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Top Antitrust Compliance Issues for In-house Counsel in 2024

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As 2024 gets underway, the US Department of Justice (DOJ) and the Federal Trade Commission (FTC) (collectively, the "agencies") are continuing to take an aggressive approach to antitrust enforcement. Here are the key antitrust compliance issues that should be on in-house counsel radars in the new year.

1. Increased scrutiny of mergers and acquisitions – *It will be significantly tougher to get deals through agency review, as amendments to the Hart-Scott-Rodino (HSR) Act substantially increase filing burdens and new Merger Guidelines, along with statements by DOJ and FTC leaders, signal aggressive enforcement against more transactions.*

a. Changes to HSR Filing Requirements

The agencies are finalizing amendments to the HSR Act that will substantially increase the amount and types of information that companies must provide regarding proposed transactions. The FTC conservatively estimates that 45% of HSR filings would require an additional 222 hours to prepare and 55% may require an additional 12 hours.

The revisions will make the HSR information filing requirements comparable with the more detailed filings required in Europe and other jurisdictions, where parties must provide significantly more information about their respective business operations, the markets where they operate and the companies against which they compete. The revisions will also substantially increase the volume of documents that will need to be searched, reviewed and potentially submitted with the HSR filing. Recent developments underscore the importance of such company documents to both agency and court determinations whether to approve deals, particularly where they undermine parties' claims that a transaction is procompetitive.

b. New Merger Guidelines

On December 18, 2023, the DOJ and FTC released substantially revamped Merger Guidelines detailing factors and frameworks the agencies will use when assessing mergers and acquisitions. The Guidelines not only reflect the Biden administration's continued aggressive stance on merger enforcement, but also substantially increase the scope of deals that will be heavily scrutinized.

The overhauled Guidelines make clear that proposed mergers in 2024 and beyond will face greater scrutiny in several respects, including (i) lower market concentration thresholds for finding transactions presumptively unlawful; (ii) evaluation of prior transactions, particularly where the company or industry is involved in "serial acquisitions"; (iii) consideration of a transaction's effect on "labor markets" for employees and other providers; (iv) greater concern that "vertical mergers" involving companies at different levels of the supply chain may foreclose rivals' access to inputs; and (v) evaluation of a transaction's potential to entrench a "dominant position" and impact potential future competition. Recent statements by agency officials also indicate that it will be more difficult to settle problematic acquisitions through divestiture (particularly at the DOJ).

Given the revised Guidelines and pending HSR changes, companies contemplating potential transactions in 2024 should involve antitrust counsel early in the acquisition process to discuss how the more onerous review factors will impact the transaction and what steps can be taken to help expedite approval. Companies should also ensure that they have effective compliance training around document creation and retention given the increased scope of both the type of materials that will be produced in the merger review process and the issues the agencies will consider in scrutinizing deals.

2. Non-compete, no-poach and other employee agreements – *Seeking to ensure competitive "labor markets," regulators are subjecting non-compete and no-poach agreements to new hostility and warning against failure to provide antitrust training for HR departments.*

While non-compete agreements historically have been common in many contexts, certain states, like California, have recently banned them entirely and federal regulators are seeking to follow suit. The FTC has proposed a rule, which will likely be up for vote in early 2024, banning most non-competes on the basis that they constitute unfair methods of competition under Section 5 of the FTC Act.

In the meantime, agency officials have indicated that they will continue to challenge aggressively no-poach agreements and other collusion among employers to fix workers' wages or allocate labor markets. While the agencies have suffered some enforcement setbacks in this area, they remain undeterred and are expanding their efforts to include reviewing how other types of employment agreements and covenants – like traditional non-compete and non-disclosure provisions – can reduce worker mobility or labor market competition.

In addition, agency officials recently cautioned that failing to engage corporate HR departments in antitrust training could raise doubts about a company's compliance program, which is something the agencies consider in investigating these cases. Companies should ensure that their compliance programs appropriately address this issue.

3. Algorithms and information sharing – *New technologies and market realities – including the use of complex algorithms – are changing the way enforcers view the collection and sharing of industry information.*

The antitrust agencies are stepping up challenges to the sharing of industry information and evaluating the competitive impact of pricing algorithms. In September 2023, the DOJ sued a research company that provided reports on industry pricing and sales, alleging that companies use the "loosely anonymized" information to align their prices with competitors. The DOJ and FTC also recently withdrew prior Guidelines regarding information sharing in the healthcare sector, which provided safe harbors for sharing pricing or cost-related information with third parties.

Agency officials have noted that new technologies and market realities – including use of complex algorithms that can lead to express or tacit pricing collusion – have altered the competitive value of data, and that information exchanges facilitated by intermediaries can have the same anticompetitive effect as direct information sharing between competitors. In November 2023, the DOJ took the unusual step of intervening in an ongoing civil case and arguing that use of a pricing algorithm by landlords amounted to *per se* unlawful price fixing.

Businesses should ensure that their sharing, collection and use of industry information – including use of pricing algorithms and third-party intermediaries – accounts for this new regulatory perspective.

4. Interlocking directorates – *The agencies are scrutinizing simultaneous service on boards of competing companies and enforcing the prohibition against it for the first time in decades.*

Antitrust enforcers are stepping up efforts to police "interlocking directorates" – where an entity simultaneously controls board seats on competing companies or partnerships – which is particularly common in the private equity and tech spaces. In August 2023, the FTC entered a consent decree prohibiting a provision in a private equity transaction that would have given one party control of a seat on the other's board and the ability to influence decisions of an alleged competitor.

The DOJ likewise has been increasing enforcement on this issue, recently announcing that its efforts have led to 15 directors resigning from 11 different boards.

These developments are particularly notable because they (i) include enforcement not only where one individual sits on competing boards, but also where an entity merely controls the right to appoint competing directors; (ii) expand enforcement to even non-corporate interlocks (i.e., those involving LPs and LLPs), which are not expressly covered by the relevant statute; and (iii) are consistent with the antitrust agencies' public statements that they will be more aggressive on this issue.

It is increasingly important that companies' compliance programs address this issue, including when choosing its own directors, when obtaining rights to appoint directors to another entity's board or when its current directors seek to join additional boards.

5. Monopolistic activity – *Increased regulatory scrutiny and bold enforcement actions are following in the tech sector and more broadly, where common business arrangements are allegedly used to exploit monopoly power.*

Regulators are scrutinizing arguably beneficial business arrangements where they are allegedly used to secure or exploit powerful market positions, including, for example, through exclusive dealing, bundling, loyalty discounts and acquisitions. In the tech space, both state and federal enforcers continue pursuing bold challenges to agreements and other practices of large firms, including cases against Amazon and Meta, as well as multiple against Google. Recognizing the rapid evolution of artificial intelligence, agency officials have said they will act swiftly in that space to avoid repeating past "misses" that they contend allowed for tech market concentration today.

The agencies' monopolization focus is not limited to the tech space, with the FTC recently challenging a pharmaceutical licensing agreement that allegedly created a monopoly for a particular drug, and the agencies recently announcing a record number of merger challenges across industries in the prior fiscal year.

These developments are consistent with the agencies' increased scrutiny of proposed transactions that may entrench dominant positions. Companies with meaningful market share should thus expect the agencies to look closely at business arrangements that are arguably used to secure or expand their strong position in a particular market. In other words, the larger a company's market share, the more likely it will be that aggressive competitive activity will be viewed as predatory.

6. Robinson-Patman Act – *Revival of this long-dormant statute has implications for common manufacturer-reseller agreements on pricing, rebates and other terms.*

After decades of agency non-enforcement of the Robinson-Patman Act – which prevents discrimination against smaller retailers in favor of larger ones on price and other terms – the FTC recently announced investigations of possible price discrimination activity by both large soft drink manufacturers and large alcohol distributors. The investigations follow a recent policy statement explaining that Robinson-Patman is among the tools at the FTC's disposal to challenge rebate and fee agreements offered by prescription drug manufacturers.

As the agencies can be expected to reinvigorate their Robinson-Patman Act enforcement, manufacturers, distributors and retailers should review their arrangements regarding price and other promotional terms to ensure they comply with the Act.

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