high profile losses by the agencies.

WHAT TO WATCH: The agencies will publish new merger guidelines in early 2023. Previous updates often reflected established agency practice and jurisprudence, but the new guidelines are likely to advance novel theories of harm and more aggressive enforcement principles that may not be supported by established legal precedent. How much deference the courts give the new merger guidelines will be critical to the agencies' enforcement goals.

VERTICAL MERGER ENFORCEMENT

The agencies are more apt to challenge vertical mergers (*i.e.*, mergers between companies involved in different stages of the supply chain) than ever before, and they are unlikely to accept behavioral remedies to resolve foreclosure concerns.

WHAT TO WATCH: The new merger guidelines will likely feature combined analysis of transactions involving horizontal and vertical impacts in one comprehensive set of guidelines rather than previous efforts, which addressed those issues separately.

MORE FIX-IT-FIRSTS

The agencies' current leadership is reluctant to negotiate remedies to fix problematic transactions. This trend will drive parties to come prepared with "clean" structural fixes that address obvious antitrust issues.

WHAT TO WATCH: Merging parties will increasingly resolve potential issues by implementing "fix-it-first" solutions. This will limit the agencies' interest in spending resources to investigate an already fixed deal.