
A Proskauer
Webinar Series
Antitrust Insights
Webinar Series
Proskauer


A Proskauer
Webinar Series
How to Stay Ahead of Moving Goalposts:
New Merger Guidelines Call For New Approaches
to Getting Deals Done
John Ingrassia, Partner
Mary Wilks, Partner
Tim Burroughs, Associate
May 16, 2024
Proskauer

Lina Khan Interview with Jon Stewart – April 2024

Proskauer

Transaction Specific Policy Changes

Focus on labor – buyer/monopsony power

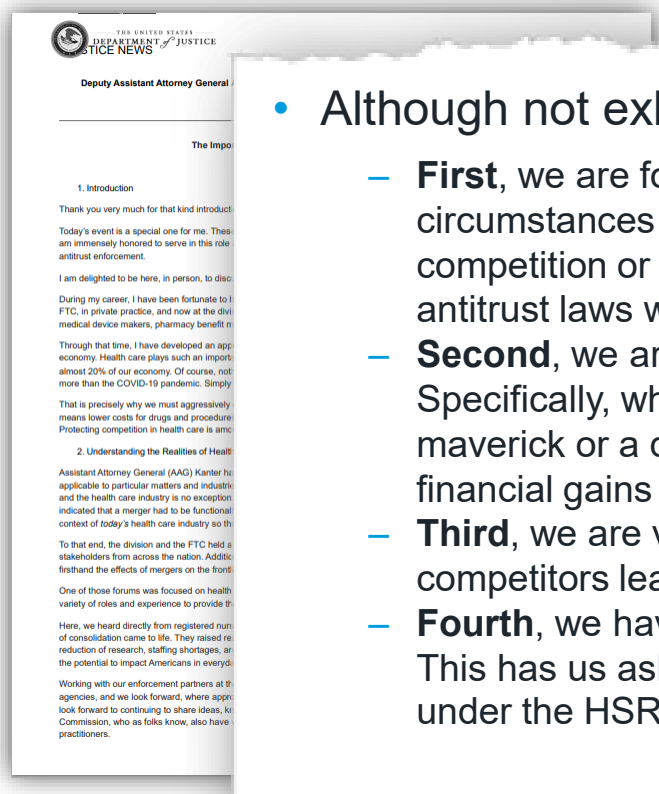
Trends towards consolidation scrutinized (esp. in P/E space)

Aggressive review of vertical mergers

Lower threshold for transactions to raise presumptive competition concerns

Market share over 30% following a transaction

Private Equity Subject to Increased Antitrust Scrutiny


THE UNITED STATES DEPARTMENT of JUSTICE
STICE NEWS

Deputy Assistant Attorney General

The Impo

1. Introduction

Thank you very much for that kind introduct

Today's event is a special one for me. Thes
am immensely honored to serve in this role
antitrust enforcement.

I am delighted to be here, in person, to disc

During my career, I have been fortunate to
FTC, in private practice, and now at the divi
medical device makers, pharmacy benefit n

Through that time, I have developed an app
economy. Health care plays such an import
almost 20% of our economy. Of course, not
more than the COVID-19 pandemic. Simply

That is precisely why we must aggressively
means lower costs for drugs and procedure
Protecting competition in health care is amc

2. Understanding the Realities of Healt

Assistant Attorney General (AAG) Kanter ha
applicable to particular matters and industri
and the health care industry is no exception
indicated that a merger had to be functional
context of *today's* health care industry so th

To that end, the division and the FTC held a
stakeholders from across the nation. Additic
firsthand the effects of mergers on the front

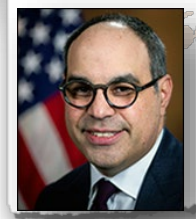
One of those forums was focused on health
variety of roles and experience to provide th

Here, we heard directly from registered nurs
of consolidation came to life. They raised re
reduction of research, staffing shortages, ar
the potential to impact Americans in everyd

Working with our enforcement partners at th
agencies, and we look forward, where appro
look forward to continuing to share ideas, kn
Commission, who as folks know, also have
practitioners.

- Although not exhaustive, here are a few specific areas of enforcement we are thinking more about:
  - **First**, we are focused on potential antitrust enforcement on private equity "roll-ups," namely whether in particular circumstances a series of often smaller transactions can cumulatively or otherwise lead to a substantial lessening of competition or tendency to create a monopoly. Similarly, we will analyze whether private equity companies may violate the antitrust laws with investments creating or enhancing power across a "stack" of technology or other products/services
  - **Second**, we are focused on whether certain private equity investments may chill fierce competition on the merits. Specifically, whether certain private equity investments may either blunt the incentive of the target company to act as a maverick or a disruptor in health care markets or otherwise cause the target company to focus solely on short-term financial gains and not on advancing innovation or quality
  - **Third**, we are very focused on potential Section 8 enforcement. To the extent that private equity investments in competitors leads to board interlocks in violation of Section 8, the division is committed to taking aggressive action
  - **Fourth**, we have recently become aware of what appears to be some HSR filing deficiencies in the private equity space. This has us asking ourselves whether private equity companies may not be taking seriously enough their obligations under the HSR Act. We are evaluating our next steps on that front

"Lina Khan vows 'muscular' US antitrust approach on private equity deals"



"Crackdown on buyout deals coming, warns top US antitrust enforcer"

2023 Merger Guidelines

A New Framework for Evaluating Transactions in the US

2023 Merger Guidelines At-A-Glance

1. Presumption of illegality with significant increase in concentration in a highly concentrated market.

2. Mergers can violate the law when they eliminate substantial competition between firms.

3. Mergers can violate the law when they increase the risk of coordination.

4. Mergers can violate the law when they eliminate a potential entrant in a concentrated market.

5. Mergers can violate the law when they limit access to products or services rivals use to compete.

6. Mergers can violate the law when they entrench or extend a dominant position.

7. Trends towards consolidation may present risk that single merger may substantially lessen competition.

8. When a merger is part of a series of multiple acquisitions, the agencies may examine the whole series.

9. In multi-sided platforms, agencies examine competition between platforms, on the platform or to displace platform.

10. Agencies examine whether merger of competing buyers may substantially lessen competition for workers, creators, suppliers or other providers.

11. Agencies will examine impact on competition with respect to acquisitions of partial ownership or minority interests.

New Attention to Labor Markets

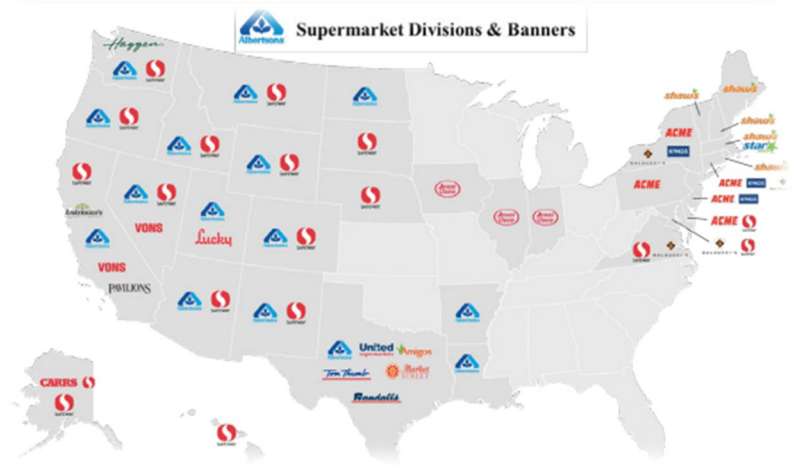
- **Guideline 10**: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers, Creators, Suppliers, or Other Providers.
  - "Labor markets are important buyer markets. The same general concerns as in other markets apply to labor markets where employers are the buyers of labor and workers are the sellers. The Agencies will consider whether workers face a risk that the merger may substantially lessen competition for their labor."
- Cited Legal Authority:
  - *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235-36 (1948)
  - *NCAA v. Alston*, 141 S. Ct. 2141 (2021)

Case in Point

Illustrative Enforcement Actions

Kroger Company/Albertsons

- **Kroger Company (“Kroger”)**
  - Operates approx. 2,700 stores and 2,300 pharmacies in 35 states and D.C. under numerous banners including the Kroger, Fred Meyer, QFC, Baker’s, City Market, Dillons, Food 4 Less, Foods Co., Fry’s, Gerbes, Harris Teeter, JayC, King Soopers, Mariano’s, Metro Market, Pay-Less, Pick ’n Save, Ralphs, Ruler, and Smith’s
  - Approx. 430,000 full- and part- time employees
  - Majority of employees covered by over 300 collective bargaining agreements
- **Albertsons Companies, Inc. (“Albertsons”)**
  - Operates approx. 2,300 stores and 1,700 pharmacies across 34 states and D.C. under numerous banners including Albertsons, Safeway, Haggen, Acme, Andronico’s, Amigos, Balducci’s Food Lovers Market, Carrs, Jewel-Osco, Kings Food Markets, Lucky, Market Street, Pavilions, Randalls, Shaw’s, Star Market, Tom Thumb, United Supermarkets, and Vons
  - Approx. 285,600 employees
  - Many of employees covered by collective bargaining agreements
- **October 2022** – Kroger and Albertsons agree on terms of Kroger’s acquisition of 100% of the equity of Albertsons
- **February 2024** – FTC sues to block Kroger’s acquisition of Albertsons
  - FTC alleges that the merger would reduce the ability of hundreds of thousands of workers to secure better wages and benefits



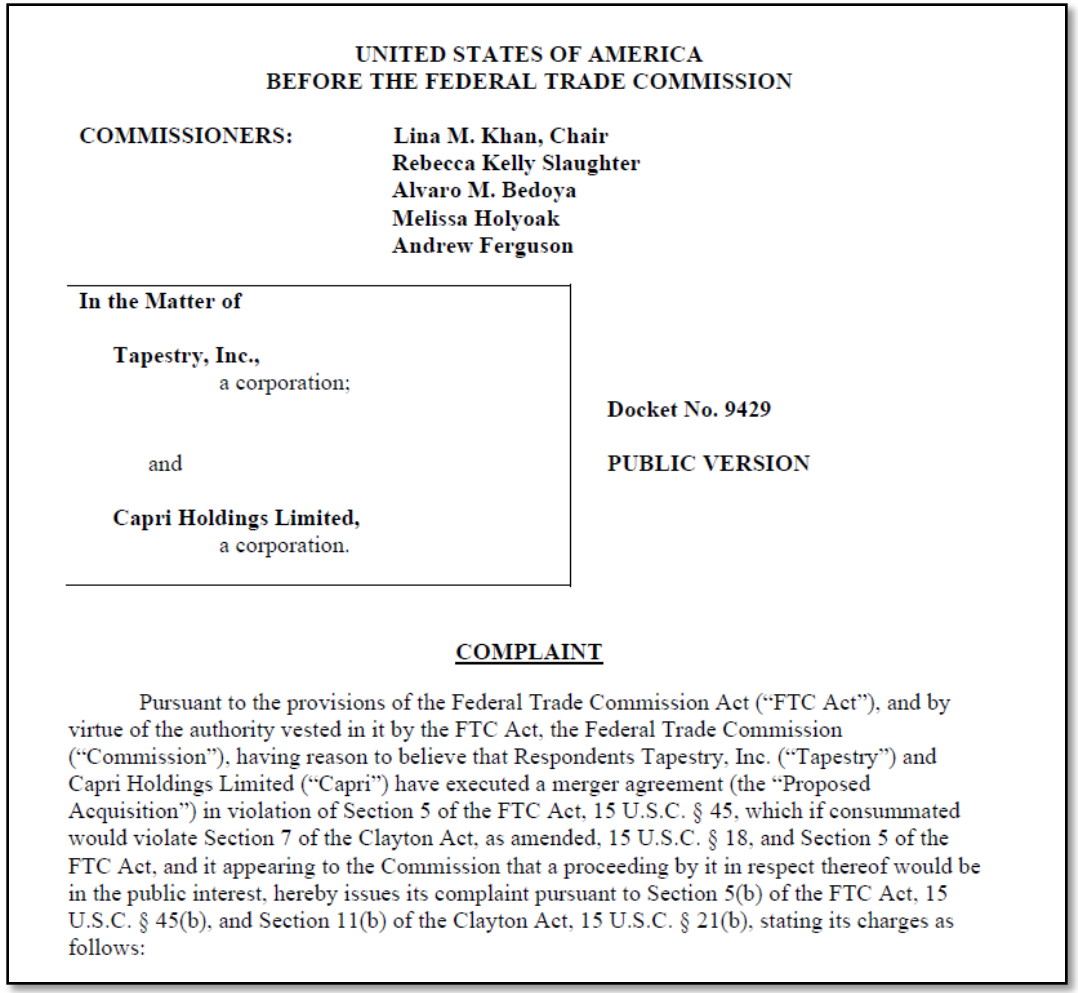
Proskauer

Kroger Company/Albertsons – Labor

- The proposed acquisition may substantially lessen competition for labor
  - Kroger and Albertsons compete aggressively to hire and retain workers in the areas where their supermarket operations overlap
    - Monitor wages and benefits set at local competitors, including each other, and often attempt to match or exceed competing wage and benefit offers
    - Poach workers from each other
    - Offer promotions, retention bonuses, or improvement in hours to retain high-performing workers
  - Competition for workers is most acute and apparent in the context of collective bargaining negotiations with union grocery workers
    - Most of Kroger and Albertsons' workers are members of unions, predominantly the **United Food and Commercial Workers** ("**UFCW**")
    - In many markets where both Kroger and Albertsons employ union workers, the unions that represent grocery workers leverage the fact that Kroger and Albertsons are separate companies competing for customers and workers to negotiate better terms of employment for union grocery workers
    - Proposed acquisition would eliminate such competition, likely leading to lower wages and reduced benefits, opportunities, and quality of workplace conditions and protections for thousands of Kroger and Albertsons employees

Tapestry (Coach, Kate Spade) Acquisition of Capri (Michael Kors)

- FTC's Concerns
  - Gives Tapestry a "dominant share" of the "accessible luxury handbag market"
  - Threatens to eliminate competition for employees (Tapestry and Capri employ roughly 33,000 employees worldwide)
  - Tapestry has engaged in "a decade-long M&A strategy through serial acquisitions"



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Lina M. Khan, Chair
Rebecca Kelly Slaughter
Alvaro M. Bedoya
Melissa Holyoak
Andrew Ferguson

In the Matter of

Tapestry, Inc.,
a corporation;

and

Capri Holdings Limited,
a corporation.

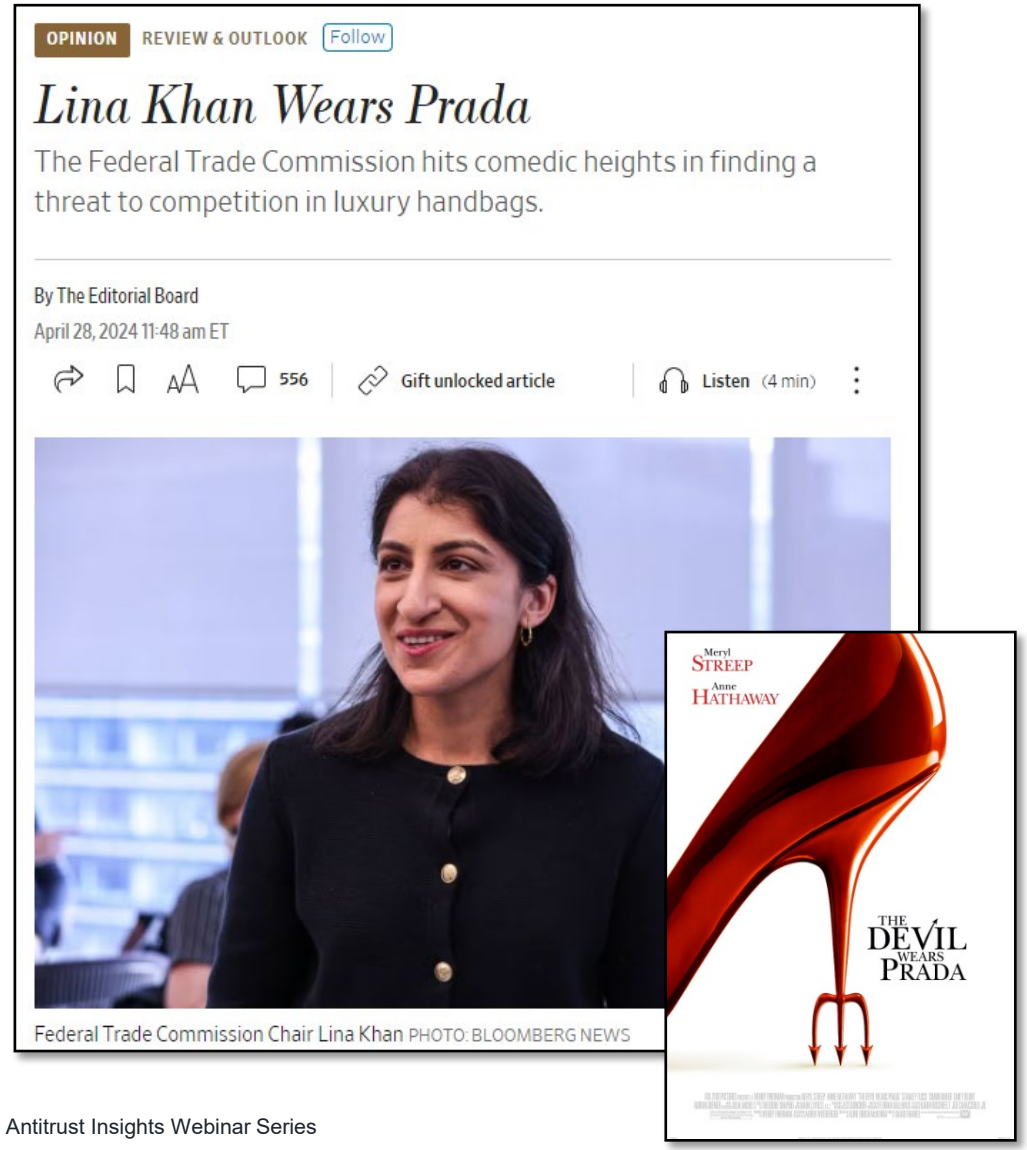
Docket No. 9429

PUBLIC VERSION

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by the FTC Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents Tapestry, Inc. ("Tapestry") and Capri Holdings Limited ("Capri") have executed a merger agreement (the "Proposed Acquisition") in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

Tapestry (Coach, Kate Spade) Acquisition of Capri (Michael Kors)



OPINION REVIEW & OUTLOOK Follow

Lina Khan Wears Prada

The Federal Trade Commission hits comedic heights in finding a threat to competition in luxury handbags.

By The Editorial Board

April 28, 2024 11:48 am ET

556 Gift unlocked article Listen (4 min)

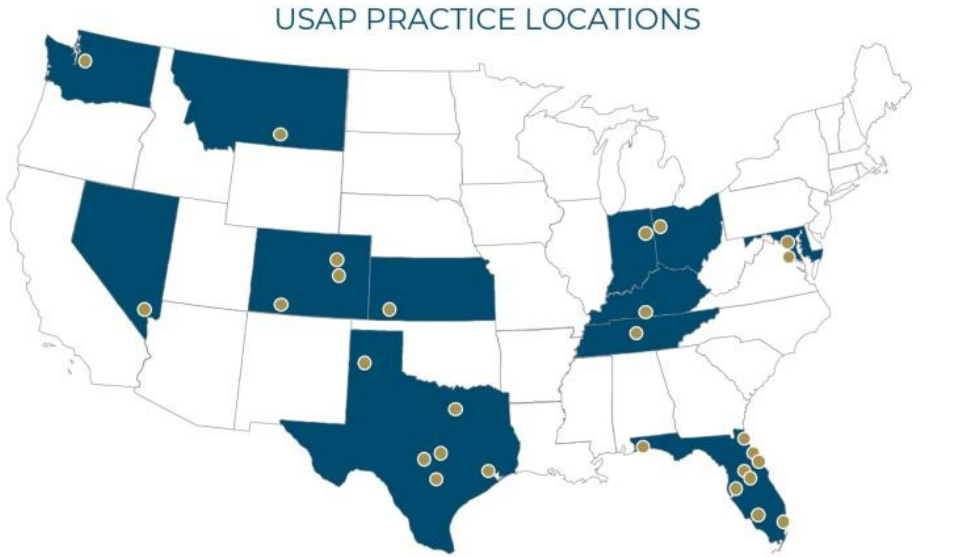
Federal Trade Commission Chair Lina Khan PHOTO: BLOOMBERG NEWS

- Counterpoints:
  - **Geographic Market** - European luxury fashion powerhouse LVMH (Louis Vuitton, Dior, Marc Jacobs) had $92.2 billion in 2023 revenue – **eight times** Capri and Tapestry **combined**.
  - **Product Market** – "Accessible luxury" and "affordable handbag market"; excluding "true luxury" brands such as Louis Vuitton, Prada, and Gucci. Excludes handbags not available online such as Chanel and Hermes.
  - **Labor** – Most Tapestry and Capri handbags are made in Asia. Raising wages would increase prices for US consumers.

U.S. Anesthesia Partners – Roll-Up

- Sweeping complaint filed September 21, 2023
  - Welsh, Carson and U.S. Anesthesia Partners, Inc.
  - Provider of anesthesia services in Texas
  - Allegations of 10 year "roll-up" strategy to consolidate independent anesthesia practices in unconcentrated markets across Texas metropolitan areas
    - "Roll Up Houston" through a series of "tuck-in acquisitions."
  - Clayton Act Section 7
    - Acquisitions substantially lessened competition
  - FTC Act Section 5
    - Unfair methods of competition
    - Price-setting arrangements/market allocation
  - Sherman Act Section 1
    - Horizontal Agreements to Bill at a Fixed Price
  - Sherman Act Section 2
    - Monopolization/Conspiracy to Monopolize

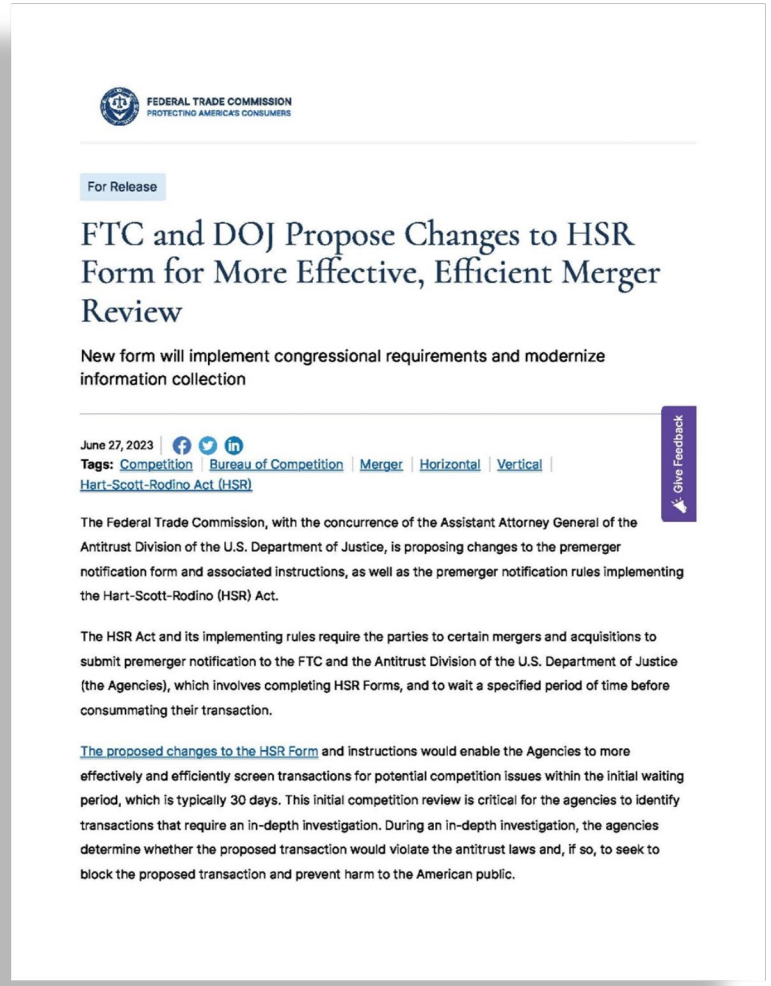
US ANESTHESIA PARTNERS™



Changes to HSR Rules

A New Era of Premerger Filings in the United States

Proposed HSR Rules Changes



FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

For Release

FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review

New form will implement congressional requirements and modernize information collection

June 27, 2023

Tags: Competition | Bureau of Competition | Merger | Horizontal | Vertical | Hart-Scott-Rodino Act (HSR)

Give Feedback

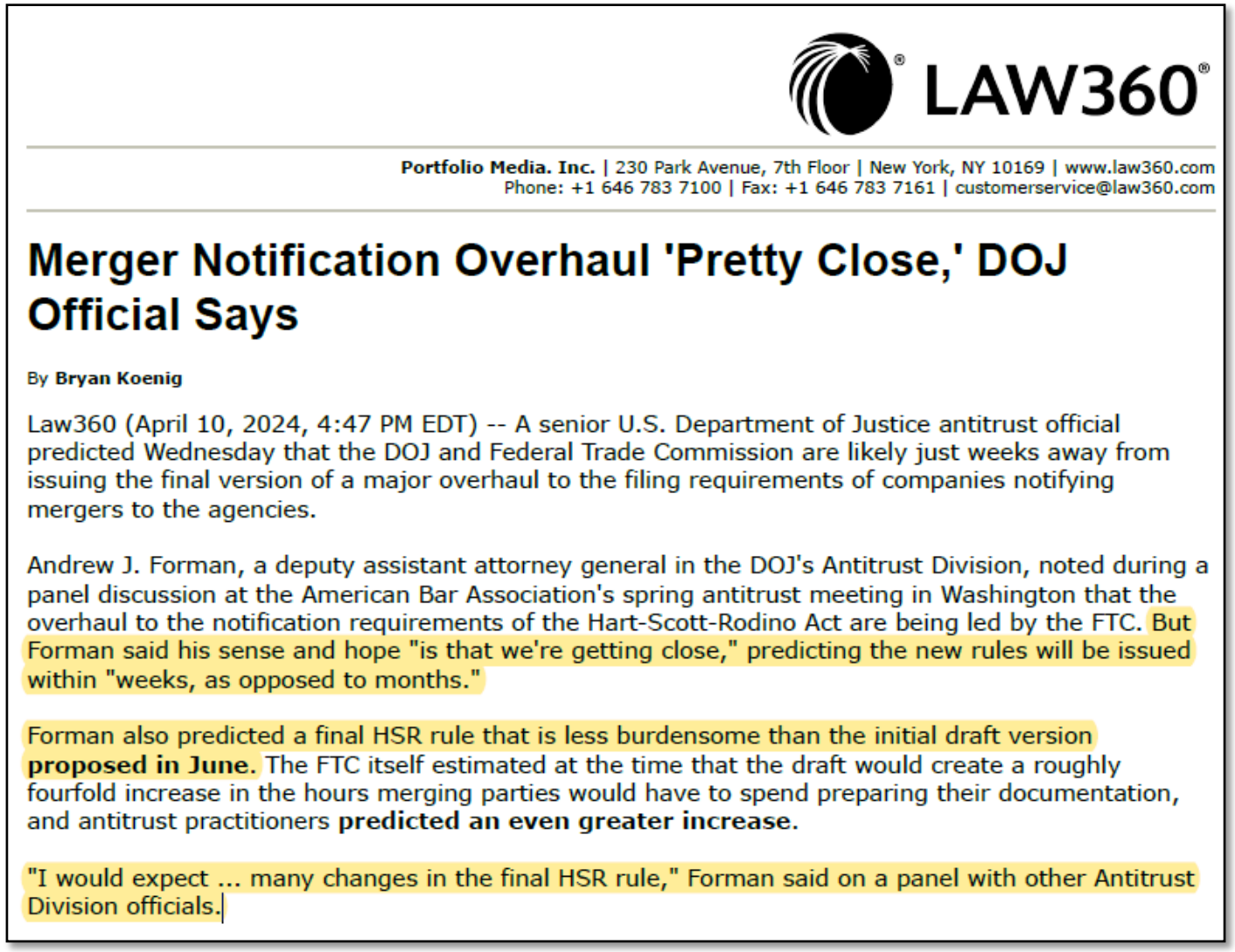
The Federal Trade Commission, with the concurrence of the Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice, is proposing changes to the premerger notification form and associated instructions, as well as the premerger notification rules implementing the Hart-Scott-Rodino (HSR) Act.

The HSR Act and its implementing rules require the parties to certain mergers and acquisitions to submit premerger notification to the FTC and the Antitrust Division of the U.S. Department of Justice (the Agencies), which involves completing HSR Forms, and to wait a specified period of time before consummating their transaction.

The proposed changes to the HSR Form and instructions would enable the Agencies to more effectively and efficiently screen transactions for potential competition issues within the initial waiting period, which is typically 30 days. This initial competition review is critical for the agencies to identify transactions that require an in-depth investigation. During an in-depth investigation, the agencies determine whether the proposed transaction would violate the antitrust laws and, if so, to seek to block the proposed transaction and prevent harm to the American public.

- **June 2023** – Notice of Proposed Rulemaking issued
- Dramatically expands HSR reporting requirements
- Brings in typically "off-limits" reporting, such as the identity of fund limited partners
- Includes new reporting related to:
  - Employees and labor issues
  - Commercial relationships between the parties
  - Officer and director interlocks with competitors
  - Competition analyses and transaction rationale
  - Prior iterations and drafts of transaction documents
  - Ordinary course market related documents
  - Prior acquisition history
  - PE fund structure and investment vehicle reporting
  - Creditors/debt holders
  - Foreign subsidies

Proposed HSR Rules Changes



LAW360®

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Merger Notification Overhaul 'Pretty Close,' DOJ Official Says

By **Bryan Koenig**

Law360 (April 10, 2024, 4:47 PM EDT) -- A senior U.S. Department of Justice antitrust official predicted Wednesday that the DOJ and Federal Trade Commission are likely just weeks away from issuing the final version of a major overhaul to the filing requirements of companies notifying mergers to the agencies.

Andrew J. Forman, a deputy assistant attorney general in the DOJ's Antitrust Division, noted during a panel discussion at the American Bar Association's spring antitrust meeting in Washington that the overhaul to the notification requirements of the Hart-Scott-Rodino Act are being led by the FTC. But Forman said his sense and hope "is that we're getting close," predicting the new rules will be issued within "weeks, as opposed to months."

Forman also predicted a final HSR rule that is less burdensome than the initial draft version **proposed in June**. The FTC itself estimated at the time that the draft would create a roughly fourfold increase in the hours merging parties would have to spend preparing their documentation, and antitrust practitioners **predicted an even greater increase**.

"I would expect ... many changes in the final HSR rule," Forman said on a panel with other Antitrust Division officials.

The FTC and Non-Competes

FTC Finalizes New Rules Governing Non-Compete Agreements

The FTC and Non-Competes

Case 6:24-cv-00148-JCB Document 1 Filed 04/24/24 Page 1 of 52 PageID #: 1

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, TEXAS ASSOCIATION OF BUSINESS, and LONGVIEW CHAMBER OF COMMERCE,

Plaintiffs,

v.

FEDERAL TRADE COMMISSION and LINA KHAN, in her official capacity,

Defendants.

CASE NO. 6:24-cv-00148

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

FTC Takes Action Against Another Company That Imposed Harmful Noncompete Restrictions on Its Workers

Agency action p
that Anchor Gla
employees

March 15, 2023

Tags: Competition | Bure

The Federal Trade Commis

OPINION REVIEW & OUTLOOK Follow

The FTC Decrees: No More Non-Compete Agreements

Lina Khan's latest rule instantly invalidates 30 million contracts without Congressional authority.

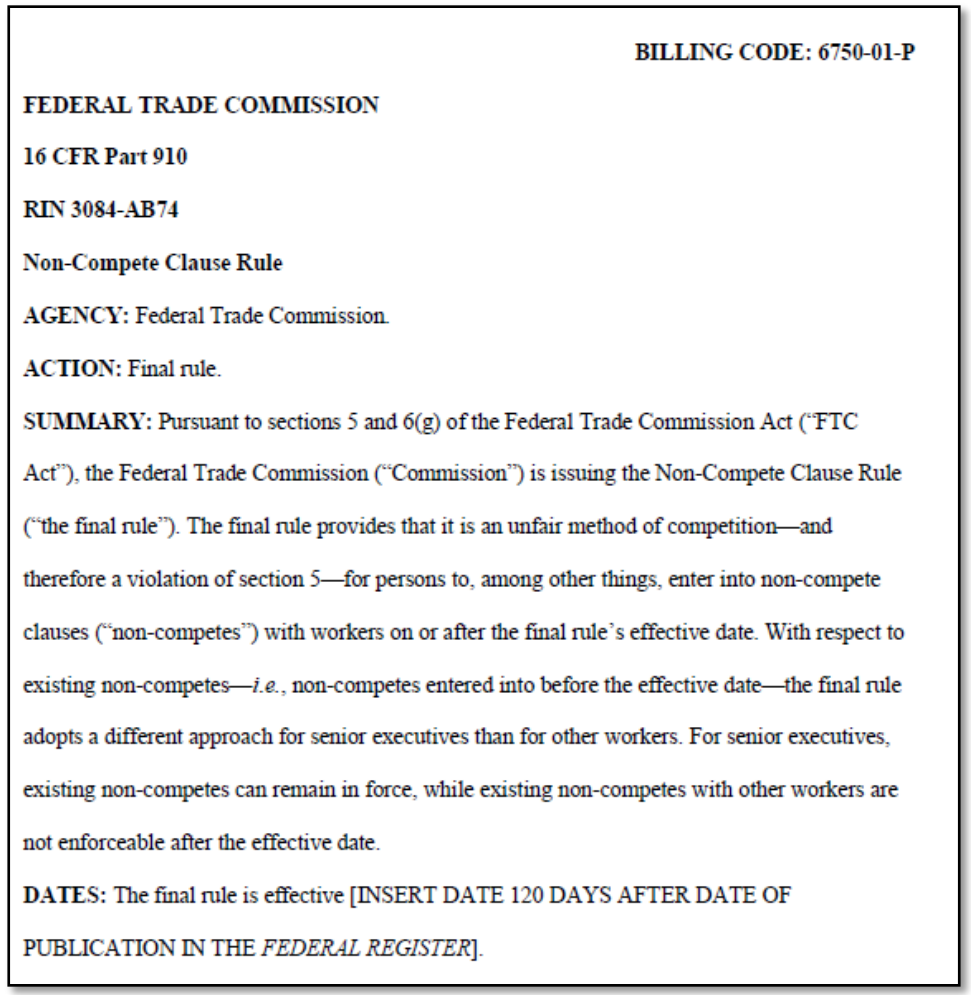
By The Editorial Board Follow
April 24, 2024 5:50 pm ET

330 Gift unlocked article Listen (5 min)

Sale-of-Business Exception § 910.3(a)

- Allows for noncompetes to be used when entered into pursuant to sale of:
  - a business entity,
  - a person's ownership interest in a business entity, or
  - all or substantially all of a business's operating assets

- The exception applies to even small shareholders so long as the sale is made in good faith, between two independent parties, and after a reasonable period of negotiations



BILLING CODE: 6750-01-P

FEDERAL TRADE COMMISSION

16 CFR Part 910

RIN 3084-AB74

Non-Compete Clause Rule

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: Pursuant to sections 5 and 6(g) of the Federal Trade Commission Act ("FTC Act"), the Federal Trade Commission ("Commission") is issuing the Non-Compete Clause Rule ("the final rule"). The final rule provides that it is an unfair method of competition—and therefore a violation of section 5—for persons to, among other things, enter into non-compete clauses ("non-competes") with workers on or after the final rule's effective date. With respect to existing non-competes—*i.e.*, non-competes entered into before the effective date—the final rule adopts a different approach for senior executives than for other workers. For senior executives, existing non-competes can remain in force, while existing non-competes with other workers are not enforceable after the effective date.

DATES: The final rule is effective [INSERT DATE 120 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

Global expansion of foreign investment screening

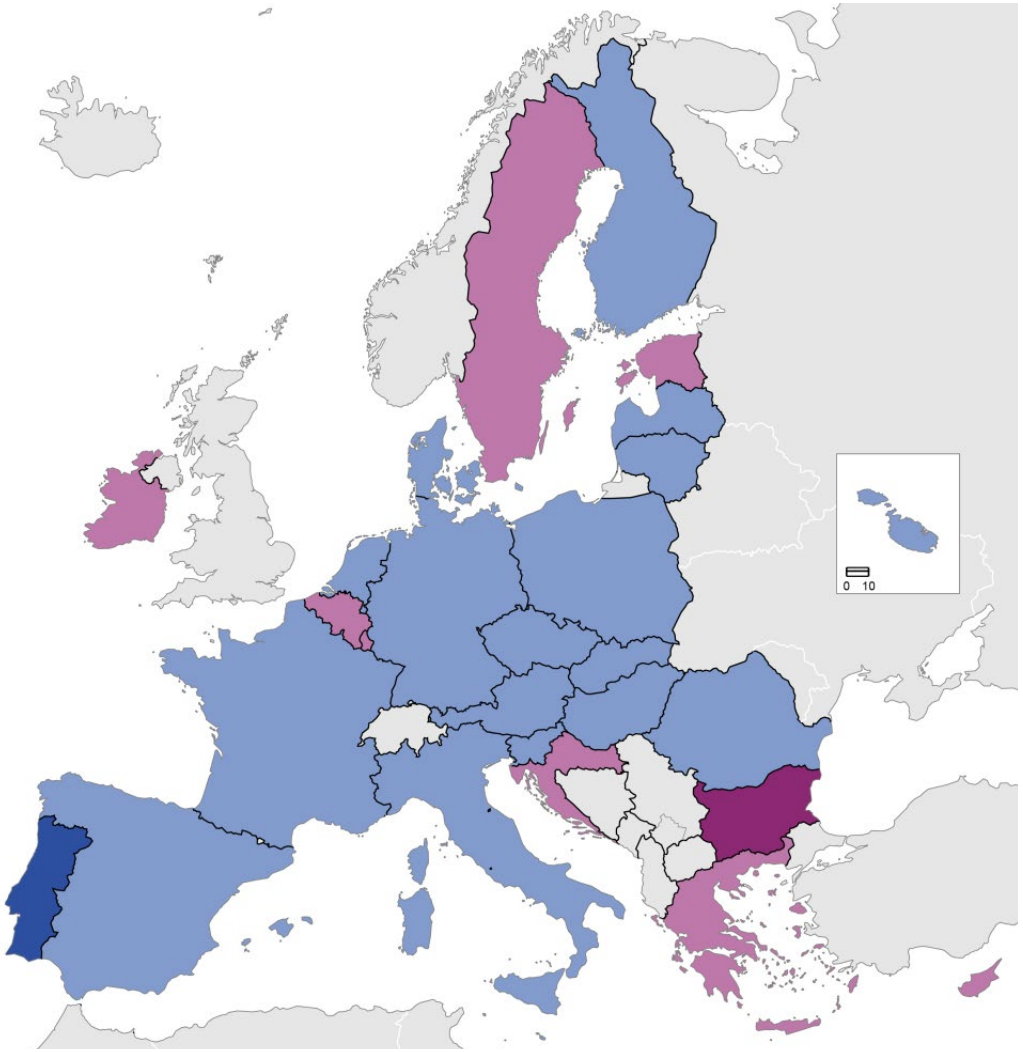
A critical aspect of international transaction planning and execution

A growing number of jurisdictions review inbound M&A

- Over 100 jurisdictions now have some form of investment screening
- Wide range of transaction types may be reviewable
  - including indirect acquisitions, asset sales, minority investments…
- No uniform rules: regimes are complex and vary significantly
  - thresholds often deliberately vague
- Review timing is less predictable than merger control
- Civil or criminal penalties for failure to make mandatory filing
  - risk of transaction being void
- Authorities frequently exchange views on specific transactions

> "…security has multiple new dimensions, and the economy is one of these dimensions"

Rapid development of FDI screening in Europe



Source: European Commission

- **2019: 11 out of 27** EU Member States had foreign investment screening regimes
- **2023: 23 out of 27** EU Member States have foreign investment screening regimes
- Legislation in development in remaining four (Bulgaria, Croatia, Cyprus, Greece)
- EU Economic Security Strategy published July 2023
- Revisions to EU FDI Screening Regulation proposed January 2024

Is foreign investment screening relevant to my transaction?

Where does the target company have subsidiaries / assets / operations?

- Most regimes apply to acquisitions of an interest in an entity in that jurisdiction

What is the nationality of the acquirer(s)?

- Most regimes apply to foreign investors
- Certain investor types / nationalities may receive differing treatment for their deals

Is there a trigger event?

- What level of shareholding is being acquired?
  - Who will exercise the voting rights?
- Are assets transferring (e.g. land, IP)?
- Is there a supply of goods or services in the jurisdiction?

Is the target active in a sensitive sector?

- Critical infrastructure, products and services
- Critical or emerging technologies or data
- Dual use products or technology
- Control over sensitive data
- Freedom and plurality of the media

Practice Tips

Managing regulatory risk in M&A transactions and minority investments

Antitrust Enforcers Rewrite the Rules

MERGERS&ACQUISITIONS PRIVATE EQUITY STRATEGIC BUYERS INVESTMENT BANKING LENDING SECTORS JOHN INGRASSIA

Latest News Trends & Analysis People Awards & Honors Data & Research M&A Magazine

PRIVATE EQUITY | STRATEGIC BUYERS

Antitrust Enforcers Rewrite the Rules

SEPTEMBER 8, 2023

John Ingrassia
Partner

John Ingrassia is a partner at Proskauer Rose.

Tim Burroughs
Associate

Tim Burroughs is an associate at Proskauer Rose.

In **Gershwin**'s **Summertime**, "the living is easy", but not for dealmakers and M&A lawyers. In recent weeks, the **Department of Justice** and **Federal Trade Commission** have embarked on the largest formal revisions to antitrust enforcement policy in a generation – revisions that represent a highly skeptical and pessimistic view of the ability of the economy and markets to serve consumers' interests without government intervention.

Looking forward, the following best practices and considerations will help streamline the HSR process and position deals for quick and painless clearance so you can get on with your business:

- **1. Plan Ahead**
  For investment firms that file frequently, along with operating companies that regularly make acquisitions, many parts of the new filing requirements that are buyer-specific can be 'pre-built' and ready to go for filings as they arise. This has the benefit of being able to move faster – which can be a key competitive advantage in deals – while ensuring consistency on an ongoing basis with respect to statements made and positions taken in filings.

- **2. Be Strategic**
  New filing requirements calling for narrative responses relating to transaction rationale, markets, competitive landscape, and labor impacts provide an opportunity for advocacy to best position a transaction for approval. Think about this part of the submission as a mini white paper on the deal that would be submitted to the agency in response to a preliminary investigation.

- **3. Maintain a Good Record**
  While the new filing process provides real opportunities for advocacy, it will be key to establish and maintain a solid evidentiary basis for statements made and positions taken.

- **4. Stand your Ground**
  Plan to stand by the level of detail and statements made in filings under the new rules. Invariably, the agencies will use ambiguities in the new filing requirements to push for additional disclosures and

1. Plan Ahead

- Pre-build buy-side sections of premerger filings
- Understand how substantive and procedural changes to premerger process may affect deal timing
- Establish risk tolerance

2. Be Strategic

- Involve antitrust counsel early
- Thoughtfully prepare narrative responses in new HSR filings
- Mini-white paper
  - Preemptively address potential concerns
  - Provide the full picture
  - Take control of the narrative

3. Maintain a Good Record

- Deal Docs become 4(c) Docs
- Market definitions can be your friend and support future positions
- Strategic rationale for transaction should match documents

- From the Tapestry/Capri Complaint:

*"The Proposed Acquisition is also part of Tapestry's pattern and strategy of serial acquisitions…. The Proposed Acquisition builds on a deliberative, decade-long M&A strategy by Tapestry—and is just one in a string of acquisitions for Tapestry to achieve its goal to become the major American fashion conglomerate—or, in Tapestry's own words, a [REDACTED]. **Its documents detail** its strategy and goal of operating as a [REDACTED]."*

4. Stand Your Ground

- The Merger Guidelines push the bounds of antitrust law and are untested in court to date

- Some “novel” concepts we might see tested include:
  - 30% presumption for horizontal mergers
  - Unilateral anticompetitive effects with no market definition
  - “Potential Competition” evidentiary issues
  - Vertical Mergers that ***may*** harm rivals
  - “Dominance” without market definition

Road Ahead

New merger guidelines and proposed HSR changes reflect stepped-up antitrust increased enforcement

Agencies around the globe are especially focused on challenging deals in the healthcare and technology sectors; PE investors are also under the spotlight

Additional scrutiny for M&A transactions and minority investments across the board requires upfront planning and careful navigation