Premerger Notification Rule Gets Stay of Execution

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The new Premerger Notification Rule, vacated by a federal district court because its benefits outweighed its costs, has been temporarily reinstated by the Fifth Circuit. While the appeal plays out, companies will have to bear the burden of filing bloated Hart Scott Rodino notices.

But relief for filers may ultimately arrive with a decision on the merits. The findings of the Eastern District will be hard to for the Federal Trade Commission to argue away:

> [T]he Final Rule exceeds the FTC's statutory authority because the agency has not shown that the Rule's claimed benefits will 'reasonably outweigh' its significant and widespread costs… Though the FTC asserts that the Rule will detect illegal mergers and save agency resources, the FTC fails to substantiate these assertions. The Final Rule is therefore not 'necessary and appropriate.…

In an unsparing opinion the District Court took the Commission at its word that the Rule would triple the costs of compliance and then found that the "the benefits of the Final Rule identified by the FTC are illusory or, at least, unsubstantiated." Especially sharp was the Court's reference to the Commission's boast that the prior form had been a success, which led the court to ask rhetorically why the agency had not identified one harmful merger that former filings had failed to detect.

When only 8% of reportable transactions resulted in open investigations – *and only 3% received second requests* – the judge saw no basis for tripling the burden on the vast majority of ordinary deals. He could have added that only a fraction of the second requests lead to challenges in court and that the Commission also has the ability to obtain all the information it wants simply by asking for it during the initial waiting period or through the second request process. That process is sufficiently intrusive and expensive to inspire parties to give the Commission whatever it wants to avoid it.

Not revealed in the decision was another aspect of modern merger review. These days, A-sides with large portfolios around the world face costs of three to four times what a filing once required, and the information takes significantly longer to pull together than the ten days most merger agreements allow for filing. To allay concerns over mistakes, the agencies have encouraged filers to make use of 803.3 in explaining noncompliance. Not so long ago, parties rarely invoked 803.3; they simply found the materials. It's more widely accepted now.

It is disappointing to see the agencies fighting to impede a hundreds innocent deals to find a few worth investigating. Other options are available to target potentially relevant information – perhaps expanding the definition of 4(c) to capture the documents reflecting competition. But there's no reason to front-load inquiries into supply and distribution arrangements and overlapping directorates; those were fishing expeditions of the last administration.

The only beneficiary of the new Rules were merger lawyers who earned more fees collecting and filing information. Fortunately for clients and the economy, that’s not a benefit that counts in the law. The agencies should embrace the vacation and drop the appeal.