CARLTON FIELDS

New Merger Guidelines Cap Off a Year of Hostility to Employers — 2023 Closes With Antitrust Agencies' Most Radical Foray Yet

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The year in antitrust began apace on January 5 with the release of the Federal Trade Commission's proposed rule banning all employer-employee noncompete agreements. At mid-year, the FTC and the Antitrust Division of the Department of Justice issued a proposal that, when finalized, will dramatically increase merging parties' filing requirements, and expense, under the Hart-Scott-Rodino Act. At year's end, the federal antitrust agencies have issued their most radical refocus of enforcement authority of all, through their newly published Merger Guidelines. A common thread in these initiatives is hostility to big business generally, and large employers more specifically. The proposed ban on all noncompete agreements — regardless of the benefits exchanged for the noncompete, or the need for one — is the most brazen example. But the most revolutionary, and misguided, takes the form of the tenth of the eleven new merger guidelines. While the first two initiatives noted (re: noncompetes and the Hart-Scott-Rodino Act) have not yet completed their journey through the rulemaking process, the merger guidelines became effective upon publication earlier this week. That means that newly merging parties will be the guinea pigs in the agencies' now formal, and at least partial, abandonment of antitrust law's venerable "consumer welfare" standard. The consensus position in the broader antitrust community — enforcers, academics, private attorneys, and the judiciary alike — has for decades been that antitrust laws should be enforced and interpreted to protect and advance the welfare of consumers. Other interests — be they worker rights, corporate profits, the environment, or the nation's evolving retail landscape — were deemed best left to other government departments, the market, or the political process. While enforcers over those decades have differed in how aggressively they wielded the tools of enforcement in favor of consumers, there has at least been wide agreement about the principle animating their exercise. The consumer welfare benchmark has provided a key element of an effective regulatory regime: a shared understanding of the regulator's goals. The Merger Guidelines, while not binding, are issued to afford insight into "the factors and frameworks the Agencies consider when investigating mergers." In the long-awaited update to those guidelines, Guideline 10 provides:

> When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers, Creators, Suppliers, or Other Providers.

The explanation for this guideline begins inauspiciously, correctly observing that "[a] merger between competing buyers may harm sellers just as a merger between competing sellers may harm buyers." Antitrust law has always been concerned with cartel activity or monopolization of the buy-side, albeit with less fanfare than with seller cartels or the classic sell-side monopolist, like Bell Telephone or Standard Oil. But the guideline flies off the rails quickly into, from an antitrust perspective, the great unknown. The agencies explain further:

> 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.

A common side effect of mergers is headcount reduction, as redundancy in personnel, in the merger context, can be inevitable. That reduction, though harsh, is part of the efficiency of the combination and is almost invariably taken for procompetitive reasons, particularly cost reduction. A reduction in variable costs, like labor, should lead to a reduction in prices, advancing *consumer* welfare. A focus on the other side of this dynamic comes inevitably at the expense of consumers. Indeed, a focus on a merger's impact on anything *but* consumer welfare comes at consumers' expense, in the same way that a homeowners association that tries to balance safety and sociability is likely to be less safe, or less social, than an HOA that is single-focused on one goal or the other. Had the agencies made a merger's impact on workers (and "creators" and others) one factor that can weigh against a merger in which the likely impact on consumers was ambiguous, Guideline 10 would be less misguided. But the guidelines close the door to that weighing, making clear that the reduction in competition in the labor markets in which the merged firms' compete cannot be "offset by purported benefits in a separate downstream product market." That means that even mergers that present crystal-clear benefits to consumer welfare (in the "downstream product market") can be challenged under Guideline 10's logic if they also cause a reduction in competition for the services of the merged firms' workers, or workers like them. While the health of the labor economy is a laudable interest, it has not heretofore been a focus of merger review, as it does not speak to a merger's impact on the combination's prices or quality. One way to think about this reorientation is to ask, "What's next?" There are 11 new guidelines, but nothing stops future enforcers from issuing additional guidelines that mandate consideration of a merger's impact on, e.g., the environment, income equality, or crime — important social issues, but ones antitrust enforcers are ill-suited to address. Nor is there a backstop, once moving off a consumer welfare benchmark is normalized, to the inclusion of less laudable or more politically contentious considerations in merger review. Such shifts in focus would come, inevitably, at the expense of the one constituency all agree the agencies are in place to protect: the nation's consumers. If you would like to discuss how the federal antitrust agencies' latest initiatives may impact your business, please contact the author of this article.

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