FTC, DOJ Launch Review to Strengthen Merger Guidelines, Antitrust Enforcement

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- **M&A activity in US shale basins hit 8-year high in 2021**
- **Mergers seen as key driver of consolidation: FTC chair**
- **Public inquiry launches with comments due March 21**

Calling out increased consolidation and shifts in business practices brought on by the digital revolution, the US Federal Trade Commission and Department of Justice Antitrust Division Jan. 18 kicked off an effort to modernize federal merger guidelines and beef up enforcement against anticompetitive deals.

The review of the 12-year-old current guidelines follows a surge in dealmaking in 2021 that saw more than double the number of merger filings received on average by the FTC and DOJ in any of the past five years. Merger and acquisition activity in US shale basins in 2021, for instance, reached an eight-year high at $59.6 billion, according to S&P Global Platts Analytics.

The FTC and DOJ jointly issued a request for information that seeks input on economic developments and new evidence of mergers' effects on competition to inform any potential revisions to the guidelines.

"Evidence suggests that decades of mergers have been a key driver of consolidation across industries, with this latest merger wave threatening to concentrate our markets further," FTC Chair Lina Khan said at a press briefing.

"A lack of competition also appears to have left segments of our economy more brittle as consolidated supply and reduced investment in capacity can render us less resilient in the face of shocks," Khan continued. "These facts invite us to assess how our merger policy tools can better equip us to discharge our statutory obligations and help this trend."

Comments are due March 21.

Assistant Attorney General Jonathan Kanter said during the press event that the agencies plan, after the initial comment period, "to release a draft of the updated guidelines and seek further comment before finalizing."

"We hope to finish this year, but we have a lot of work to do along the way," he added.

Oil, gas sector implications

Any new or revised guidelines to come from the review would have implications for industries economywide, including the oil and gas space in which there appears to be little slowdown in M&A activity as Falcon Minerals and Desert Peak Minerals announced Jan. 12 plans to expand their footprint in the prolific Permian. The companies will combine in an all-stock transaction which values the combined enterprise at $1.9 billion.

But the scope and breadth of the review's future impacts on the oil and gas sector are hard to know this early, antitrust attorneys said.

With the FTC and DOJ looking into whether certain types of transactions should be more carefully scrutinized, high-dollar oil and gas transactions or deals involving oil and gas companies with a high market capitalization "may get a closer look under the new merger guidelines," John Carroll, a former FTC lawyer and now a partner at Sheppard Mullin, said in an interview.

Oil and gas deals in markets without a lot of competitors and any subsectors within the oil and gas industry that are considered relatively concentrated could also face a tougher stance by antitrust enforcers, he said, though he added that such deals are often further complicated by other regulations and may not be subject to traditional merger review.

Acknowledging that there remains to be a lot of moving parts as the FTC and DOJ under the Biden administration pursue changes to merger policies and enforcement, Carroll said "this has the potential to be a much bigger change because you're talking about the analytical framework by which the US enforcement agencies analyze transactions."

Marc Schildkraut, a partner at BakerHostetler and a former assistant director at the FTC's Bureau of Competition, said the tone of the announcement suggests new guidelines would be more enforcement oriented. This means the FTC and DOJ will need more resources in order to challenge more deals, he said.

But "the oil industry is already used to getting harder looks, more enforcement [by the FTC] than most other industries," he asserted.

Schildkraut cited analysis he conducted several years ago that found, at the time, that 71% of FTC requests for additional information on oil sector transactions involved markets with HHIs below 2400, while only 2% of these second requests for all other sectors were in markets with HHIs below 2400.

Further, he said that of the mergers the FTC challenged over a 15-year period in 90 markets with HHIs below 200, all of them were in the oil industry.

M&A trends

The Permian led all basins in M&A activity by a substantial sum, making up 62% of all deals in 2021. The Haynesville came in second with 12% of all deals, followed by the Denver-Julesburg and Appalachia, each making up around 6%.

Last year presented operators with a robust commodity price environment for both natural gas and crude. While this boosted drilling and completion activity all year, it also led operators to buy and sell assets.

Many operators consolidated their positions in the Permian, either by adding to their current position or by selling off other assets outside of the Permian in order to generate more working capital.

One noteworthy deal of Permian consolidation included ConocoPhillips buying all of Shell's Delaware Basin acreage for $9.5 billion in September.

Also, large public gas operators bought into the Haynesville to ensure they had access to more natural gas reserves. Deals of portfolio diversification include Southwestern's purchase of Indigo Natural Resources for $2.7 billion in June and its buyout of GEP for $1.85 billion in November.

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Practice Areas

Antitrust and Competition

Energy, Infrastructure and Project Finance