FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

On “Failing” Firms — and Miraculous Recoveries

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Over the past few years, the Bureau has faced a surprising number of failing firm claims by merging parties. Even when the economy was booming, we heard many iterations of the same argument: The acquired firm is failing. The acquiring firm is failing. *Both* firms are failing (which presumably would justify the merger on the basis that if you tie two sinking rocks together, they're more likely to float). The entire industry is failing. But despite many claims and much time spent assessing the financial health of numerous firms, the Bureau rarely finds that the facts support a failing firm argument. Saying it doesn't make it so: if you want the Bureau to accept such an argument in your case, you had better actually be failing, and able to prove it.

It's important to remember the procompetitive rationale for entertaining claims that a firm is failing. The failing firm defense is just that, a defense. The merger that is being proposed is anticompetitive, but, assuming the elements of the failing firm defense are met, it is preferable to have the assets in the hands of the acquirer than see the assets exit the market completely. Note that failing is equated with reducing the acquired firm to nothing—not only does the business no longer exist, but the productive assets are also dismantled or redeployed for use outside the relevant market.

The failing firm defense has been described in every iteration of the Horizontal Merger Guidelines since 1982. Section 11 of the 2010 version of the Guidelines provide the most detailed iteration, and the Bureau has previously discussed the showing that is required to establish it in an individual case. As we noted there, the argument is often made, but rarely accepted.

Some commentators have suggested that the agencies may face a wave of mergers with failing firm arguments in the coming months, in light of current economic conditions in some sectors of the economy. And while no such wave has yet materialized – in fact, filings have fallen significantly from their recent annualized rate – parties contemplating such an argument should understand that the Bureau will not relax the stringent conditions that define a genuinely “failing” firm. We will continue to apply the test set out in the Guidelines and reflected in our long-standing practice, and in doing so we will require the same level of substantiation as we required before the COVID pandemic. As I noted previously, we have not relaxed, and will not relax, the intensity of our scrutiny or the vigor of our enforcement efforts. Consumers deserve the protection of the antitrust laws now as much as ever.

Finally, a cautionary note for those advising and representing merging parties: think twice before making apocalyptic predictions of imminent failure during a merger investigation. Candor before the agency remains paramount, and it has been striking to see firms that were condemned as failing rise like a phoenix from the ashes once the proposed transaction was abandoned in light of our competition concerns. No doubt some of these recoveries are due to the tireless efforts of the firm's leadership and employees to turn around a struggling business. But other examples have suggested to us that a serious effort to assess the standalone future of the company was not undertaken before representing that the failure of the merger would result in the imminent demise of that company. Counsel who make too many failing-firm arguments on behalf of businesses that go on to make miraculous recoveries may find that we apply particularly close scrutiny to similar claims in their future cases.

To be clear, we support vigorous competition and hope that firms that have been hard hit by the economic downturn recover quickly and remain viable competitors so that they can continue to serve their customers. We will accept solid evidence that a firm is failing, and step aside when justified by the full evidence. But we will not turn away from the challenges ahead by changing the rules that have

served us well in the past, including during prior economic downturns. And we ask that counsel not make that job harder by seeking advantage from the suffering of some.

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