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U.S. M&A Antitrust Policy in the Year Ahead

The first year of antitrust enforcement under the Biden Administration was one of transition and uncertainty. Faced with the highest deal volume in a generation and intense Congressional oversight, the Federal Trade Commission and the Antitrust Division of the Department of Justice challenged several transactions while implementing and planning procedural changes to delay and inhibit dealmaking. Under new and emboldened leadership, the agencies are expected to pursue an even more aggressive and active enforcement docket in 2022.

As in 2021, the FTC and Antitrust Division will continue to investigate and pursue nontraditional theories of harm, including vertical theories of harm, harm to potential competition or acquisitions involving nascent competitors—so-called “killer acquisitions”—, labor theories of harm, monopsony theories, and competition concerns arising from minority interests, in addition to traditional horizontal mergers. Although certain industries such as big tech and pharmaceuticals will continue to attract legal and political scrutiny, the push for increased enforcement is likely to affect many industries, as evidenced by recent calls to curb consolidation in agricultural, meatpacking, energy, and banking markets amidst rising inflation.

Merger parties should also anticipate searching inquiries relating to novel issues that are not purely competition-related, including those involving labor and sustainability. While it is unclear whether these explorations will lead to legally supportable theories of harm, they nonetheless may add significant transaction costs and delay.

In addition, we expect that settlement discussions will become more contested in the new year as agency leadership seeks further party concessions. Notably, in October 2021, a [divided FTC announced a new policy](#) that requires settling firms to obtain “prior approval” for all future acquisitions affecting the same or related relevant markets. Although the Antitrust Division has made no such policy statement, we expect both agencies to use available procedural levers to demand significantly more information, time, and concessions from transacting parties, which may ultimately lead to more litigated cases.

New Leadership and Policy Objectives

In June 2021, Lina Khan was confirmed as Chair of the FTC. Prior to her appointment, Chair Khan was well-known for her law review note, [Amazon’s Antitrust Paradox](#), which criticized the consumer welfare standard as insufficient to address competition issues in today’s modern economy. In September 2021, Chair Khan published her [Vision and Priorities for the FTC](#), which more expansively identifies “rampant consolidation,” “power asymmetries,” and “structural incentives” across markets as problematic and harmful to “workers and independent businesses as well as consumers.” The President has nominated Alvaro Bedoya, an expert in privacy law and founding director of Georgetown Law’s Center on Privacy and Technology, to fill the Commission seat vacated by Rohit Chopra in November. If confirmed, Mr. Bedoya would restore the Commission’s Democratic majority and allow Chair Khan to implement further changes without the support of Republican Commissioners.

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In November 2021, the Senate confirmed Jonathan Kanter as Assistant Attorney General of the Antitrust Division. Mr. Kanter is a seasoned practitioner with over two decades of experience at the FTC and in private practice. Although he has been less vocal than his FTC counterpart, Mr. Kanter is expected to pursue matters aggressively, particularly with respect to big tech.

President Biden's [Executive Order on Promoting Competition in the American Economy](#) tasked the FTC and Antitrust Division with revitalizing antitrust enforcement, signaling that increased antitrust enforcement is a priority for the Administration. The Executive Order, as well as statements made by Biden appointees now leading the FTC and the Antitrust Division, shows a willingness to use antitrust enforcement to address a host of macroeconomic and societal woes, particularly with respect to labor—a shift from the traditional approach to merger review which focuses on competitive harm as a function of price, output, and innovation in specific product and geographic markets.

In 2022, we expect the FTC and Antitrust Division to continue to pursue the Administration's enforcement priorities, including through changes to their existing policies and merger guidance. In response to President Biden's Executive Order, Chair Khan and then Acting Assistant Attorney General for the Antitrust Division [stated](#) that they intend to review the agencies' merger guidelines to ensure they reflect "the skepticism the law demands." Shortly after the announcement, a divided FTC withdrew the Vertical Merger Guidelines, which were amended only a year ago over the opposition of then-minority Democratic Commissioners. More recently, the Antitrust Division issued a release seeking additional public comments on whether to revise the 1995 Bank Merger Guidelines. We previously [responded](#) to the Division's earlier request for public comment on those same Guidelines made under the Trump Administration.

Citing lengthy dockets and strained resources, the agencies delayed and prolonged merger reviews in 2021, a trend that we expect to continue this year. Procedural changes adopted last year will also continue to impact merger reviews in 2022. In January 2021, the FTC and the Antitrust Division suspended the 43-year practice of issuing early terminations of the HSR waiting period for non-problematic transactions, referencing "the transition to the new Administration" and "the unprecedented volume of HSR filings." In August 2021, the FTC published a press release notifying parties that in light of "a tidal wave of merger filings that is straining the agency's capacity to rigorously investigate deals," the Commission would begin issuing "standard form letters alerting companies that the FTC's investigation remains open" in deals the FTC was simply too busy to review during the requisite HSR timelines. The [Merger Filing Modernization Act of 2021](#), which would significantly increase merger filing fees for large transactions, is intended to alleviate some of these capacity constraints, but it is unclear if the bill will pass and, if passed, whether and how quickly additional revenues would restore typical merger review practices.

Merger Enforcement in 2021

Antitrust enforcement at the FTC and Antitrust Division continued unabated despite disruptions caused by changes in agency leadership.

The FTC opened the year with five pending cases. Two cases involved hospital mergers: the FTC was successful in obtaining a preliminary injunction in one (*Hackensack/Englewood*), which the parties have appealed, and lost the other (*Jefferson Health/Einstein*). The FTC's action to break up Meta/Facebook remains pending before the D.C. District Court and is proceeding to discovery, and the FTC's administrative challenge of Altria's minority interest in Juul concluded in October 2021, with a decision expected soon. The administrative proceeding seeking to unwind Axon's 2018 acquisition of VieVu has been stayed pending the parties' appeal to the U.S. Supreme Court.

The Antitrust Division opened the year with two pending cases, one involving a minority stake in a Pennsylvania hospital system, which settled, and *Visa/Plaid*, which involved allegations that Plaid was "developing a payments platform that would challenge Visa's monopoly" in online debit payments, and therefore the acquisition would "kill" a nascent competitor. The parties abandoned the transaction in early 2021, shortly after the Antitrust Division's challenge.

The FTC initiated four new merger challenges in 2021. In both horizontal cases—*P&G/Billie* and *Lehigh Cement/Keystone Cement*—the parties abandoned the transaction shortly after the FTC filed suit. The two others—*Illumina/Grail* and *NVIDIA/Arm*—are vertical mergers and remain pending in administrative court as merger reviews before the European Commission and other jurisdictions are ongoing. In both cases, the FTC alleges that the transactions will stifle next-generation technologies by giving the combined firms control over inputs that rival firms rely on to develop innovative products. Both Illumina and NVIDIA offered remedies, including long-term supply agreements available to any potential customers, that the FTC deemed insufficient to address its concerns.

The Antitrust Division similarly brought four challenges in 2021 across various industries: *Aon/Willis* (insurance brokerage), *Penguin Random House/Simon & Schuster* (publishing), *U.S. Sugar/Imperial Sugar* (refined sugar), and a joint venture between American Airlines and JetBlue (airlines). The Division's allegations in *Penguin Random House/Simon & Schuster* notably focus on harm to authors (monopsony) rather than consumers (monopoly). Attorney General Merrick Garland described the Antitrust Division's suit as "the latest demonstration of the Justice Department's commitment to pursuing economic opportunity and fairness through antitrust enforcement."

Both agencies also had active settlement dockets, with the FTC entering into six consent decrees, including three gas station mergers and two healthcare mergers, and the Antitrust Division entering into 11 such settlements across a range of industries, including two consumable product mergers, two bank mergers, and two relating to agricultural markets.

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Although strategic deals could become more challenging to execute quickly in the present political environment, the vast majority of M&A will not be significantly impacted. Transacting parties in strategic deals should anticipate and plan for searching inquiries and associated delays. More than ever, early engagement with experienced counsel will best position dealmakers to navigate the changing regulatory environment.

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