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Antitrust Enforcement Takes a Sharp Left Turn

Progressives in the Biden administration are reshaping antitrust policy through key appointments and an executive order that aims to increase competition across the economy, not just in the tech sector. Expect more scrutiny of mergers and employment practices, in particular.

Over the past few years, a strong bipartisan consensus emerged in support of more aggressive antitrust enforcement. There has been a widespread view that enforcement, even during the Obama administration, has been too lax, resulting in higher levels of concentration and resulting harm to American consumers. Although competition in the technology sector has drawn the most attention, the concern extends across multiple industries. Senator Amy Klobuchar (D.-Minn.), a leading voice for stronger competition laws, said the problems range from "cat food to caskets."

Responding to this view, President Biden ordered department and agency heads to prioritize competition issues and he has named "progressives" to the two most important antitrust enforcement positions, where they are likely to press for a paradigm shift in policy. Business is already feeling the effects.

The new leaders of the FTC and Antitrust Division are committed to more aggressive enforcement.

Lina Khan, at age 32, is the youngest chair ever at the Federal Trade Commission (FTC). She made a name for herself with an article, "Amazon's Antitrust Paradox," that criticized Amazon and other big tech companies for allegedly abusing their monopoly positions. She has called for dramatic changes that would broaden the definitions of unlawful conduct and unlawful mergers, and focus more on protecting workers and advancing social justice. Since she was confirmed in June 2021, the FTC has taken a number of actions that portend more aggressive enforcement, including promises to revise the FTC's Horizontal Merger Guidelines; outright repeal of the Vertical Merger Guidelines, most likely in favor of guidance that will increase scrutiny of those deals; letters warning compa-

nies of ongoing investigations of mergers even after expiration of the Hart-Scott-Rodino Act (HSR) waiting period; and new rules to curb anti-competitive behavior.

In merger reviews, the FTC is now asking about the deal's impact on labor markets, the possibility that a merger might lower costs so much that other companies won't be able to compete effectively and, where the buyer is an investment firm, what consequences that may have.

Jonathan Kanter, the nominee to head the Antitrust Division of the Department of Justice (DOJ), has not been as outspoken as Kahn, and he spent 20 years in prominent law firms in New York representing large corporations. But he formed his own firm in 2020 specializing in representing plaintiffs with antitrust claims against big tech companies, and recently he has spoken publicly about the need for strong antitrust enforcement and criticized tech companies for stifling competition. When he is confirmed, he is expected to adopt a pro-enforcement stance similar to Khan's.

Mergers are likely to receive closer scrutiny, but the shift is unlikely to have a chilling effect on dealmaking.

Some deals are certain to be questioned more closely, and there will be more uncertainty and longer investigations, but tough deals can still get done with the right strategy.

The new leaders at the FTC and DOJ will look to challenge more deals and have signaled they may be less willing to accept divestitures and behavioral remedies to resolve concerns. The shift in emphasis is already reflected in the questions posed in merger reviews. Regulators have asked companies about their deals' impact on labor issues, power-buyer concerns and even "anticompetitive efficiencies" (the possibility that a merger might lower costs so much that other companies won't be able to compete effectively), a notion that runs contrary to accepted antitrust doctrine. And very recently the new Bureau of Competition Director at the FTC outlined new steps the agency will take to increase the types of information sought in merger investigations (*e.g.*, the deal's impact on labor markets, cross-market effects and the potential consequences where investment firms are buyers) and to make merging parties' compliance with second requests (the broad document and data requests issued by the agencies) even more difficult and time-consuming.

But, ultimately, to block a merger, U.S. antitrust enforcers must convince a federal judge of the merits of their case. While the FTC and DOJ have decent track records prevailing at trial, especially for traditional, horizontal deals with high market shares, they have been far less successful when they try to push the envelope, for example, by challenging vertical deals or the acquisition of

"nascent" competitors. So, unless Congress decides to lower the bar for blocking a merger, which appears unlikely, the FTC and DOJ will have to argue in court based on existing laws and precedent.

The agencies are also constrained by resources, because litigating mergers is costly. Expert witnesses must be paid and the suits require large teams of staff lawyers and economists. Traditionally, each agency has only been able to litigate a handful of cases at any given time. They simply cannot go to court to block every deal they oppose.

In this changed environment, the right strategy will be critical when defending your deal. For mergers with significant issues, parties should expect to receive and comply with a second request for documents. Compliance with the second request, which restarts the HSR waiting period, can be the only real leverage that parties have because it allows them to "put the agencies to their proof," forcing the regulators to decide whether to let the transaction proceed or file suit to block it, absent a fix. Simply waiting to try to convince the agencies on the merits without putting them on the clock will likely be a losing strategy for more transactions.

For the toughest deals, it will be important to demonstrate that your company is willing to defend the transaction in court. This will likely require tweaks to your merger agreement, including in the antitrust-efforts clause and the drop-dead date, to provide for the possibility that litigation may extend the timeline. For deals that also require foreign antitrust approvals, it will be even more important to coordinate efforts and set a global strategy.

President Biden's executive order promoting competition extends far beyond the FTC and DOJ and has already led to measures far afield from technology.

The president's sweeping July 9, 2021 Executive Order directing departments and agencies to reassess their policies and regulations with an eye to fostering greater competition created a mandate across the government and across the economy.

Industries identified in the order include airlines, healthcare, agriculture, transportation, internet services, technology and finance. Since the order, the Department of Transportation has announced that it will grant greater access to low-cost carrier airlines during peak hours at Newark Airport in order to boost competition, and the DOJ recently challenged an alliance between Jet Blue and American Airlines. Other agencies, such as the Department of Health and Human Services, the Federal Maritime Commission, the Food and Drug Administration, the Federal Communications Commission and the Consumer Financial Protection Bureau are seeking input while

they contemplate reforms to try to improve competition.

Expect to see more attention focused on the labor market.

Enhanced antitrust scrutiny of human resources practices dates back to the end of the Obama Administration, when the Antitrust Division and the FTC jointly warned that "naked" no-poach agreements between employers (*i.e.*, not linked to a transaction or collaboration) and wage-fixing agreements where employers agree not to engage in pay competition would be treated like price-fixing and market allocation agreements, which are *per se* antitrust violations, and would be criminally prosecuted.

The DOJ recently announced several indictments involving wage-fixing conspiracies and no-solicitation agreements, and we expect there will be more, as President Biden specifically called for restrictions on no-poach agreements.

Such arrangements have also given rise to class action antitrust litigation in industries ranging from technology to franchise restaurants and poultry production. If the administration pursues more enforcement actions in labor markets, more civil litigation will surely follow.

Strong bipartisan support for revisions to antitrust laws hasn't yet translated into new legislation, and the outlook is unclear.

At the same time the executive branch is taking a more activist approach to antitrust, almost two dozen proposed bills have been introduced in the House and Senate to reform key statutes. Some would

Takeaways

- Biden's DOJ and FTC appointees appear committed to major changes in enforcement priorities and practice.
- The administration's stress on promoting competition extends across the economy, not just to the technology sector.
- Many mergers will receive more scrutiny, but unless Congress amends the antitrust laws, the change in approach to enforcement should not have a major impact on dealmaking.
- Labor market practices such as no-poach agreements and coordination by employers of employee compensation will receive more attention.

make modest changes (*e.g.*, raising HSR merger review fees, lowering HSR thresholds and increasing enforcement budgets), while others take a more aggressive approach (*e.g.*, prohibiting specific conduct by large online platforms and pharma companies, breaking up online platforms, prohibiting deals by large companies and lowering the standard by which mergers and conduct are judged unlawful).

With so many competing legislative priorities, and uncertainty about which measures may garner support, the fate and timing of these bills is not clear.

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