3 Factors Affecting Retail M&A Deals In 2025

By **Brian Boyle, Amanda Wait and Scott Layfield** (January 7, 2025)

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Retailers considering mergers and acquisitions in 2025 face an evolving antitrust environment, including a new administration under President-elect Donald Trump, which requires careful attention and planning.

Although some assume that the second Trump administration will make it easier to usher deals through antitrust review, data and enforcement trends from the first Trump administration suggest the reality may be more nuanced.

Additionally, developments in the last year of the Biden administration suggest lessons that will likely remain critical for dealmakers in the coming year.

Merger Review in a Second Trump Administration

The business community widely viewed the Biden administration as hostile to M&A, and many are hoping for substantially relaxed enforcement during the new Trump administration. Historically, however, political rhetoric often outpaces actual shifts in U.S. merger enforcement.

The Biden administration pursed an aggressive antitrust agenda on many fronts, touting a whole-of-government approach to the issue. With respect to mergers, the greatest impact may have been chilling the environment for M&A by increasing uncertainty.

Federal Trade Commission Chair Lina Khan commented in September that, "now potential antitrust risk is part of the conversation on day one."[1]

Still, according to FTC data, the agencies were less aggressive during the Biden administration than during the first Trump administration in terms of both second requests and enforcement actions.[2] Indeed, in each of the last three fiscal years, the percentage of reported transactions that received a second request was lower than in any year from 2001 to 2020.[3]

Even though enforcement actions have remained relatively consistent across administrations, in our experience, one significant change during the Biden administration was an increase in the scope and burden of complying with an FTC second request for information about a company or proposed merger.

It is impossible to predict with certainty what the next Trump administration will bring. The last four years have marked a significant change in rhetoric by the agencies, leading to a perception in the business community generally that merger enforcement has been more aggressive.

This tone from the top, as it were, is very likely to change. Still, history suggests that

substantive changes in merger enforcement are more likely to be incremental than revolutionary.

Companies planning mergers in 2025 should remain prepared for a rigorous enforcement environment.

Revised Merger Guidelines

On Dec. 18, 2023, the FTC and DOJ released new merger guidelines, formalizing the vigorous enforcement agenda seen over the last several years. The guidelines are not law, but rather provide merging parties with a road map of the likely areas of potential concern during premerger review.

These guidelines articulate several important principles for retail companies to keep in mind.

Vertical Integration Scrutiny

The guidelines reflect an increased skepticism of vertical mergers, as well as mergers that do not fit neatly into the horizontal-vertical paradigm. They caution retailers considering acquisitions along their chains of supply and distribution to carefully consider potential antitrust issues.

Substantially Lower Thresholds For Market Share

The Herfindahl-Hirschman Index, or HHI, and market share thresholds at which the agencies consider a merger presumptively anticompetitive, are substantially lower than in the past.

In plain language, this means that any merger resulting in a firm with more than 30% market share in any relevant market and a small increase in market concentration may be presumed anticompetitive.

Prudent retailers will carefully analyze the relevant markets they are in, since the agencies will often focus on narrow slices of markets as the FTC did in the now-abandoned $8.5 billion Tapestry Inc.-Capri Holdings Ltd. merger, discussed below.

Novel Theories of Harm

The guidelines articulate several theories of harm that have increased in prominence in recent years. These include finding that a company may violate the law by engaging in an anticompetitive pattern of multiple acquisitions, even if no individual acquisition would violate the law.

Another example discussed below is challenging mergers based on labor market issues alone — i.e., finding that proposed deals substantially lessen competition in labor markets, resulting in lower wages or other harms, even if the deal does not raise issues in product markets.

Testing the Merger Guidelines: The Tapestry-Capri challenge

In August 2023, Tapestry, the fashion house that includes brands such as Coach and Kate Spade, announced an agreement to acquire Capri Holdings, the luxury group behind brands like Versace, Jimmy Choo and Michael Kors.

The FTC conducted an investigation of the $8.5 billion deal and, in April 2024, challenged the proposed transaction though its Part 3 administrative process and in the U.S. District Court for the Southern District of New York.

This case suggests several important lessons for retailers, summarized below.

Know Your Submarket

The FTC focused on a narrow slice of the fashion market. The administrative complaint alleged that the parties "compete on everything from clothing to eyewear to shoes," but compete "most fiercely [and] boast eye-popping market shares" in "accessible luxury handbags."

The parties argued that the handbag market is highly competitive, but the FTC singled out the accessible luxury segment, excluding both higher-end luxury products and lower-end mass-market products.

Although product market definitions in merger disputes can be hotly contested, there is ample precedent holding that the competition affected by a merger may relate to only a narrow set of products.

The U.S. Supreme Court held long ago — in the 1962 Brown Shoe Co. v. U.S. decision — that, "within a broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes."[4]

Indeed, the FTC has challenged other retail mergers based on markets as specialized as "super-premium ice cream." Retailers are encouraged to bear this in mind when considering how potential transactions might be viewed.

Know Your Product Positioning Strategy

The FTC alleged that Tapestry itself used the term "accessible luxury" with respect to handbags. Evidence of the way merging parties view their markets and competitors in the ordinary course of business can be persuasive in merger investigations and litigation. Retailers may consider this not only when evaluating potential transactions, but in their day-to-day operations.

Know Your Growth Strategy

Consistent with the new guidelines, the FTC alleged that "the Proposed Acquisition is also part of Tapestry's pattern and strategy of serial acquisitions." Citing internal Tapestry documents, the FTC alleged that this "is just one in a string of acquisitions for Tapestry to achieve its goal to become the major American fashion conglomerate" and "solidify its dominance in accessible luxury."

That is, the FTC challenged not just the four corners of this transaction, but the net effect on competition of Tapestry's alleged pattern of acquisitions.

Know Your Labor Market

The FTC alleged that the merger would harm labor market competition as well. According to the commission's April 22, 2024, administrative complaint, "Tapestry and Capri together

employ more than 33,000 employees worldwide and compete for employees working in a variety of locations and functions — including thousands of non-union retail employees."

Tapestry-Capri Merger: The Court's Opinion

The Southern District of New York held a seven-day evidentiary hearing in September 2024 for the FTC's request to preliminarily enjoin the proposed merger, in which it heard from numerous witnesses, including experts and company executives.

Then, on Oct. 24, 2024, the court granted the FTC's request for an injunction. Although it initially appeared that the parties would appeal on Nov. 14, 2024, they notified the FTC that they had terminated the proposed acquisition.

The court's opinion was a straightforward application of antitrust law in most respects. It focused extensively on the "fiercely disput[ed] relevant product market," and sided with the FTC finding a relevant so-called accessible luxury product market.

It arrived at this conclusion following a thorough and well-reasoned Brown Shoe analysis and application of the Hypothetical Monopolist Test — that is, wholly traditional analyses.

Interestingly, that court noted that, during the hearing, Tapestry and Capri witnesses tried to downplay the concept of accessible luxury, including claiming that the term "has no commonly understood meaning at all, even within Tapestry and Capri."

The court found this testimony not credible in large part because of "the substantial body of compelling evidence, including reams of ordinary-course documents, showing that terms like 'accessible luxury' are used frequently and consistently." Again, the significance of ordinary course documents can scarcely be overstated.

After resolving the product market question, the court went on to find significant evidence that "the merger of Tapestry and Capri would result in the combined firm holding excessive market share and market concentration, thus establishing a presumption that the merger's effects will be anticompetitive."

The court reached this conclusion by applying the HHI analysis and 30% market share threshold from the 2023 merger guidelines. Importantly, however, the HHI resulting from the Tapestry-Capri transaction would have also exceeded the presumption thresholds in the 2010 guidelines.

Overall, the FTC blocked the deal without having to rely on its more novel and aggressive theories. The decision barely applied the new guidelines and likely would have been the same under the prior guidelines or under the last Trump administration.

Prudent retailers will not dismiss this decision as only reflecting Biden-era enforcement or risks that will not persist under the Trump administration if the 2023 merger guidelines are repealed. It also remains to be seen how the incoming Trump administration will treat the guidelines, so parties are encouraged to carefully monitor future enforcement developments.

New Hart-Scott-Rodino Rules

In addition to the agencies issuing new merger guidelines, the FTC also issued new Hart-Scott-Rodino Act rules on Oct. 10, 2024. These amended procedural rules for premerger

notifications take effect Feb. 10, and impose significant additional requirements.

They increase the types and number of documents that must be submitted with a filing, and require new disclosures and narrative information. Notably, the FTC vote approving the new rules was unanimous and bipartisan, meaning that companies should not assume that these rules will be withdrawn automatically during the next administration.

Some of the new requirements are designed specifically to obtain the information the agencies need to analyze issues outlined in the merger guidelines. For example, they require increased information about prior transactions to help the agencies identify anticompetitive patterns of acquisitions.

They also require new information about supply and customer relationships, which may help identify the types of vertical merger issues identified in the merger guidelines.

Ultimately, these new HSR rules mean that retailers contemplating mergers may consider planning for a lengthier and more rigorous merger review process than in the past.

Additionally, they are encouraged to ensure that internal deal teams are trained on antitrust and HSR filing requirements, so that they can position their companies well in terms of evaluating potential transactions and preparing for the administrative burdens of a filing and potential substantive review.

Retail Industry Distress

Distress in the retail industry has been a concern for many in 2024 due to high interest rates, inflation, geopolitical unrest and continually shifting consumer shopping habits. These concerns may persist into 2025 and result in more distressed retail transactions, both in and out of bankruptcy.

Parties should be aware that the FTC's antitrust review of transactions in bankruptcy largely mirrors its review of transactions outside bankruptcy. However, there are some important differences for bankruptcy transactions, namely:

- The typical 30-day waiting period following an HSR filing is shortened to 15 days.[5]
- Certain acquisitions by a creditor in a "bona fide debt work-out" in connection with "a bona fide credit transaction entered into in the ordinary course of the creditor's business" are exempt from HSR filing requirements under Title 19 of the Code of Federal Regulations, Section 802.63(a).[6]
- In merger disputes, parties can sometimes assert the "failing firm" defense, essentially arguing that the weak financial position of the debtor company will prevent a lessening of competition — a very limited defense that is generally available only if there is a grave probability of business failure, the failing firm would be unable to reorganize successfully under Chapter 11 of the Bankruptcy Code, and the acquiring company is the only available purchaser.

The applications of these HSR rules and the so-called failing firm defense are extremely nuanced.

Looking Ahead

The net effect of these developments and others is that prudent retailers considering M&A transactions in 2025 and beyond will make antitrust a central part of their planning process.

The risk profiles of potential deals vary widely, meaning careful antitrust planning can help retailers identify the most attractive transactions on a risk-adjusted basis.

Notwithstanding the cautionary tale of Tapestry-Capri, most retail deals can still pass antitrust review. Companies may consider meeting the agencies and the courts where they stand, understanding the challenges their deals may face and preparing strategically to put their deals in the best possible position.

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[1] A Conversation with Lina Khan: Antitrust, Innovation, and China's Competitive Challenge, Council on Foreign Relations (Sept. 20, 2024).

[2] Hart-Scott-Rodino Annual Report for Fiscal Year 2023, Fed. Trade Comm'n (Oct. 10, 2024).

[3] Id. at 8.

[4] Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

[5] 11 U.S.C. § 363; 16 C.F.R. § 803.10(b)

[6] 16 C.F.R. 802.63(a)