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Biden Administration Seeks Significant Changes in M&A Antitrust Enforcement from the Outset

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I. Introduction

Every Presidential administration seeks to leave its mark on antitrust enforcement policy. The administration typically does so by picking its leadership at the federal enforcement agencies—the Antitrust Division of the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC" or "Commission")—and then that leadership decides what policies to promote, which settlements to take, and which mergers to challenge in court. Over the course of four (and sometimes eight) years, precedent is set that can impact the direction that antitrust law takes. The overall changes, however, have tended to be gradual, with broad bipartisan consensus having existed within the antitrust bar regarding the main principles governing the role of antitrust law as it applies to merger review. As discussed below, the Biden Administration's ambitions on the antitrust front are much bolder than has been seen in decades. This article will discuss the substantive and procedural changes that are underway and the implications for parties undertaking transactions in the current enforcement environment.

II. Antitrust Has Moved to Center Stage in the Political Arena

In recent years, however, the political arena has become particularly interested in antitrust law and whether enforcement policy has contravened industrial and societal objectives. Policymakers have increasingly contemplated applying antitrust law to achieve broader societal goals related to labor, privacy, sustainability, and ensuring economic opportunity and fairness for all. For instance, each of the major Democratic Presidential candidates discussed the role of antitrust policy, with some advocating major changes in the law, particularly with respect to agricultural and high technology firms. Some key members of the Democratic congressional leadership also advocated major changes to antitrust procedures and standards. Notably, in February 2021, U.S. Sen. Amy Klobuchar introduced broad-sweeping legislation when she introduced the Competition and Antitrust Law Enforcement Reform Act, which would significantly alter federal law for both mergers and exclusionary conduct. Several other pending bills target online platforms, and, unlike the across-the industry bills, have bipartisan support, so are more likely to pass. A proposed provision of the Build Back Better bill would give the FTC authority to levy civil penalties for unfair or deceptive acts or practices under the Federal Trade Commission Act ("FTC Act"). In addition, congressional committees held hearings on a wide range of topics, including the scope and possibly even replacement of the consumer welfare standard and enhanced enforcement tools.

On January 5, 2022, the White House indicated that President Biden is contemplating issuing a Statement of Administrative Policy endorsing bipartisan, bicameral initiatives to update the antitrust laws. While this move could add some momentum for passage of the legislative changes focused on the tech sector that have gained bipartisan support and may pass, the chances of passage of the original Klobuchar broad-sweeping rewrite of the antitrust laws in the near term

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seem to have faded absent changes to the U.S. Senate filibuster rules. At a bare minimum, though, we are likely to see, in the near term, additional funding for the agencies and Congressional encouragement of vigorous antitrust enforcement, possibly using the existing laws, but interpreting them to achieve broader societal objectives.

Regardless of whether new legislation passes, the Biden Administration will likely seek to implement the greatest changes to antitrust enforcement policy that have been seen in at least a couple of decades and would potentially overrule decades of U.S. Supreme Court precedent and economic thinking. This direction is coming right from the top: In July 2021, President Biden issued a 72-item Executive Order ("EO") focused entirely on competition policy. In addition, the President's leadership selections uniformly point to the desire for zealous enforcement. On the White House staff, as Special Assistant to the President for Technology and Competition Policy, is Timothy Wu, one of the leaders of the progressive New Brandeis movement. In choosing Merrick Garland as the Attorney General ("AG"), Biden got someone who, as he indicated during his Senate confirmation hearings, identified antitrust law as "[his] first love in law school," who worked on antitrust law matters while in private legal practice, and who has "taken it very seriously and have throughout my entire career . . . . The Supreme Court has repeatedly referred to antitrust law as the charter of American economic liberty, and I deeply believe that."[1] In a December 2021 speech to the National Association of Attorney Generals, AG Garland pledged: "No matter the industry and no matter the company, the Justice Department will vigorously enforce our antitrust laws. We will aggressively protect consumers, safeguard competition and work to ensure economic fairness and opportunity for all."[2] In 2021, AG Garland authorized the bringing of lawsuits challenging: (1) an airline alliance;[3] (2) the combination of buyers of top-selling book rights;[4] (3) the combination of large insurance-broking firms, even after the

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[1] Chris Wilson, *Attorney General Nominee Garland Says He Will 'Vigorously' Enforce Antitrust Law*, MARKETWATCH (Feb. 22, 2021, 12:30 PM), https://www.marketwatch.com/story/attorney-general-nominee-garland-says-he-will-vigorously-enforce-antitrust-law-11614015038.

[2] Attorney General Merrick B. Garland Delivers Remarks at the National Association of Attorneys General (Dec. 7, 2021), https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-addresses-national-association-attorneys-general/.

[3] Press Release, U.S. Dep't of Justice, *Justice Department Sues to Block Unprecedented Domestic Alliance Between American Airlines and JetBlue* (Sept. 21, 2021), https://www.justice.gov/opa/pr/justice-department-sues-block-unprecedented-domestic-alliance-between-american-airlines-and. AG Garland stated: "Millions of consumers across America rely on air travel every day for work, to visit family, or to take vacations. Fair competition is essential to ensuring they can fly affordably and safely. . . . In an industry where just four airlines control more than 80% of domestic air travel, American Airlines' 'alliance' with JetBlue is, in fact, an unprecedented maneuver to further consolidate the industry. It would result in higher fares, fewer choices, and lower quality service if allowed to continue. The complaint filed today demonstrates the Justice Department's commitment to ensuring economic opportunity and fairness by protecting consumers and competition."

[4] Press Release, U.S. Dep't of Justice, *Justice Department Sues to Block Penguin Random House's Acquisition of Rival Publisher Simon & Schuster* (Nov. 2, 2021), https://www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon. AG Garland stated: "The complaint filed today to ensure fair competition in the U.S. publishing industry is the latest demonstration of the Justice Department's commitment to pursuing economic opportunity and fairness through antitrust enforcement. . . . Books have shaped American public life throughout our nation's history, and authors are the lifeblood of book publishing in America. But just five publishers control the U.S. publishing industry. . . . If the world's largest book publisher is permitted to acquire one of its biggest rivals, it will have unprecedented control over this important industry. American authors and consumers will pay the price of this anticompetitive merger—lower advances for authors and ultimately fewer books and less variety for consumers."

European Commission ("EC") and other jurisdictions settled and the parties committed to significant divestitures;[5] and (4) a refined sugar producers merger involving a region that reportedly has domestic supply chain issues.[6]

In a September 14, 2021 speech, Associate AG Vanita Gupta (who oversees the Antitrust Division) explained the basis for the Biden Administration's interest in antitrust:

> What was once regarded as a narrow, highly technical field has become an important part of our national dialogue. The concentration of economic power is on the minds of members of Congress and people across America. It has captured headlines and the attention of governments around the world. What explains this renewed interest in antitrust? I think it's the realization that robust antitrust enforcement is critically important for advancing economic justice. As President Biden said in his recent Executive Order on Competition, "the American promise of a broad and sustained prosperity depends on an open and competitive economy."[7]

Associate AG Gupta stressed the DOJ's commitment to broad antitrust enforcement in agriculture, banking, healthcare, housing, labor markets, and technology.[8] Other important priorities flagged by Gupta are digital markets, and the need to stop "killer acquisitions," which are "acquisitions involving potential or nascent competitors [and] . . . are one category of particularly concerning transactions because they undermine competition that can disrupt monopolies."[9]

Consistent with these objectives, the White House selected Jonathan Kanter to serve as the Assistant Attorney General ("AAG") for Antitrust.[10] Kanter is an antitrust law expert, having worked at the FTC and then having spent about 20 years in private practice, with a focus on antitrust. He has been a vocal opponent to big tech companies. At a Senate Judiciary Committee hearing, Kanter stated: "Antitrust laws have to address market realities and market realities have shifted in dramatic ways just over the last 20 or 30 years. . . . And the kinds of harm that can be inflicted on society as a result of concentrations of power has also changed. Those harms can embody privacy, can involve the marketplace of ideas, distribution of information, political

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[5] Press Release, U.S. Dep't of Justice, *Justice Department Sues to Block Aon's Acquisition of Willis Towers Watson* (June 16, 2021), https://www.justice.gov/opa/pr/justice-department-sues-block-aon-s-acquisition-willis-towers-watson. AG Garland stated: "American companies and consumers rely on competition between Aon and Willis Towers Watson to lower prices for crucial services, such as health and retirement benefits consulting. Allowing Aon and Willis Towers Watson to merge would reduce that vital competition and leave American customers with fewer choices, higher prices, and lower quality services."

[6] Press Release, U.S. Dep't of Justice, https://www.justice.gov/opa/pr/justice-department-sues-block-us-sugar-s-proposed-acquisition-imperial-sugar. AG Garland stated: "U.S. Sugar and Imperial Sugar are already multibillion-dollar corporations and are seeking to further consolidate an already cozy sugar industry. Their merger would eliminate aggressive competition in the supply of refined sugar that leads to lower prices, better quality, and more reliable service. . . . This deal substantially lessens competition at a time when global supply chain challenges already threaten steady access to important commodities and goods. The department's lawsuit seeks to preserve the important competition between U.S. Sugar and Imperial Sugar and protect the resiliency of American domestic sugar supply."

[7] Associate Attorney General Vanita Gupta Delivers Remarks at Georgetown Law's 15th Annual Global Antitrust Enforcement Symposium (Sept. 14, 2021), https://www.justice.gov/opa/speech/associate-attorney-general-vanita-gupta-delivers-remarks-georgetown-law-s-15th-annual.

[8] *Id.*

[9] *Id.*

[10] Press Release, U.S. Dep't of Justice, *President Biden Announces Jonathan Kanter for Assistant Attorney General for Antitrust* (July 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/20/president-biden-announces-jonathan-kanter-for-assistant-attorney-general-for-antitrust/.

discourse. And so to be effective, the antitrust laws, in my view, should be enforced in a manner that adapts to those market realities. I think there's a great amount to do."[11] In response to written questions posed by U.S. Senator Chuck Grassley, he responded:

> In the past, I have voiced concerns that the application of the consumer welfare standard has been inconsistent, vague, and insufficient to keep pace with market realities. Effective antitrust enforcement requires a deep understanding of market realities and facts to determine whether the conduct at issue harms competition and the competitive process. Enforcement authorities should use state-of-the-art analytical tools to analyze key facts and empirical evidence with the aim of protecting competition and the competitive process. . . . Antitrust enforcement is essential to promoting a healthy, competitive economy, which can lead to a wide range of benefits, including better wages, benefits, and other terms of employment for workers. . . . The effective enforcement of the antitrust laws can lead to more competitive markets, including labor markets. Healthy and competitive markets yield a wide range of benefits for many stakeholders, including small business owners, farmers, and workers.[12]

On November 16, 2021, the Senate confirmed Kanter's nomination with bipartisan support. AAG Kanter's Senate testimony suggests that he is likely to be a proactive enforcer, willing to bring actions that reflect a more progressive view of antitrust law, particularly in the high technology area.

The President's appointment of Lina Khan as Chair of the FTC is consistent with an aggressive antitrust enforcement path for the Biden Administration. Prior to becoming Chair of the FTC, Khan was an Associate Professor of Law at Columbia Law School, having previously served as counsel to the U.S. House Judiciary Committee's Subcommittee on Antitrust, Commercial and Administrative Law, legal adviser to then-FTC Commissioner Rohit Chopra, and legal director at the progressive Open Markets Institute. She is likely to continue to advocate her progressive vision to change law and policy. In addition, she has chosen as her Director of the Bureau of Competition ("BC Director") none other than the attorney advisor to former FTC Commissioner Chopra, Holly Vedova.

On June 15, 2021, Lina Khan was sworn in as Chair of the FTC. The new FTC leadership started to leave its mark by the summer of 2021, buttressed by Chair Khan having two supportive Democratic Commissioners in place. On September 13, 2021, President Biden nominated Alvaro Bedoya, a privacy lawyer, to fill the expired Commission seat held by Commissioner Chopra. Bedoya has been serving as founding director of Georgetown Law Center on Privacy & Technology. His focus has been on surveillance technologies. Commissioner Chopra departed the FTC on October 8, 2021, to assume his position as Chairman of the Consumer Financial Protection Bureau, leaving this seat vacant pending Bedoya's confirmation. On December 1, 2021, the U.S. Senate Commerce Committee split 14-14 on a vote to advance Bedoya's nomination for FTC Commissioner. On January 4, 2022, President Biden renominated Bedoya for the FTC Commis-

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[11] Andrew Goudsward, *With Bipartisan Support, DOJ Antitrust Nominee Vows Aggressive Enforcement*, LAW.COM (Oct. 6, 2021, 2:57 PM), https://www.law.com/nationallawjournal/2021/10/06/with-bipartisan-support-doj-antitrust-nominee-vows-aggressive-enforcement/; *see also* Bryan Koenig, *DOJ Nominee Hedges on Expansion of Competition Reviews*, LAW360 (Oct. 6, 2021, 9:00 PM), https://www.law360.com/articles/1428662/doj-nominee-hedges-on-expansion-of-competition-reviews.

[12] Questions for the Record, Jonathan Kanter, Nominee to be Assistant Attorney General of the Antitrust Division, S. Comm. on the Judiciary, 117th Cong. (Oct. 2021), https://www.judiciary.senate.gov/imo/media/doc/Kanter%20Responses%20to%20Questions%20for%20the%20Record.pdf.

sioner position, following the U.S. Senate returning the nomination to the President the preceding day under the Senate standing rules. Until his nomination is confirmed, Chair Khan's future measures to change the FTC might be slowed due to the lack of a Democratic majority at the Commission. In the meantime, despite the bipartisan divide on policy initiatives, the Commissioners have been mostly aligned in the FTC's enforcement actions in 2021. Of particular note is the December 2, 2021 challenge of Nvidia Corp.'s proposed acquisition of Arm Ltd., which allegedly involved the type of killer acquisition described by Associate AG Gupta, premised on vertical theories of harm.

The long-term implications of the focus on antitrust enforcement are likely to have a greater overall impact on M&A enforcement than on specific transactions alone. Ultimately, the courts serve as a check to overreaching demands of the agencies to the extent that transaction parties are willing to go to court rather than settle, or abandon, their transactions. The United States, however, is not alone in its increased use of competition review processes to address broader societal and industrial objectives, which can impact the strategies taken in a specific deal. Transaction parties should take these developments into account when negotiating deal terms and adopting their regulatory approval strategy, while keeping in mind that a vast majority of even strategic transactions will ultimately get done.

III. The Biden Administration Boldly Embraces a Progressive Agenda

Although the press has been correctly focused on the changes that the Biden Administration may make in antitrust enforcement, what may be getting lost in these discussions is the extent to which some of these changes actually were already emerging throughout the last decade and reflect a bipartisan retreat from Chicago School economic principles being viewed as paramount to all other objectives. One potentially diverging aspect is the willingness to regulate and impose restrictions on conduct that extend beyond a specific transaction. As discussed below, from the very outset, the Biden Administration—in its appointments of key antitrust positions and policy pronouncements—has adopted a progressive and bold interventionist approach to antitrust enforcement.

A. "Whole of Government" Approach Promised by the Biden Administration

Although prior administrations have had advisors with extensive antitrust credentials serve at the White House and in other Executive-branch positions, the Biden Administration has taken this to a new level, both with its selection of experts and the infrastructure that has been created to implement its broad-ranging approach to antitrust policy. On March 5, 2021, Timothy Wu, a leading member of the New Brandeis movement,[13] joined the National Economic Council as a Special Assistant to the President for Technology and Competition Policy. Wu's books include *The Curse of Bigness: Antitrust in the New Gilded Age*,[14] which posits that increasing corporate consolidation presents threats beyond the U.S. economy to the American political system itself. He and fellow Columbia Law Professor (and now FTC Chair) Khan have a history of collaboration in their intentions to replace the consumer welfare standard with broader societal objectives. According to Wu, the Biden Administration is rededicating the United States to a policy of strong

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[13] For a more extensive discussion of the New Brandeis movement, see Ilene Knable Gotts, *Back to the Future: Should the "Consumer Welfare" Standard Be Replaced in U.S. Antitrust Enforcement?*, 1 ANTITRUST REPORT (Feb. 2018).

[14] TIMOTHY WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018).

antitrust enforcement, following what he refers to as a "failed" 40-year experiment with the wrong approach.[15] The New Brandeis movement's philosophy includes, among other things, an increased focus on labor markets: "[m]arket consolidation makes it harder for workers to bargain for higher wages or better working conditions."[16] Wu points to the healthcare, pharmaceutical and meatpacking industries as prime examples of excessive consolidation. The biggest target of all is internet platforms, which, according to Wu, are able to use their market power to exclude new entrants and extract monopoly profits, and have gathered too much intimate personal information that they can exploit to their own advantage.

On July 9, 2021, President Biden signed into law a 72-item EO on Promoting Competition in the American Economy. The EO created a White House Competition Council to "coordinate, promote, and advance Federal Government efforts to address overconcentration, monopolization and unfair competition" and called upon over a dozen federal agencies to review and more vigorously enforce their respective mandates and rectify the "Federal Government inaction [which] has contributed" to "excessive market concentration."[17] The EO identified labor markets, agriculture, the information technology sector (with emphasis on "a small number of dominant internet platforms," "especially as they stem from serial mergers, the acquisition of nascent competitors, . . . and the presence of network effects"),[18] prescription drug and healthcare services, the telecommunications sector, the financial services sector, and markets directly affected by foreign cartel activity—such as the global container shipping industry—as areas of particular competitive concern. In his remarks, President Biden argued that previous administrations had allowed "bad mergers" to go forward, leading to mass layoffs, higher prices, and fewer options for consumers.[19]

On September 10, 2021, the newly formed Council held its inaugural meeting, attended by eight cabinet members and the heads of seven independent agencies, to discuss priorities for the Administration. The Chair of the Council is Brian Deese, Director of the National Economic Council and the Assistant to the President for Economic Policy. In a video previously released by the Biden Administration's transition team, Deese indicated that he takes a "pragmatic and realistic" approach to issues and focused on "human stakes" and "good union jobs" when he worked on the Obama Administration's bailout of the auto industry.[20] In the almost six months since the EO was issued, the Biden Administration cites the U.S. Food and Drug Administration's actions to promote competition in the market for over-the-counter hearing aids, the U.S. Department of Transportation's opening up more slots for budget airlines at Newark Airport, and the Surface Transportation Board's signaling its competition preferences in the Canadian

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[15] Matthew Perlman, *White House Adviser Touts 'Revitalization of Antitrust'*, LAW360 (Sept. 30, 2021, 7:04 PM), https://www.law360.com/articles/1426882/.

[16] *Id.*

[17] Exec. Order No. 14,036, 86 Fed. Reg. 36,987, 36,987, 36990 (July 9, 2021), https://www.govinfo.gov/content/pkg/FR-2021-07-14/pdf/2021-15069.pdf.

[18] *Id.*, 86 Fed. Reg. at 36,987, 36,988.

[19] Remarks by President Biden at Signing of an Executive Order Promoting Competition in the American Economy, (July 9, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/.

[20] Franco Ordoñez, *Biden Names BlackRock's Brian Deese as His Top Economic Aide*, NPR (Dec. 3, 2020, 1:01 PM), https://www.npr.org/sections/biden-transition-updates/2020/12/03/942205555/biden-names-blackrocks-brian-deese-as-his-top-economic-aide.

Pacific-Kansas City Southern merger as examples of its "whole of government" approach to competition policy. Press accounts also indicate that the Administration is having: (1) the U.S. Department of Agriculture investigate large meatpackers to determine whether they have been raising prices, underpaying farmers, and tripling their profit margins during the pandemic, (2) the FTC investigate accusations that large oil companies had artificially inflated prices, and (3) the Federal Maritime Commission investigate possible price gouging by large shipping companies that are critical to the supply chain. These initiatives are part of the White House's crusade to fight inflation.[21]

As suggested above, the Biden Administration's competition agenda extends beyond the antitrust agencies and M&A review. The changes underway at the FTC and the DOJ, however, will be the primary focus of this article. Most of the policy changes have occurred at the FTC to date, partly due to the delayed arrival of a new AAG at the Antitrust Division and continuing gaps in senior Antitrust Division leadership. As mentioned above, FTC Chair Khan used the time period during which the Democrats held a majority of the Commission seats to adopt several significant changes, which, when coupled with additional actions undertaken under her leadership, have created an enforcement environment in which transaction parties could potentially face longer delays, greater uncertainty, and broader risks in their M&A activities. The changes fall into two categories: (1) procedural; and (2) substantive. As discussed below, both types of changes can significantly impact merger review. In some instances, the FTC's actions will also potentially impact transactions reviewed at the DOJ. In addition, two sections will also discuss further changes likely to be considered for discussion at both agencies in 2022.

B. FTC Procedural Changes Impact Even Non-Problematic Deals

1. Hart-Scott-Rodino Reviews Become Longer and Investigations More Expansive

On February 4, 2021, four months prior to Chair Khan's arrival at the FTC, the FTC indefinitely suspended the decades-old process by which the initial waiting period applicable to Hart-Scott-Rodino ("HSR") Act reportable transactions that raise no substantive issues can be terminated early. The justifications for this change were the pandemic and "agency" workload.[22] This procedural change, however, impacted all transactions notified under the HSR Act, not just transactions that the FTC reviews. In addition, there has been an increase in the number of deals for which the agency's investigation is not concluded during the initial waiting period. In some of these deals, the parties have "pulled and refiled" (sometimes more than once) their HSR notifications in order to avoid a second request. Moreover, there are no indications that these timing developments are likely to change anytime soon: The record volume of M&A transactions has resulted in a high number of HSR-reportable transactions to be processed, and in some cases reviewed, by the agencies.

BC Director Vedova's more recent pronouncements regarding changes in merger review processes at the FTC may also create further delays and uncertainty even for deals that the FTC

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[21] Jim Tankersley & Alan Rappeport, *As Prices Rise, Biden Turns to Antitrust Enforcers*, N.Y. TIMES (Dec. 29, 2021), https://www.nytimes.com/2021/12/25/business/biden-inflation.html.

[22] Press Release, Fed. Trade Comm'n, *FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination* (Feb. 4, 2021), https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early ("Given the confluence of an historically unprecedented volume of filings during a leadership transition amid a pandemic, we will presume we need those 30 days to ensure we are doing right by competition and consumers.").

ultimately determines are not problematic from a competition standpoint. As far as deals that do raise competition concerns, the procedural changes discussed below will have even greater long-term implications.

On August 3, 2021, for instance, a Bureau of Competition ("BC") blog posting indicated that even in those deals in which the parties have not been told that they would receive a second request if they did not pull and refile, it "had begun to send standard form letters alerting companies that the FTC's investigation remains open and reminding companies that the agency may subsequently determine that the deal was unlawful. Companies that choose to proceed with transactions that have not been fully investigated are doing so at their own risk."[23] Although it has always been the case that the agencies *can* investigate *and even challenge* deals after the HSR waiting period expires, this has historically arisen in isolated and infrequent cases, and typically months (or longer) after the HSR waiting period has expired, rather than as a broader practice to continue the review despite the end of the waiting period. This practice increases uncertainty for transaction parties and is inconsistent with the overarching purpose of the HSR process. As indicated above, these delays in completion of the review of HSR-notified deals will likely continue for the foreseeable future: A November 8, 2021 Statement of FTC Chair Khan and FTC Commissioner Slaughter indicated that "[e]ven in ordinary times, these [HSR Act] timelines prove challenging given our tight resources; during a decades-high boom in merger filings, the 30-day window is crippling."[24]

On September 28, 2021, the BC issued yet another blog post, this time regarding second requests.[25] The blog posting indicated that, "[w]hen the FTC issues a second request, FTC staff typically engage in negotiations (sometimes quite extensive) with merging companies to tailor the scope of the search to meet the specific needs of [its] investigation, and to consider modifications requested by the companies under investigation."[26] However, going forward, the FTC will be making several changes to how it investigates mergers and acquisitions, including the scope of second requests. The FTC indicated that it will be seeking to ensure that its merger reviews are more comprehensive and analytically rigorous, noting that an unduly narrow approach to merger review may have created blind spots that have enabled unlawful consolidation. Accordingly, the FTC is examining a broader set of factors, including, for example, how a proposed merger will affect labor markets, the cross-market effects of a transaction, and how the involvement of investment firms may affect market incentives to compete. In fact, recent second requests reportedly have included new questions regarding employment terms and contracts, including non-compete provisions, unionization at companies, environmental issues, and corporate governance practices.

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[23] BC Director Vedova, *FTC Adjusting Its Merger Review to Deal with the Surge in Merger Filings*, FED. TRADE COMM'N: COMPETITION MATTERS BLOG (Aug. 3, 2021, 3:08 PM), https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings.

[24] Fed. Trade Comm'n, Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter Regarding the FY 2020 Hart-Scott-Rodino Annual Report for Transmittal to Congress 2, FTC File No. P110014 (Nov. 8, 2020), https://www.ftc.gov/system/files/documents/public_statements/1598131/statement_of_chair_lina_m_khan_joined_by_rks_regarding_fy_2020_hsr_rep_p110014_-_20211101_final_0.pdf.

[25] BC Director Vedova, *Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave*, FED. TRADE COMM'N: COMPETITION MATTERS BLOG (Sept. 28, 2021, 8:08 AM), https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/making-second-request-process-both-more-streamlined.

[26] *Id.*

2. *New FTC Prior Approval Policy Has Broad Implications for Repeat Players*

On October 25, 2021, through a partisan-divided vote, the FTC revoked a policy adopted in 1995 that limited the use of prior notices and prior approval provisions in merger consent decrees, thereby effectively flipping the burden of proof to transaction parties on deals captured by the new provision.[27] The FTC's action was controversial for a number of reasons.

First, the Commission's action followed a three-to-two vote in which the decisive "proxy" vote was cast by Commissioner Chopra, even though he had departed on October 8, 2021, under an arcane rule that allows a Commissioner's votes to be counted for up to 60 days after that Commissioner leaves the agency. In a largely symbolic move, six Republican U.S. senators introduced legislation on December 2, 2021 that would retroactively prevent such "zombie voting" as of January 1, 2021.[28]

Second, the FTC announced its new policy without notice to Republican Commissioners Phillips and Wilson, who later issued a dissenting statement, pointing out, among other things, that the 2021 Policy Statement will potentially chill M&A activity in the United States well beyond potentially anticompetitive transactions, would constitute an end-run around the HSR premerger notification framework, and goes far beyond merely reverting to the pre-1995 policy *status quo*.[29]

Third, under the new policy, proposed FTC consent orders will require merging parties to obtain the agency's prior permission to close any future acquisition in an affected market for at least 10 years. Moreover, where "stronger relief is needed," the FTC may also seek to impose prior approval obligations covering additional markets beyond those affected by a merger.[30] The agency notes that it will consider a number of factors in determining the duration and breadth of prior approval provisions, including whether the transaction under review is substantially similar to a transaction that was previously challenged by the FTC and the parties' "history of acquisitiveness."[31] The FTC's prior approval regime would in essence apply to all subsequent acquisitions in designated markets, whether or not independently reportable under the HSR Act, and the investigations would not be subject to the normal HSR process. This practice will have important timing and procedural implications, as prior approval reviews would not be subject to the HSR Act's statutory time frames, giving buyers no control of timing in open-ended investigations. More significantly, prior approval eliminates the Commission's burden of proof and confers upon it discretion to approve or disapprove a deal, regardless of the value or merit of the transaction.[32] The FTC further indicates that the Commission may seek prior approvals even when parties abandon

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[27] Fed. Trade Comm'n, Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

[28] Leah Nylen, *Senators Propose Ban on FTC 'Zombie Votes'*, POLITICO (Dec. 2, 2021, 5:02 PM), https://www.politico.com/news/2021/12/02/senators-propose-ban-on-ftc-zombie-votes-523685.

[29] Fed. Trade Comm'n, Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 29, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598095/wilson_phillips_prior_approval_dissenting_statement_102921.pdf.

[30] Statement of the Commission on Use of Prior Approval Provisions in Merger Orders 2, *supra* note 27.

[31] *Id.* at 3.

[32] Press Release, Fed. Trade Comm'n, *FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers* (Oct. 25, 2021), https://www.ftc.gov/news-events/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive.

a transaction. The FTC's press release quotes BC Director Vedova as the motivation for the Commission's action: "The FTC should not have to waste valuable time and resources investigating clearly anticompetitive deals that should have died in the boardroom. . . . Restoring the long-standing prior approval policy forces acquisitive firms to think twice before going on a buying binge because the FTC can simply say no."[33]

The punitive nature of this policy for repeat M&A players may become a deterrent for certain transactions that typically would require a remedy to be completed because entering into a consent with the FTC could then subject the buyer to Commission oversight for subsequent deals. Some companies may consider engaging in self-help to fix the areas of concern, thereby forcing the agency to litigate the fix if it wants to impose a prior approval provision, rather than entering into a consent agreement with the FTC containing the prior approval provision.

Finally, the FTC has traditionally had a policy where it rarely imposed restrictions on a divestiture buyer. The new policy, however, will require buyers of divested assets to agree to prior approval for any future sale of the assets they acquire in divestiture orders for a minimum of 10 years. A blanket policy of imposing prior approval requirements on all divestiture buyers may potentially deter candidates from being willing to be divestiture buyers, thereby potentially making it less likely for the Commission to resolve matters without litigation.

3. Additional Transactions May Be Subjected to HSR Review

Although not of the same magnitude, but nevertheless noteworthy, an August 26, 2021 BC blog post revoked a long-standing informal interpretation under the HSR rules on not treating the retirement of debt as consideration. Other HSR rules changes may also be on the horizon.[34] Notably, on September 21, 2020 (*i.e.*, during the last days of the *Trump* Administration), the FTC proposed significant amendments to the HSR rules that would aggregate and capture more information about holdings of investment funds, while at the same time exempt from the filing requirements certain minority acquisitions that "almost never present competition concerns."[35] Under the existing rules, investment funds and master limited partnerships managed by the same general partner or managing entity are generally treated as separate "persons" for HSR purposes. As a result, acquisitions made by different funds under common management are typically not aggregated, and are treated as separate transactions that may or may not individually trigger a filing requirement. The FTC's proposed amendment would close this "loophole" by requiring acquirers to aggregate the value of shares across all commonly managed funds. The proposed change would also require HSR filings to include detailed information for all commonly managed funds and their portfolio holdings.[36]

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[33] *Id.*

[34] BC Director Vedova, *Reforming the Pre-Filing Process for Companies Considering Consolidation and a Change in the Treatment of Debt*, FED. TRADE COMM'N: COMPETITION MATTERS BLOG (Aug. 26, 2021, 2:06 PM), https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/reforming-pre-filing-process-companies-considering.

[35] Press Release, Fed. Trade Comm'n, *FTC and DOJ Seek Comments on Proposed Amendments to HSR Rules and Advanced Notice of Proposed HSR Rulemaking* (Sept. 21, 2020), https://www.ftc.gov/news-events/press-releases/2020/09/ftc-doj-seek-comments-proposed-amendments-hsr-rules-advanced. The DOJ concurred with the FTC's proposal. Press Release, U.S. Dep't of Justice, *Antitrust Division Supports Modernizing Merger Filing Exemptions for Certain Investments* (Sept. 21, 2020), https://www.justice.gov/opa/pr/antitrust-division-supports-modernizing-merger-filing-exemptions-certain-investments.

[36] A second proposed rules change, which would have enabled many activist investors to accumulate equity

In addition to the proposed rule changes, the FTC issued an advance notice of proposed rulemaking ("ANPRM") to gather information on seven topics to "help to determine the path for future amendments to the premerger notification rules" and interpretations of those rules.[37] The notice covered important aspects of HSR reportability, including, among others, existing exemptions for transactions involving real estate investment trusts, convertible securities, and acquisitions made "solely for the purpose of investment,"[38] as well as the potential application of the HSR reporting obligations for certain events that do not involve stock purchases, such as the right to appoint board observers. The public comment period for both the proposed rule changes and the ANPRM ended on February 1, 2021. It remains to be seen whether the new FTC leadership takes any action to implement any of these proposed amendments to HSR reporting requirements. In addition, the new leadership may choose to rescind other informal interpretations or adopt other rule amendments.

The most likely target for more expansive HSR reporting will be transactions involving high technology. On February 11, 2020 (again, during the *Trump* Administration), the FTC ordered five large technology (digital platform) companies—Alphabet, Amazon, Apple, Facebook and Microsoft—to produce information about potentially hundreds of acquisitions consummated between January 2010 and December 2019 that were not reportable under the HSR Act because they did not meet the applicable monetary reporting thresholds.[39] This initiative followed the FTC's 2018–2019 public hearings and the creation of a technology task force dedicated to monitoring competition in technology-related sectors, and is separate from the FTC's continuing antitrust investigations into big tech companies, but could inform those investigations.

On September 15, 2021, the FTC staff presented its findings at an open meeting of the Commission.[40] Notably, of the 616 transactions studied that were valued at or above $1 million:

- 15% exceeded the HSR "size-of-transaction" threshold (but had been exempted from HSR reporting under an applicable statutory or regulatory provision);
- In 36% of the transactions, the acquirer assumed some amount of debt or liabilities. When

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positions up to 10% in public companies without filing with antitrust agencies, seems very unlikely to be adopted. Unlike the existing passive investor exemption that applies narrowly to acquisitions made "solely for the purpose of investment," proposed Rule 802.15 would exempt all acquisitions up to 10%, so long as the buyer: (1) is not a competitor of the issuer, (2) does not hold 1% or more of the equity of any competitor of the issuer, (3) does not have a representative serving as an officer or director of the issuer, (4) does not have a representative serving as an officer or director of any of its competitors, and (5) has no vendor-vendee relationship with the issuer. Premerger Notification; Reporting and Waiting Period Requirement, 85 Fed. Reg. 77053, 77058, 77061 (proposed Dec. 1, 2020) (to be codified at 16 C.F.R. pts. 801–03), https://www.govinfo.gov/content/pkg/FR-2020-12-01/pdf/2020-21753.pdf. The Commission's two Democratic Commissioners dissented from the decision to propose this new rule. *See* Press Release, Fed. Trade Comm'n, *FTC and DOJ Seek Comments on Proposed Amendments to HSR Rules and Advanced Notice of Proposed HSR Rulemaking*, *supra* note 35.

[37] Premerger Notification; Reporting and Waiting Period Requirement, 85 Fed. Reg. 77042, 77042 (proposed Dec. 1, 2020) (to be codified at 16 C.F.R. pts. 801-03), https://www.govinfo.gov/content/pkg/FR-2020-12-01/pdf/2020-21754.pdf.

[38] *Id.*, 85 Fed. Reg. at 77047.

[39] Press Release, Fed. Trade Comm'n, *FTC to Examine Past Acquisitions by Large Technology Companies* (Feb. 11, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

[40] Fed. Trade Comm'n, Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An FTC Study (Sept. 2021), https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf.

added to the purchase price of the target, three (less than 1% of the total number of transactions) more transactions would have been above the size of transaction threshold (as noted above, the FTC has now changed its interpretation to ensure that future transactions involving debt or liabilities account for this aspect of the deal in valuation of the transaction);

- More than 79% of the transactions used deferred or contingent compensation to the founders and key employees; an additional 1.5% of the total number of transactions would have exceeded the size of transaction threshold if this compensation had been added to the purchase price;
- More than 75% of the transactions included non-compete clauses for founders and key employees of the target;
- 65% of the transactions were valued below $25 million;
- For transactions exceeding $5 million in value, the majority were control transactions;
- Roughly one-third of the transactions involved foreign targets;
- At least 39.3% of the transactions involved a target that started less than five years before the acquisition; and
- In more than half of the transactions, the number of full-time non-sales employees at the target was 10 or less.

In the accompanying press release, Chair Khan stated: "While the Commission's enforcement actions have already focused on how digital platforms can buy their way out of competing, this study highlights the systemic nature of their acquisition strategies, . . . [i]t captures the extent to which these firms have devoted tremendous resources to acquiring start-ups, patent portfolios, and entire teams of technologists—and how they were able to do so largely outside of our purview."[41]

Then-Commissioner Chopra issued a statement at the meeting urging the closing of these loopholes.[42] Chopra also discussed the use of "aqui-hire," under which the acquirer provides a payout to the target's employees, in exchange for the target's assets and, crucially, to key employees staying on to work at the acquiring firm. Chopra suggested that it is a common way for dominant firms to take over innovators and competitors by obtaining the target on an undervalued basis and disguising the real purchase price in the form of future stock grants and options in an employment agreement. Similarly, Chopra discussed the deployment of an avoidance device utilized by firms where the target issues to investors a special dividend, leaving the buyer free to take over the target at a price below the HSR reporting thresholds.[43]

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[41] Press Release, Fed. Trade Comm'n, *FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies* (Sept. 15, 2021), https://www.ftc.gov/news-events/press-releases/2021/09/ftc-report-on-unreported-acquisitions-by-biggest-tech-companies.

[42] Fed. Trade Comm'n, Prepared Remarks of Commissioner Rohit Chopra Regarding Non-HSR Reported Acquisitions by Big Tech Platforms (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596340/20210915_final_chopra_remarks_non-hsr_reported_acquisitions_by_big_tech_platforms.pdf. Chopra notes that many of the loopholes being used today were created through informal staff interpretations that could be rescinded without formal Commission action.

[43] Facebook's acquisition of Giphy reportedly included Giphy paying a dividend to investors, which lowered the value of Giphy's assets to below reporting thresholds.

Commissioner Slaughter also issued a statement on this topic at the meeting. It was widely understood that if, during this study, the FTC uncovered transactions it believed substantially lessened competition, then it could initiate enforcement actions to challenge those deals.[44] Commissioner Slaughter noted that:

> I know there was some speculation about whether this study would have revealed specific transactions the Commission would have liked to know about in order to challenge. But I think that's the wrong question. To my mind, the more significant contribution this study provides is the window into the overall pattern of these firms' acquisitions. My concern has always been that when we simply review acquisitions serially, we may miss bigger picture patterns of anticompetitive roll-up strategies. I think of serial acquisitions as a PacMan strategy: Each individual merger, viewed independently, may not seem to have a significant impact, but the collective impact of hundreds of smaller acquisitions can lead to a monopolistic behemoth. The study released today helps us understand the bigger picture patterns among the largest tech platforms. This perspective will help us to better target our enforcement efforts. In addition, the reports we're able to publish about the data we collect provide the public with a better understanding of market patterns and practices.[45]

Thus, whether or not the FTC's inquiry ultimately results in challenges to any consummated transactions, other initiatives may be taken by the agency to close what are deemed as "loopholes" to the HSR rules. The FTC's findings could also have implications beyond the technology sector. In fact, Commissioner Wilson responded to the report by renewing her recommendation that the FTC should conduct similar studies for other industries beyond the large digital platforms, urging that healthcare be next on the agenda.[46]

C. Substantive Changes Could Be Outcome-Determinative for Some Deals

The clearly stated objective of the Biden Administration is to change which deals are permitted to proceed and the terms under which they proceed. Less clear is what the new standards will be that will govern the enforcement decisions. What we have seen thus far, though, is that the changes will likely be significant, and may subject more deals to enforcement actions. Ultimately, though, it will be up to the courts (or Congress, if it chooses to change the law) to decide what legal standards apply to merger challenges to the extent that transaction parties are willing to litigate, rather than to settle or abandon their transactions.

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[44] It is not unusual for one or two consummated transactions per year that were non-reportable under the HSR Act to be challenged by the federal agencies. Nor is this the first time that the FTC has focused on consummated transactions in a particular industry. In 2002, for instance, the FTC established a merger litigation task force and commissioned a retrospective study of consummated hospital mergers to develop new strategies for trying hospital merger cases. As a result of the study, the FTC identified, and challenged, some consummated hospital mergers that it concluded had had an anticompetitive impact, developed evidence for use in future challenges that would refute common substantive claims of merging parties, and adopted a new approach to demonstrating competitive harm.

[45] Fed. Trade Comm'n, Prepared Remarks of Commissioner Rebecca Kelly Slaughter Regarding Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An FTC Study (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596324/rks_statement_on_tech_6b_91521.pdf.

[46] Fed. Trade Comm'n, Oral Remarks of Commissioner Christine S. Wilson for the Open Commission Meeting (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596380/cw_remarks_open_commission_meeting_9_16_2021.pdf.

1. FTC Rescinds 2015 Unfair Methods of Competition Policy, Opening the Way for Consideration of Broader Objectives

On July 1, 2021, only two weeks after being sworn in as Chair, and with no notice or public input, FTC Chair Khan (along with the other two Democratic Commissioners) rescinded the FTC's policy statement on the FTC's enforcement of "unfair methods of competition" under Section 5 of the FTC Act that had been adopted in 2015 with bipartisan support (the "2015 UMC Policy Statement"). The 2015 UMC Policy Statement had provided that: (1) the Commission would use as its guiding principle the widely adopted public policy of promoting consumer welfare; (2) conduct would be evaluated under a framework similar to the rule of reason, considering both likely harm to competition and procompetitive justifications; and (3) a stand-alone Section 5 of the FTC Act case would be less likely when the competitive harm could be addressed by the Sherman and Clayton Acts. The 2015 UMC Policy Statement was consistent with case law precedent in treating Section 5's prohibition of unfair methods of competition no differently from the other antitrust laws in its singular focus on competition.

According to the statement issued by the three Democratic Commissioners, with the decision to rescind the 2015 UMC Policy Statement, "the 2015 policy was shortsighted," and "[i]n practice, the [2015 UMC Policy Statement] has doubled down on the Commission's longstanding failure to investigate and pursue 'unfair methods of competition.' "[47] Rescinding the 2015 UMC Policy Statement, they concluded, is crucial to bringing the FTC back in line with its statutory obligations. Instead, the majority asserted that "the time is right for the Commission to rethink its approach and to recommit to its mandate to police unfair methods of competition even if they are outside the ambit of the Sherman Act or the Clayton Act." This viewpoint is consistent with the approach that the New Brandeis movement has espoused as part of a fundamental refocusing of antitrust law and objectives.[48] The majority stopped short, however, in providing any further guidance to the business community of what objectives will replace the 2015 UMC Policy Statement.

Republican Commissioners Wilson and Phillips dissented from the rescission of the 2015 UMC Policy Statement for three reasons: (1) rescinding the 2015 UMC Policy Statement—absent any new guidance about how the Commission interprets its authority—reduces clarity in the application of the law and threatens to unleash regulatory power never intended by Congress to be exercised by a bare majority of unelected individuals at the FTC; (2) the 2015 UMC Policy Statement was consistent with Section 5 of the FTC Act in considering both likely harm to competition and procompetitive justifications; and (3) the 2015 UMC Policy Statement reflected several core principles of mainstream antitrust enforcement, and withdrawing it runs contrary to sound competition law and policy.[49] Moreover, to the extent that the FTC adopts a broader

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[47] Fed. Trade Comm'n, Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf.

[48] *See also* Christine S. Wilson, Comm'r, Fed. Trade Comm., The Neo-Brandeisian Revolution: Unforced Errors and the Diminution of the FTC, Remarks for the ABA Antitrust Law Section's 2021 Fall Forum (Nov. 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598399/ftc_2021_fall_forum_wilson_final_the_neo_brandeisian_revolution_unforced_errors_and_the_diminution.pdf.

[49] Fed. Trade Comm'n, Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson on the "Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding 'Unfair

standard of law for mergers based on its Section 5 mandate, it may diverge in its approach from that applied by the DOJ in the mergers it reviews under Clayton Act Section 7 standards. Such divergence would add further arbitrariness and uncertainty for transaction parties to the extent that which agency is cleared to review a transaction potentially becomes outcome-determinative.

2. *New Horizontal and Vertical Merger Guidelines Likely*

The July 2021 EO encourages the DOJ and the FTC to address perceived deficiencies in antitrust enforcement by, among other things, considering revisions to the Horizontal Merger Guidelines and the Vertical Merger Guidelines. In response to this EO, FTC Chair Lina Khan and then-Acting AAG Richard Powers issued a joint statement a few hours later, indicating their plans to launch a joint review of the agencies' merger guidelines "with the goal of updating them to reflect a rigorous analytical approach," and "to review mergers with the skepticism the law demands."[50] Since then, Chair Khan and AAG Kanter have discussed the need to have an updated "tool kit." As AAG Kanter explained:

> The most important thing is that we have a tool kit that works. . . . We have a modern economy that is highly dynamic, multidimensional, and it's not horizontal or vertical. You look at things, for example, through a horizontal-vertical lens and it's like watching 4K video on a black and white TV. Having a tool kit that can understand the realities of how markets function so we can intervene to protect our competitive process is going to be the first and most important place we can start.[51]

Chair Khan added that, in antitrust today, the standards and theories are premised on assumptions about how markets work that are no longer corresponding to the reality of how they are actually functioning: "We see areas of these gaps between the theory and the evidence, so I think our role collectively is to try to close that gap."[52] Guidelines are one part of that "tool kit."

Vertical merger guidance was the first area to be attacked by the FTC. Interest in vertical mergers has grown over the last decade. Vertical mergers—*i.e.*, ownership of some combination of inputs, production, and distribution—can raise concerns to the extent that they enable the merged firm to raise rivals' costs or foreclose access to an input (input foreclosure), reduce rivals' revenues by foreclosing access to customers (distribution foreclosure), or otherwise create barriers to entry by forcing potential entrants to enter both the upstream and downstream markets simultaneously.[53] In addition, a vertical merger can potentially increase the likelihood of coordination among competitors due to access to competitively sensitive information regarding a competitor. Under traditional "Chicago School" doctrine, however, these theories rarely resulted in an enforcement action, with vertical mergers typically viewed favorably because of their

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Methods of Competition' Under Section 5 of the FTC Act" (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591710/p210100phillipswilsondissentsec5enforcementprinciples.pdf.

[50] Fed. Trade Comm'n & U.S. Dep't of Justice, Statement of Acting Assistant Attorney General Richard A. Powers of the Antitrust Division and FTC Chair Lina Khan on Competition Executive Order's Call to Consider Revisions to Merger Guidelines (July 9, 2021), https://www.justice.gov/opa/pr/statement-acting-assistant-attorney-general-richard-powers-antitrust-division-and-ftc-chair.

[51] Austin Peay and Flavia Fortes, *DOJ's Kanter, FTC's Khan Highlight Importance of Appropriate Antitrust Tool Kit, Joint US Federal, State Enforcement*, MLEX MARKET INSIGHT (Dec. 7, 2021, 7:29 PM), https://mlexmarketinsight.com/news/insight/doj-s-kanter-ftc-s-khan-highlight-importance-of-appropriate-antitrust-tool-kit-joint-us-federal-state.

[52] *Id.*

[53] *See* James Langenfeld, *Non-Horizontal Merger Guidelines in the United States and the European Commission: Time for the United States to Catch Up?*, 16 GEO. MASON L. REV. 851, 857–61 (2009), https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0053-d-0015-154988.pdf.

efficiency-enhancing potential through the reduction of double marginalization.[54] In fact, during the entire George W. Bush Administration, only a few transactions were deemed to have raised vertical concerns that required relief.

Enforcement activity involving vertical merger concerns during the Obama Administration increased some. During the Trump Administration, enforcers showed heightened interest in vertical mergers, including when the DOJ brought the first court challenge based on vertical theories in three decades when it sued to block the proposed *AT&T/TW* transaction.[55] Publicly available data suggest that there were at least 14 significant investigations involving vertical issues from 2016 to 2018. This trend continued in 2019–2020, when both the DOJ and the FTC investigated a number of transactions on vertical theories and even required remedies in some.[56]

On June 30, 2020, the DOJ issued new Vertical Merger Guidelines ("2020 Vertical Merger Guidelines")[57] that outlined how the federal agencies would evaluate the likely competitive impact of mergers involving firms operating at different levels of the supply chain, and determine whether to challenge those mergers. From the outset, though, the two Democratic Commissioners raised concerns about the Guidelines. The final Guidelines eliminated a discussion that had appeared in the draft suggesting that vertical mergers involving companies with shares of less than 20% in their respective markets were unlikely to be anticompetitive.[58] As adopted, the 2020 Vertical Merger Guidelines stated more generally that the agencies "may consider measures of market shares and market concentration" in analyzing competitive effects without making reference to any specific market share or concentration threshold.

Despite this change, both Democratic Commissioners continued to oppose the issuance of the 2020 Vertical Merger Guidelines, taking particular issue with their emphasis on the potential benefits of vertical mergers.[59] Central to their opposition was the express recognition that, while "vertical mergers are not invariably innocuous," they may create significant efficiencies that "often benefit consumers." The 2020 Vertical Merger Guidelines indicated that efficiencies were an

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[54] *Id.*

[55] *See* Press Release, U.S. Dep't of Justice, *Justice Department Challenges AT&T/DirecTV's Acquisition of Time Warner* (Nov. 20, 2017), https://www.justice.gov/opa/pr/justice-department-challenges-attdirectv-s-acquisition-time-warner.

[56] *See, e.g., United Health Group/DaVita Medical Group*, Press Release, Fed. Trade Comm'n, *FTC Imposes Conditions on UnitedHealth Group's Proposed Acquisition of DaVita Medical Group* (June 19, 2019), https://www.ftc.gov/news-events/press-releases/2019/06/ftc-imposes-conditions-unitedhealth-groups-proposed-acquisition; *see also United Technologies/Raytheon*, Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures in Merger Between UTC and Raytheon to Address Vertical and Horizontal Antitrust Concerns* (Mar. 26, 2020), https://www.justice.gov/opa/pr/justice-department-requires-divestitures-merger-between-utc-and-raytheon-address-vertical-and.

[57] U.S. Dep't of Justice & Fed. Trade Comm'n, Vertical Merger Guidelines (June 30, 2020), https://www.justice.gov/atr/page/file/1290686/download.

[58] *See* Fed. Trade Comm'n, Statement of Commissioner Rebecca Kelly Slaughter Regarding FTC-DOJ Draft Vertical Merger Guidelines 3, FTC File No. P810034 (Jan. 10, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561721/p810034slaughtervmgabstain.pdf.

[59] Fed. Trade Comm'n, Dissenting Statement of Commissioner Rohit Chopra Regarding the Publication of the Vertical Merger Guidelines, FTC File No. P810034 (June 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577503/vmgchopradissent.pdf; Fed. Trade Comm'n, Dissenting Statement of Commissioner Rebecca Kelly Slaughter In Re FTC-DOJ Vertical Merger Guidelines, FTC File No. P810034 (June 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577499/vmgslaughterdissent.pdf.

important part of the agencies' review of vertical mergers, particularly the elimination of double marginalization ("EDM") and contracting frictions between independent firms. The 2020 Vertical Merger Guidelines also specified that the agencies would consider "*the likely net effect*" of the merged firm's unilateral conduct on competition and would consider countervailing effects, including EDM.[60] The 2020 Vertical Merger Guidelines made clear, however, that the transaction parties bore the burden of proof for any efficiencies claims.

On September 15, 2021, the FTC repealed the 2020 Vertical Merger Guidelines in a three-to-two partisan vote.[61] Although the withdrawal of these Guidelines was not surprising, its timing was. The Democratic-majority Commissioners justified the timing by noting that the Guidelines had been adopted only recently, so they had not yet had a significant impact and that by acting swiftly they were able to prevent judicial reliance on the flawed discussion regarding potential benefits of vertical mergers from EDM and efficiencies, when there was no basis of support in the law or market reality. Separately, Commissioner Slaughter has advocated for presumptions of illegality from vertical deals in concentrated industries when the upstream supplier provides critical inputs, and would shift the burden to the transaction parties to show that they could not achieve the same lower prices through, for instance, contractual arrangements.[62] Their repeal, however, without replacement guidelines being proposed or issued creates a policy gap during a period when vertical concerns are being explored in many deals, and are the focus of a number of recent enforcement actions. In the near term, the result may be longer reviews in transactions raising vertical merger concerns due to lack of transparency and uncertainty regarding the approach to be taken in the review process and on what enforcement actions to bring.

Thus far, the DOJ has not yet acted to withdraw the 2020 Vertical Merger Guidelines.[63] Soon after being confirmed by the U.S. Senate, AAG Kanter indicated that the DOJ would be working with the FTC in devising new vertical merger guidelines. The DOJ had earlier indicated, on September 15, 2021, that the staff had identified five areas that warranted consideration:

1. Whether the 2020 Vertical Merger Guidelines create confusion as to the merging parties' burden to establish that EDM is verifiable, merger-specific and will likely be passed through to consumers.
2. Whether the 2020 Vertical Merger Guidelines unduly emphasize the quantification of price effects, which is not the only means to determine that a vertical merger is unlawful.
3. Whether the 2020 Vertical Merger Guidelines appropriately account for the traditional burden-shifting framework applied by U.S. courts in their review of mergers. For

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[60] 2020 Vertical Merger Guidelines, Section 4. The treatment of EDM is notably included as part of both the unilateral effects section and the procompetitive effects section. For a general discussion, see Koren Wong-Ervin & John Harkrider, *Assessment of the Vertical Merger Guidelines and Recommendations for the VMGs Commentary*, LAW360 (July 6, 2020), https://www.law360.com/articles/1289373/assessing-the-new-doj-ftc-vertical-merger-guidelines.

[61] Press Release, Fed. Trade Comm'n, *Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary* (Sept. 15, 2021), https://ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines.

[62] *See, e.g.*, Fed. Trade Comm'n, Dissenting Statement of Commissioner Rebecca Kelly Slaughter In Re FTC-DOJ Vertical Merger Guidelines, FTC File No. P810034 (June 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577499/vmgslaughterdissent.pdf.

[63] Press Release, Antitrust Div., U.S. Dept. of Justice, *Justice Department Issues Statement on the Vertical Merger Guidelines* (Sept. 15, 2021), https://www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines.

example, some have suggested that descriptions of how the DOJ may consider offsetting incentives in determining the net effect of a transaction suggests a deviation from the prevailing legal framework in which the DOJ may establish in court a *prima facie* case based on evidence of harm alone.

4. Whether the 2020 Vertical Merger Guidelines should more fully explain, as some have suggested would be appropriate, the range of circumstances that can lead to a concern that a merger may have anticompetitive effects.

5. Whether the 2020 Vertical Merger Guidelines would benefit from further elaboration of the circumstances in which mergers raise concerns of harm related to the evasion of regulation.

In addition to new vertical guidance, the FTC and the DOJ have committed to reviewing the Horizontal Merger Guidelines, most recently revised in 2010. Again, according to FTC Chair Khan, "[p]rior guidelines have represented a somewhat narrow and outdated framework for assessing mergers, and revising the guidelines is an opportunity to close gaps between theory and practice, setting the foundation for more effective and empirically grounded enforcement work."[64] On January 18, 2022, FTC Chair Khan and AAG Kanter held a joint press conference where they announced that the agencies would review updating the Horizontal Merger Guidelines to strengthen enforcement and address consolidation, particularly in the high tech area.[65] Among other things, the agencies noted that they are particularly interested in hearing about "aspects of competition the [current] guidelines may underemphasize or neglect, such as labor market effects and non-price elements of competition like innovation, quality, [or] potential competition. . . ."[66] The agencies will seek public comments on a variety of questions for a 60-day period, with a goal of issuing new guidelines by the end of 2022.

At the same time, drafting (much less adopting) these guidelines will not be an easy task. There are very real questions about how to factor into a competition analysis both traditional economic objectives (*e.g.*, consumer welfare) and other objectives such as wage equality, racial equity, environmental, and benefits to members of underserved, marginalized and diverse groups. Nor is it clear how the agency would balance the concerns with recent uncontrolled inflation (in which cost savings from a merger could be helpful) with these non-price concerns that could exacerbate inflation. Guidelines (if they could be agreed upon by the various constituencies within the Biden Administration) would be a useful first step in clarifying the obtainment of these objectives. At the same time, as long as the law does not change, it will ultimately be the courts that decide to what extent these other objectives are relevant to the merger inquiry, provided that parties are willing to challenge in court the agencies' right to include these objectives in their analysis.

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[64] Memorandum from Lina M. Khan, Chair, Fed. Trade Comm'n, to Commission Staff and Commissioners, Vision and Priorities for the FTC (Sept. 22, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf.

[65] Press Release, U.S. Dep't of Justice, *Justice Department and Federal Trade Commission Seek to Strengthen Enforcement Against Illegal Mergers* (Jan. 18, 2022), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-strengthen-enforcement-against-illegal.

[66] U.S. Dep't of Justice & Fed. Trade Comm'n, *Request for Information on Merger Enforcement* (Jan. 18, 2022), https://www.justice.gov/opa/press-release/file/1463566/download.

3. *FTC Chair Khan's Other Enforcement Priorities*

On September 22, 2021, FTC Chair Khan circulated to the staff of the Commission a memorandum on "Vision and Priorities for the FTC" during her term.[67] Noteworthy for this article (and to the extent not already discussed above) is the focus in the memorandum on the following:

First, special attention is to be paid to "next-generation technologies, innovations, and nascent industries across sectors." In this regard, Chair Khan's statement is consistent with what has been a special focus of the FTC for the last couple of years and is not really new.[68] Nor is this focus limited to the FTC alone: the DOJ has similarly brought challenges, such as in *Visa/Plaid*, in which the allegedly monopolist payment provider, Visa, was trying to buy a rival before it could disrupt the industry.[69]

Second, without making any specific suggestions, Chair Khan noted that the Commission needs "to find ways to deter unlawful transactions. The rate at which firms propose facially illegal deals heavily strains agency resources and compromises our ability to investigate significant mergers, raising the risk of false negatives. Identifying ways to reduce the agency resources and burden associated with investigating and filing lawsuits against unlawful mergers will be important as we look for ways to turn the page." One possibly *intended* consequence of the prior approval policy may be to deter repeat M&A acquirers from engaging in transactions that are likely to raise antitrust concerns because of the heavy burden that these provisions will then pose for *all their future* acquisitions in the identified space.

Third, Chair Khan identified going after "dominant intermediaries and extractive business models" as another priority area. This mandate included examination of private equity and other investment vehicles to determine whether these business models may distort ordinary incentives in ways that strip productive capacity and facilitate unfair methods of competition and consumer protection violations. Chair Khan noted that "evidence suggests that many of these abuses target marginalized communities, and combating practices that prey on these communities will be a key priority." Unclear is what impact, if any, these considerations will have during specific transaction review, and, ultimately, merger enforcement decisions.

Fourth, Chair Khan focused on the ways in which certain contract terms, including

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[67] Memorandum from Lina M. Khan, Chair, Fed. Trade Comm'n, to Commission Staff and Commissioners, Vision and Priorities for the FTC, *supra* note 64.

[68] The FTC's court challenges to the *Illumina/Grail* and *Nvidia/Arm* transactions this year are consistent with this priority. *See* Press Release, Fed. Trade Comm'n, *FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail* (Mar. 30, 2021), https://www.ftc.gov/news-events/press-releases/2021/03/ftc-challenges-illuminas-proposed-acquisition-cancer-detection; Press Release, Fed. Trade Comm'n, *FTC Sues to Block $40 Billion Semiconductor Chip Merger* (Dec. 2, 2021), https://www.ftc.gov/news-events/press-releases/2021/12/ftc-sues-block-40-billion-semiconductor-chip-merger. Previously, for instance, in December 2019, the Commissioner challenged Illumina's acquisition of Pacific Biosciences, alleging that Illumina was seeking to maintain illegally its monopoly in the market for next-generation DNA sequencing systems by acquiring PacBio to eliminate it as a nascent competitive threat. Press Release, Fed. Trade Comm'n, *FTC Challenges Illumina's Proposed Acquisition of PacBio* (Dec. 17, 2019), https://www.ftc.gov/news-events/press-releases/2019/12/ftc-challenges-illuminas-proposed-acquisition-pacbio.

[69] *See* Press Release, U.S. Dep't of Justice, *Justice Department Sues to Block Visa's Proposed Acquisition of Plaid* (Nov. 5, 2020), https://www.justice.gov/opa/pr/justice-department-sues-block-visas-proposed-acquisition-plaid. Ultimately, the parties announced that they had mutually agreed to terminate their merger agreement and agreed with the DOJ to dismiss the pending litigation. Press Release, U.S. Dep't of Justice, *Visa and Plaid Abandon Merger After Antitrust Division's Suit to Block* (Jan. 12, 2021), https://www.justice.gov/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block.

non-competes and exclusionary clauses, may constitute unfair methods of competition. The focus, and even challenge, of non-competes in the merger context, however, is not new for either the FTC or the DOJ. The agencies required the waiver of such restrictions as a condition of approval of transactions and as grounds for challenge of other transactions. In both the *Axon*[70] and *Altria*[71] cases, the complaints focused on the impact of non-competes. In 2021 alone, the agencies restricted the enforcement of non-competes and/or non-solicitation provisions for employees and/or customers as a condition for clearance in five proposed transactions.[72]

4. Revisions to Bank Merger Guidelines Being Considered

On December 17, 2021, the DOJ announced that it is seeking public comments on whether the 1995 Bank Merger Competitive Review Guidelines ("1995 Bank Merger Guidelines") should be strengthened.[73] Public comments were due by February 15, 2022.

This initiative is not surprising. President Biden's EO urged the DOJ and the agencies responsible for banking oversight to refresh their guidance "to provide more robust scrutiny" of bank mergers.[74] AG Garland and Associate AG Gupta have both spoken on the potential harm from bank consolidations. In a series of tweets, Chair Khan applauded the DOJ's announcement,

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[70] Press Release, Fed. Trade Comm'n, *FTC Challenges Consummated Merger of Companies that Market Body-Worn Camera Systems to Large Metropolitan Police Departments* (Jan. 3, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-challenges-consummated-merger-companies-market-body-worn. This administrative proceeding remains stayed pending an appeal to the U.S. Supreme Court challenging FTC jurisdiction. Order, *Axon Enter. Inc.* v. *FTC*, No. 20-15662 (9th Cir. Oct. 2, 2020), https://www.law360.com/articles/1316925/attachments/0.

[71] Press Release, Fed. Trade Comm'n, *FTC Sues to Unwind Altria's $12.8 Billion Investment in Competitor JUUL* (Apr. 1, 2020), https://www.ftc.gov/news-events/press-releases/2020/04/ftc-sues-unwind-altrias-128-billion-investment-competitor-juul. Following a 13-day administrative trial in June 2021 and subsequent post-trial briefing, a decision from the ALJ is expected in the first quarter of 2022.

[72] *See 7-Eleven Inc./Marathon Petroleum Corp.* (Press Release, Fed. Trade Comm'n, *FTC Orders the Divestiture of Hundreds of Retail Stores Following 7-Eleven, Inc.'s Anticompetitive $21 Billion Acquisition of the Speedway Retail Fuel Chain* (June 25, 2021), https://www.ftc.gov/news-events/press-releases/2021/06/ftc-orders-divestiture-hundreds-retail-stores-following-7-eleven); *DaVita/University of Utah* (Press Release, Fed. Trade Comm'n, *FTC Imposes Strict Limits on DaVita, Inc.'s Future Mergers Following Proposed Acquisition of Utah Dialysis Clinics* (Oct. 25, 2021), https://www.ftc.gov/news-events/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following); *Huntington/TCF Financial* (Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures in Huntington Bancshares Incorporated's Acquisition of TCF Financial Corporation* (May 25, 2021), https://www.justice.gov/opa/pr/justice-department-requires-divestitures-huntington-bancshares-incorporated-s-acquisition-t-0); *Bancorp/Cadence* (Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures in BancorpSouth Bank's Merger with Cadence Bank* (Sept. 2, 2021), https://www.justice.gov/opa/pr/justice-department-requires-divestitures-bancorpsouth-bank-s-merger-cadence-bank); and *S&P/IHS* (Press Release, U.S. Dep't of Justice, *Justice Department Requires Substantial Divestitures and Waiver of a Non-Compete for S&P to Proceed with its Merger with IHS Markit* (Nov. 12, 2021), https://www.justice.gov/opa/pr/justice-department-requires-substantial-divestitures-and-waiver-non-compete-sp-proceed-its).

[73] Press Release, U.S. Dep't of Justice, *Antitrust Division Seeks Additional Public Comments on Bank Merger Competitive Analysis* (Dec. 17, 2021), https://www.justice.gov/opa/pr/antitrust-division-seeks-additional-public-comments-bank-merger-competitive-analysis.

[74] Press Release, White House, *FACT SHEET: Executive Order on Promoting Competition in the American Economy* (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.

stating that increased consolidation among banks had led to higher consumer fees and reduced access to credit for small businesses.[75]

Notably, during the Trump Administration, the DOJ had announced a similar review process of the 1995 Bank Merger Guidelines, with public comments due by October 15, 2020.[76] The 2020 notice, however, focused on revising the guidelines to reflect the modern, evolving economy and emerging technologies that continue to disrupt traditional banking models. Specifically, the notice recommended: (1) increasing the concentration screening thresholds to reflect non-bank competition and deposit data issues; (2) incorporating and clarifying informal analyses adopted since 1995 affecting retail and small-business banking markets; (3) clarifying the DOJ's analysis of middle-market banking; (4) reducing uncertainty in local geographic market definition; (5) offering more guidance to address recurring issues related to centrally booked deposits; and (6) expanding and clarifying the weakened competitor defense applicable to financially impaired banks. The new notice differs in its focus on: "whether bank merger review is currently sufficient to prevent harmful mergers and whether it accounts for the full range of competitive factors appropriate under the laws."

The comments and work undertaken by the DOJ staff in connection with the 2020 notice *may* facilitate the drafting of revisions of the 1995 Bank Merger Guidelines. The process, however, is likely to take time, given the EO's objectives that the other banking agencies are to be involved in the process. In addition, any draft new guidelines will be subject to public comments, which takes some time to complete. Nor are the issues raised simple to address. Even if one were to take the position that there is an "overconcentration" in banking, concentration may vary among industry segments, and these differences should be carefully considered rather than quickly brushed aside. Even concerns of diminished consumer access to bank branches may miss the benefits from reduced transaction costs and entry by nontraditional players, as well as different products offerings, all of which have increased consumer choice. Therefore, to the extent there are changes in the review of bank mergers, those changes are more likely first to be revealed in the enforcement decisions that the DOJ makes in individual transactions and speeches, rather than in new Guidelines.

5. Unclear Whether Merger Remedies Guidelines Will Be Developed As Well

One of former Commissioner Chopra's last actions at the FTC was to urge the rescission of a 2017 FTC remedies report that validated the efficacy of remedies for the vast majority of FTC consents between 2006 and 2012.[77] There has been no indication on whether the 2017 report, or the Merger Remedies Manual[78] released by the DOJ on September 3, 2020, will be rescinded or replaced. The FTC draft strategic plan for FY2022 through FY2026, released by the FTC on

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[75] FTC Chair Lina Khan (@linakhanFTC), TWITTER (Dec. 17, 2021, 12:08 PM), https://twitter.com/linakhanFTC/status/1471890178247643157.

[76] Press Release, U.S. Dep't of Justice, *Antitrust Division Seeks Public Comments on Updating Bank Merger Review Analysis* (Sept. 1, 2020), https://www.justice.gov/opa/pr/antitrust-division-seeks-public-comments-updating-bank-merger-review-analysis.

[77] Fed. Trade Comm'n, Statement of Rohit Chopra Regarding Flaws in the FTC's 2017 Study on Merger Remedies (Oct. 8, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597278/final_chopra_statement_on_2017_remedies_study_redacted.pdf.

[78] U.S. Dep't of Justice, Antitrust Division, Merger Remedies Manual (Sept. 2020), https://www.justice.gov/atr/page/file/1312416/download.

November 12, 2021, does makes clear that the sale of stand-alone business units will continue to be the preferred remedy in merger cases. The DOJ Merger Remedies Manual (the "Manual") articulates a default preference for structural remedies (*e.g.*, divestiture) over conduct or behavioral remedies. The Manual claims that behavioral remedies do not "effectively redress persistent competitive harm" and "substitute central decision making for the free market."[79] The Manual, does, however, leave open the possibility of behavioral remedies only to facilitate structural relief, or where a divestiture would sacrifice significant merger-specific efficiencies and a behavioral remedy both "completely cures the anticompetitive harm" and "can be effectively enforced."[80] For instance, conduct relief, such as temporary supply agreements, is appropriate to facilitate structural relief; however, restrictions on the merged company's right to compete in the final output markets or against the divestiture buyer, even as a transitional term, will not be accepted. Firewall provisions to prevent information from being disseminated within a firm are also to be infrequently used, the DOJ asserted, because "no matter how well crafted, the risk of collaboration in spite of the firewall is great."[81] In weighing the benefits of a firewall, the Manual indicates that the DOJ will work to ensure that it fully walls off information and to establish a carefully designed enforcement mechanism.

The Manual also discusses the DOJ's approach to consummated merger remedies, identifying and approving upfront buyers, and collaborating with other agencies when structuring remedies. In doing so, the Manual memorialized existing agency practice, including a preference for "divestiture of an existing stand-alone business" and an expectation "in most merger cases" that parties must negotiate, finalize, and execute a divestiture agreement with an approved "upfront" buyer before closing.[82] The Manual put strategic and private equity divestiture buyers on an equal footing, even noting that "in some cases[,] a private equity purchaser may be preferred."[83] The Manual also embraced the possibility, in certain cases, of "fix-it-first" remedies that would avoid formal proceedings under the Tunney Act.

It is unclear to what extent the Biden Administration's leadership will feel the need to express their disapproval by quickly revoking the Report or the Manual. Also unclear is whether there will be instances where remedies will be imposed to address any nonconventional concerns discussed above, and, if so, what those remedies will consist of. What is clear, however, is that the Democratic FTC Commissioners will be unbending in their insistence that relief should be structural in all transactions, even when behavioral remedies would preserve the efficiencies of a transaction.

Conclusion

As mentioned at the outset, the pandemic and the heightened deal flow have taxed the agencies in carrying out their mandate. Even without the additional initiatives described above to broaden the scope of antitrust investigations and the deals that are subjected to HSR review, these dynamics were likely to delay the agencies' review of strategic transactions. However, the elimination of

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[79] *Id.* at 4.

[80] *Id.* at 16–17.

[81] *Id.* at 15.

[82] *Id.* at 8–9, 22.

[83] On this point, the Manual is directly at odds with the position taken by FTC Commissioner Chopra. *See* Dissenting Statement of Commissioner Rohit Chopra Regarding the Publication of the Vertical Merger Guidelines, *supra* note 59.

early terminations for *all* deals means that even deals that raise *no* issues were delayed from closing due to compliance with the initial HSR waiting period. And many other deals were delayed further even when a second request was not ultimately issued. For deals that receive second requests, the additional areas of inquiry being explored are adding to the parties' burden (cost and time), and, to the extent their inclusion is novel, increasing the uncertainty of compliance. The delays in reviews is only made worse at present by the remaining gaps in the leaderships of the agencies that are further stretching the resources of the agencies. Given the current and likely near-term continuing heavy workload at the agencies, parties should take these factors into account when planning their transactions and negotiating the timing provisions of their deal.

More generally, antitrust policy and enforcement is currently in the political limelight. Even absent passage of the legislation to alter materially the merger review standards and HSR rule changes, the DOJ and the FTC have committed to being very active in investigating and undertaking enforcement actions in mergers. Hot areas will continue to be nascent/potential competition, particularly in high technology/pharma areas, vertical transactions, and digital/data sectors. Given the heightened antitrust enforcement environment, transaction parties should identify not only current overlapping operations that may raise issues under traditional horizontal merger theories, but also other possible areas of inquiry, including vertical merger issues and the elimination of potential competition as a result of the transaction. Transaction parties should consider the implications of the evolving merger enforcement landscape when drafting the risk provisions of their agreements.

Transaction parties should also have a clear understanding of what remedies they will be prepared to offer if the reviewing agency remains concerned about the transaction, and whether they are prepared to litigate if these concerns cannot be resolved. In some matters, offering to remedy concerns early in the review process may be advantageous. In other matters, litigating with the fix in place that the parties choose to execute may become a preferred way to mitigate risk in those transactions that raise significant concerns but cannot be resolved amicably with the agency. One additional important consideration is the extent to which competition authorities outside the United States may also have concerns and the ability to thwart the transaction parties in their endeavors to close the transaction on a timely basis. Even in this vigorous and evolving enforcement environment, with careful planning and coordination, the vast majority of transactions—even involving strategic firms—should remain achievable.