they deliver (although sellers risk losing the benefit of the anticipated growth of the business through closing unless they capture it in the headline price or otherwise). While there is some truth to that idea, the full picture is more complex and use of a locked box construct may be beneficial to both buyer and seller, given the right set of facts and circumstances. U.S. M&A practitioners should add the locked box mechanism to their tool-kit and seriously consider its utilization where warranted based on the nature of the deal.

MEXICO'S ANTITRUST AUTHORITY UPDATES MERGER GUIDELINES

By Jesús Gabriel Altamirano, Javier Martínez del Campo L. and Michael A. Gleason

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Newly-revised merger control guidelines ("Guidelines") from the Comisión Federal de Competencia ("COFECE"), Mexico's competition law authority, clarify when parties to joint ventures or collaborations ("JVs") must report those transactions to COFECE. The Guidelines provide much needed guidance about JV notification obligations and narrow the types of JVs that parties must report. The Guidelines also incorporate a "failing firm" defense and a number of technical changes to Mexico's notification requirements.

Mexico requires parties to certain "concentrations" to report those transactions to COFECE prior to closing. Mexican law defines concentrations to include mergers, acquisitions, or "any act by virtue of which companies, associations, shares, social shares, trusts or assets in general that is carried out between competitors, suppliers, clients or any other economic agents." The Guidelines introduce factors to help JV parties determine whether Mexican merger control law requires a premerger notification to COFECE under the broad definition of a "concentration." Like other M&A, JVs are reportable in Mexico only if they also meet one of the three alternative thresholds regarding revenues and assets of the parties and transaction size. Those thresholds remain unchanged.

According to the Guidelines, the most common types of JVs that could be notifiable "concentrations," include: (i) consolidation of business or production activities analogous to a merger; (ii) creation of a network involving the sharing of a majority of or all marketplace assets; (iii) joint selling, marketing, distribution, or commercialization; (iv) joint purchasing (buyers' clubs); and (v) R&D JVs.

To determine whether a notification is necessary, COFECE will consider the duration, independence, and scope/effect (competitive impact) of the JV on a case-by-case basis. A filing is more likely to be necessary if:

- Duration. The JV is of permanent, long-term, or undetermined duration (compared to short-term agreements).
- Independence. The parties create a new marketplace participant with operational autonomy with respect to marketing, prices, distribution, sales, financial, or other decisions.

- Scope/Effect. The JV reduces or eliminates competition between the parties.

Failing Firm Defense

Although COFECE already considers the impact of a target's failing financial condition in its antitrust analysis, the Guidelines introduce the first written guidance on a "failing firm" defense to an otherwise anticompetitive transaction. The elements of the defense are similar to the failing firm defense in the U.S. Horizontal Merger Guidelines[1] and require the parties to show that: (i) the company cannot meet its financial commitments; (ii) there is imminent risk that the company will exit the market; (iii) there are no reorganization alternatives; and (iv) the seller made good faith efforts to find an alternative buyer. Parties to a transaction involving a failing business should consider the best evidence to present COFECE about the company's financial deterioration and lack of alternative transactions.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

ENDNOTES:

[1]*See* Jones Day Alert from July 2017, "Federal Court Rejects Failing Firm Defense in Merger Case," and Ryan Thomas, Kate Brockmeyer, and Kristie Xian, "Navigating Antitrust and Bankruptcy Laws: M&G's Sale of Its Corpus Christi Facility," *The M&A Lawyer*, February 2019, Vol. 23, Issue 2.

REASONABLY CAPABLE? APPLYING SECTION 2 TO ACQUISITIONS OF NASCENT COMPETITORS

By Noah Joshua Phillips

Noah Joshua Phillips is a Commissioner in the Federal Trade Commission. The following is edited from remarks that he gave at the "Antitrust in the Technology Sector: Policy Perspectives and Insights From the Enforcers" virtual seminar held on April 29, 2021 by Charles River Associates and Skadden, Arps, Slate, Meagher & Flom LLP.

Our nation's populist antitrust moment puts merger policy on the table, with the market for corporate control and avenues for M&A exit on the chopping block. Reform proposals in the last year include making acquisitions by large companies presumptively illegal, barring those same acquisitions outright, and even banning all acquisitions, full stop.[1]

A subset of acquisitions play a starring role in Washington, D.C.'s new hostility to M&A, and provide a putative justification for such proposals: the acquisitions by dominant firms of nascent or potential competitors. For example, last year's report by the majority staff of the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law stated that the Federal Trade Commission and the Department of Justice "consistently underestimated—by a significant margin—the degree to which [such] an acquisition would undermine competition and impede entry."[2]

Too little of this policy debate, which contem-