The Brave New World of Antitrust Merger Review & Enforcement

December 7, 2021

The Biden administration's approach to antitrust merger review and enforcement may signal a dramatic departure from that taken by the DOJ and FTC over the past four decades. Dealmakers face much greater uncertainty about the course that the antitrust agencies review of their transactions will follow, and the type of transactions that will attract Second Requests or enforcement actions. Here are some of the major developments over the past year.

How Aggressive Will the Biden Administration Be?

This Fried Frank memo from January 2021 discusses managing antitrust risk in the Biden Administration. After noting that regulators have evolved toward more enforcement & have demonstrated a greater willingness to tolerate litigation risk in recent years, the memo suggests that because antitrust enforcement is one of the few truly bipartisan issues, the new Administration may well have incentives to "push the limits of the law." The memo discusses various potential legislative initiatives, and then turns to the enforcement side of the equation. Here's an excerpt on that topic:

> Apart from proposed legislative changes, any change in enforcement will depend on President-Elect Biden's appointments to lead the FTC and the DOJ. What is clear, however, is that the sitting Democratic-appointed FTC Commissioners support major changes in the next Administration's approach to antitrust.
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> For example, Commissioner Chopra has been critical of the FTC's long-standing practice of approving pharmaceutical mergers with divestitures limited to overlap products and has argued that the Commission should also consider the overall impact of the size of the companies on competition. He has also been particularly critical of private equity, arguing that roll-up acquisitions by PE-backed firms allow them to quietly accumulate market share and harm competition.
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> Commissioners Chopra and Slaughter recently dissented from the DOJ/FTC Vertical Merger Guidelines and Vertical Merger Commentary because they believe that vertical merger enforcement has been too lax, and strongly

cautioned the market against relying on these guidelines as an indication of how the FTC will act going forward.

While the rhetoric from some commissioners may be strong, the memo also points out that the FTC's enforcement efforts may be constrained by both the lack of judicial receptivity to novel antitrust theories and the agency's own budgetary constraints.

Antitrust Agencies Increase Use of Sherman Act in M&A Enforcement

This [Arnold & Porter memo] from February 2021 looks at 2020 antitrust M&A enforcement and what may lie ahead in 2021. This excerpt says that the DOJ & FTC are increasingly turning to the Sherman Act's anti-monopoly provisions when bringing enforcement actions involving acquisitions of nascent competitors:

> Enforcers usually bring their merger challenges under Clayton Act § 7, which specifically addresses mergers and acquisitions. But enforcers may also allege a conspiracy to restrain trade under Sherman Act § 1 and they may allege monopolization or attempted monopolization under Sherman Act § 2. DOJ can bring these claims directly under the Sherman Act while FTC brings such claims under FTC Act § 5, which prohibits "unfair methods of competition" or "unfair or deceptive acts or practices."
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> In recent years, enforcers have emphasized use of Sherman Act challenges. Last year, we noted that both FTC and DOJ suggested that they may use Sherman Act § 2 to investigate and challenge serial acquisitions of nascent competitors to allow enforcers to analyze mergers as part of a broader pattern of conduct. In 2020, both FTC and DOJ challenged several transactions citing both the Sherman Act and the Clayton Act.
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> DOJ alleged that the "Collaboration Agreement" between Geisinger and Evangelical constituted a conspiracy to restrain trade in violation of Sherman Act § 1, and that Visa/Plaid constituted monopolization in violation of Sherman Act § 2. FTC challenged Altria's minority investment in Juul Labs Inc and associated agreements on the basis that it violated Sherman Act § 1, while Commissioners Chopra and Slaughter argued that FTC should also have challenged the transaction as a conspiracy to monopolize electronic cigarettes in violation of Sherman Act § 2. FTC also is challenging Facebook's consummated acquisitions of Instagram and WhatsApp as part of broader monopolization scheme in violation of Sherman Act § 2.

The increased use of the Sherman Act may be another signal that the agencies are ratcheting up merger enforcement. The Clayton Act isn't a criminal statute, but that's not the case with the Sherman Act. Here's an excerpt from the FTC's description of the Sherman Act in its "Guide to the Antitrust Laws":

> The penalties for violating the Sherman Act can be severe. Although most enforcement actions are civil, the Sherman Act is also a criminal law, and individuals and businesses that violate it may be prosecuted by the Department of Justice. Criminal prosecutions are typically limited to intentional and clear violations such as when competitors fix prices or rig bids.
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> The Sherman Act imposes criminal penalties of up to $100 million for a corporation and $1 million for an individual, along with up to 10 years in prison. Under federal law, the maximum fine may be increased to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime, if either of those amounts is over $100 million.

4th Cir. Affirms Divestiture Order in Private Plaintiff's Antitrust Case

If the increasingly stringent approach of the DOJ & FTC wasn't enough to convince dealmakers of the need to pay close attention to antitrust compliance, a recent 4th Circuit decision may do the trick. In *Steves and Sons v. Jeld-Wen*, (4th Cir.; 2/21), the Court affirmed a lower court's decision to order a divestiture of assets acquired in a deal that closed almost a decade ago!

That would be an interesting result even if the action was brought by regulators – but it wasn't. As this Nixon Peabody memo explains, the lawsuit involved a private plaintiff:

> Jeld-Wen, CMI, and another competitor, were the three makers of "doorskins," an outer layer for molded doors. The three firms sold the doorskins to independent door makers—such as Steves— and also to finish their own molded doors. In October 2012, following the closing of a U.S. Department of Justice investigation, Jeld-Wen and CMI merged. The Department of Justice investigated the merger again in early 2016, and again took no action. In July 2016, almost four years after the merger, Steves sued Jeld-Wen, contending the merger violated Section 7 of the Clayton Act, 15 U.S.C. § 18. A jury subsequently found for Steves, and the district court, among other things, ordered Jeld-Wen to divest the doorskins plant it had acquired from CMI.

On appeal, the defendant argued that divestiture was an improper remedy because, among other things, Steves had waited too long to bring its case. The 4th Circuit disagreed, and affirmed the lower court's divestiture order. The memo points out that *Jeld-Wen* is the first case to order divestiture at the behest of a private plaintiff.

Antitrust: Make Sure the HSR Clock Has Started Running

In March 2021, the FTC provided some reminders on its "Competition Matters" blog, about the importance of making sure that filers have received official confirmation of their HSR filings. This typically comes in the form of a "Waiting Period Letter," and if you haven't received one within a few days of filing, there may be a problem that you need to address.

The blog says that the Pre-merger Notification Office will only send Waiting Period Letters if both the FTC & DOJ have received complete filings from all parties. If your Waiting Period Letter appears to be delayed, there might be a filing deficiency needs to be addressed, or there may be problems with the filing fee. The blog goes on to offer the following tips on making sure that the clock has started to run on your HSR filing:

> – Until you receive a Waiting Period Letter confirming the dates, you should not assume that the waiting period is running or will expire on a certain day. Most of the time, the waiting period will start on the day the agencies receive the filing. Occasionally, if filing deficiencies are not cured promptly or for other reasons (as noted above), PNO staff must delay the start of the waiting period.
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> – You should not assume that the waiting period is running because the PNO has provided you the transaction number. If there are issues with your filing, PNO staff will give you the transaction number to ensure that corrections and updates are processed appropriately. The assignment of a transaction number, which creates a record of the filing, does not mean that the waiting period has started and is not a substitute for the Waiting Period Letter.
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> – In 801.30 transactions (such as tender offers or acquisitions from third parties), only the buyer will receive a Waiting Period Letter. 801.30 transactions are by definition non-consensual, and the buyer's waiting period is confidential under the HSR Rules. After the PNO receives the seller's 801.30 filing, the PNO will send an acknowledgement letter providing only the transaction number.

> – If you need a confirmation that the PNO has received and downloaded your submission before you receive your Waiting Period Letter, use the tracking function of the Accellion FTP platform. You will need to go into your Sent folder in the Accellion FTP application, open the submission, and click on the "Track" button. There is no need to contact the PNO to confirm receipt of the filing.

FTC Challenges Vertical Merger

In March 2021, the FTC announced that had filed an administrative complaint & authorized a federal lawsuit to stop Illumina's $7.1 billion proposed acquisition of Grail, which is developing an early stage cancer detection test. What makes this challenge particularly interesting is that involves a vertical merger, not a merger between competitors. This excerpt from a WSJ article on the FTC's action suggests that it could also set the tone for the Biden administration's merger enforcement efforts:

> The case has added significance because Illumina's proposed acquisition of Grail Inc. is a vertical merger of companies that don't compete head-to-head. Most merger lawsuits involve challenges to so-called horizontal deals that involve the combination of direct rivals. There has only been one litigated challenge to a vertical merger in more than 40 years: the Justice Department's 2017 case against AT&T Inc.'s acquisition of Time Warner Inc., which the government lost.
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> The FTC—consisting currently of two Democrats and two Republicans—voted 4-0 to go forward with the suit against Illumina's planned acquisition, which comes amid expectations that the Biden administration will step up government efforts to police the marketplace for potential harms to competition.
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> FTC Acting Chairwoman Rebecca Kelly Slaughter, a Democrat, has advocated a more aggressive stance against vertical deals, and Tuesday's case could set the tone for future efforts. The suit also comes two weeks after the FTC signaled it is preparing to take a harder line on drug-company mergers.

The case represents the first challenge to a vertical merger since the FTC & DOJ published new Vertical Merger Guidelines last summer. Vertical mergers are often viewed as beneficial because of the efficiencies they create, but the Guidelines note that a vertical merger raises antitrust concerns when it "may diminish competition by allowing the merged firm to profitably use its control of the related product to weaken or remove the competitive constraint from one or more of its actual or potential rivals in the relevant market." This excerpt from the FTC's press release indicates that these concerns featured prominently in the decision to challenge the deal:

> As the only viable supplier of a critical input, Illumina can raise prices charged to Grail competitors for NGS instruments and consumables; impede Grail competitors' research and development efforts; or refuse or delay executing license agreements that all MCED test developers need to distribute their tests to third-party laboratories. For the specific application at issue in this matter—MCED tests—developers have no choice but to use Illumina NGS instruments and consumables.

An Antitrust Divestiture With a Twist

This Mintz memo discusses a recent settlement agreement that the DOJ reached with a buyer, under the terms of which it agreed to divest a portion of the business in exchange for clearance of a proposed merger. There's nothing unusual about an antitrust-related divestiture, but the intro to the memo points out that this one was a little different:

> Stone Canyon Industry Holdings LLC ("Stone Canyon") and its portfolio company SCIH Salt Holdings Inc. ("SCIH") reached a settlement agreement with the Department of Justice ("DOJ") to resolve its investigation of SCIH's proposed acquisition of Morton Salt Inc. ("Morton"). Under the terms of the settlement agreement, which is subject to Tunney Act review, Stone Canyon and SCIH are required to divest all assets relating to evaporated salt in order to proceed with the Morton acquisition. This settlement agreement is noteworthy in that the divestiture was of the buyer to divest its own assets in order to proceed with the transaction, and the DOJ and the parties reached agreement without a divestiture buyer identified.

The memo notes that although antitrust regulators usually require a buyer to be identified in advance, the DOJ has on occasion been willing to move forward without an identified buyer if it determines that the divestiture package is "sufficient to attract a purchaser in whose hands the assets will effectively preserve competition, and that there will be a sufficient number of acceptable potential purchasers for the specified asset package."

Proposed Bi-Partisan Legislation Would Change HSR Fee Structure

This Wachtell Lipton memo says that bipartisan legislation working its way through the Senate would, if enacted, revamp the HSR filing fee structure, and impose significantly greater fees on most transactions over $500 million. Here's an excerpt that breaks down the proposed fee changes:

Size of Transaction	Current Filing Fee
$92 mm to $161.5 mm	$45,000
$161.5 mm to $500 mm	$45,000 or $125,000
$500 mm to $1 bn	$125,000 or $280,000
$1 bn to $2 bn	$280,000
$2 bn to $5 bn	$280,000
$5 bn or greater	$280,000

This Akin Gump blog has more details on the legislation, which advanced through the Senate Judiciary Committee on May 13th.

7-Eleven Acquires Speedway Despite FTC Objections

At some point in their careers, every deal lawyer has been involved in a situation in which the business decision is made that, despite a potentially significant unresolved issue, the parties will move forward and "close through it." A decision like that always involves a willingness to accept some risk, but it takes real fortitude to close through an unresolved HSR review in which all sitting FTC commissioners have expressed opposition to your deal.

Nevertheless, that's what 7-Eleven & Marathon apparently decided to do with 7-Eleven's purchase of Marathon's nearly 4,000 Speedway gas stations/convenience stores. Here's an excerpt from this Freshfields' blog:

> On May 14, 7-Eleven closed its $21 billion acquisition of approximately 3,800 Speedway retail gasoline and convenience store outlets from Marathon Petroleum, despite FTC commissioners unanimously asserting objections to the transaction.
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> All four commissioners acknowledged that the transaction presented antitrust issues, but the Commission evidently failed to reach a majority-supported resolution before the Hart-Scott-Rodino waiting period expired and the parties' timing agreements with FTC staff lapsed – paving the way for closure of the transaction. Lack of Commission resolution within the prescribed framework highlights the uncertainty parties face under a politically and ideologically divided (i.e., 2 Democrats: 2 Republicans) Commission.

The blog notes that the two Democrats issued a statement contending that the transaction may well be illegal & that the parties closed it "at their own risk." The two Republicans countered with a statement alleging that their counterparts "failed to act" and provided nothing more than a "strongly worded statement," despite having nearly a year to address the antitrust concerns raised by the deal.

With statements like that from the commissioners, it's pretty clear that the decision to close the deal involved some courage. But it's also apparent that there was quite a bit of exasperation with the process as well. Check out this excerpt summarizing 7-Eleven's statement about its reasons for moving forward with the transaction:

> – 7-Eleven entered into a timing agreement with FTC staff, which it extended *four times* at the request of staff, that permitted the transaction to close on May 14.
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> – 7-Eleven had also negotiated a settlement agreement involving divestiture of 293 fuel outlets that FTC staff recommended the Commission approve.
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> – On May 11 – less than three days before the scheduled closing date – Acting Chairwoman Slaughter and Commissioner Chopra asked for more time to review the settlement agreement. According to 7-Eleven, the only concern articulated by the two Commissioners was that the agreement allowed too much time for divestiture, with 7-Eleven contending it had offered to shorten this period several times.

The blog also points out that 7-Eleven was facing a contractual obligation to close the transaction within business days of the satisfaction of the deal's closing conditions (which included the expiration of the HSR waiting period).

Interlocking Director Issues

Section 8 of the Clayton Act prohibits competitors from having overlapping directors or managers, regardless of whether any anticompetitive conduct actually occurs. This Sidley memo provides a refresher on antitrust issues regarding the suitability of potential director appointments. This excerpt addresses highlights the application of Section 8 in proxy contests and M&A:

> Interlocking directorate issues may arise when a person serves as an officer or director of two competing companies. In a proxy contest, activist investors should ensure that their candidates do not have any interlocking directorate issues, like in the recent proxy contest launched by activist investor Ancora Holdings, Inc. against Blucora, Inc. Press Release, Blucora, Inc., "Acclaimed Antitrust Expert Believes Ancora CEO Fred DiSanto Cannot Serve on Blucora's Board of Directors" (Apr. 12, 2021).

> The issue can also arise in connection with deals cleared by the U.S. antitrust agencies. Press Release, Dep't of Justice, "Tullett Prebon and ICAP Restructure Transaction after Justice Department Expresses Concerns about Interlocking Directorates" (July 14, 2016) (allowing partial investment between parties under Section 7 of the Clayton Antitrust Act, but requiring the parties to remove director interlock). Most recently, two executives stepped down from a board after the Department of Justice (DOJ) expressed concerns that the appointments created an illegal director interlock between two companies that compete in ticket sales in sports and entertainment markets. Press Release, Dep't of Justice, "Endeavor Executives Resign from Live Nation Board of Directors after Justice Department Expresses Antitrust Concerns" (June 21, 2021.

The memo also points out that even if a particular situation doesn't involve an interlock prohibited by Section 8 of the Clayton Act, other provisions of the antitrust laws, including Section 5 of the FTC Act and Section 1 of the Sherman Act, may be implicated. Compliance with these provisions may require an officer or director to take steps to recuse himself or herself from participation in certain decisions and not access certain information provided to the board that is directly relevant to the competitive overlap.

President's Executive Order Puts the Squeeze on M&A

In July, President Biden signed an "Executive Order on Promoting Competition in the American Economy." The order represents a sweeping, "all government" effort to promote competition. It seeks to accomplish that objective by making it easier for workers to change jobs by banning or limiting the use of non-competes and unnecessary licensing requirements, by limiting the ability of employers to share information that might help suppress wages, and by reducing consolidation in multiple industries.

When it comes to reducing consolidation, the executive order & accompanying fact sheet make it clear that the President wants antitrust regulators to turn up the heat on enforcement & on merger reviews across a variety of industries. The executive order calls on the DOJ & FTC "to review the horizontal and vertical merger guidelines and consider whether to revise those guidelines" in order to address concerns about consolidation, but that's not the only aspect of the order that could impact M&A. According to these excerpts from the fact sheet, the order:

> – Calls on the leading antitrust agencies, the Department of Justice (DOJ) and Federal Trade Commission (FTC), to enforce the antitrust laws

> vigorously and recognizes that the law allows them to challenge prior bad mergers that past Administrations did not previously challenge.
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> – Underscores that hospital mergers can be harmful to patients and encourages the Justice Department and FTC to review and revise their merger guidelines to ensure patients are not harmed by such mergers.
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> – Announces an Administration policy of greater scrutiny of [technology] mergers, especially by dominant internet platforms, with particular attention to the acquisition of nascent competitors, serial mergers, the accumulation of data, competition by "free" products, and the effect on user privacy.
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> – Encourages DOJ and the agencies responsible for banking (the Federal Reserve, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency) to update guidelines on banking mergers to provide more robust scrutiny of mergers.

Wow. The President not only wants antitrust regulators to crack down on three giant sectors of deal economy – healthcare, tech & bank mergers – but he's giving them a forceful reminder that they have the ability to challenge "bad" mergers that past Administrations let through. Like Bette Davis said in "All About Eve," "fasten your seatbelts, it's gonna be a bumpy night." We're posting memos in our "Antitrust" Practice Area.

FTC Chair Lina Khan did not waste any time responding to the executive order's directives. On the same day the President issued his order, she issued a joint statement with the head of the DOJ's Antitrust Division in which the two pledged to "jointly launch a review of our merger guidelines with the goal of updating them to reflect a rigorous analytical approach consistent with applicable law."

FTC Withdraws HSR Guidance on Debt Repayment

In August, the FTC's Bureau of Competition announced that it's walking back an informal interpretive position that some parties have relied upon to avoid HSR filings by reducing the transaction value through repayment of target debt. Here's an excerpt from the agency's "Competition Matters" blog addressing the Bureau's decision:

> Under the Hart-Scott-Rodino rules, parties generally need to file if the transaction is valued over a certain dollar-value threshold. However, previous informal interpretations gave the impression that companies could avoid filing by paying off a target company's debt, instead of paying the company with cash.

> It appears that some merging parties have responded by structuring deals in ways that they believe fall outside of the filing requirements. Target companies may be incentivized to take on debt just before an acquisition, so that the acquiring company can retire the debt as part of the deal. These deals then are not being reported to the FTC and the DOJ, which means that merging parties are effectively sidestepping the law and avoiding accountability.
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> Herein lies the problem of unintended consequences with informal interpretations. Despite the agency's clearly stated assertion that informal interpretations are not a legal determination, companies appear to rely on them as a substitute or supplement for their own legal analysis. In practice, this means that informal interpretations regarding instances that companies may not have to file are being treated by merging parties as if they are legal exemptions.
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> That outcome is not aligned with either the statute or the agency's stated instructions. It is the Commission's responsibility, with the concurrence of the DOJ, to determine whether and when reporting exemptions are appropriate, through rules or formal interpretations of those rules. As a law enforcement agency, the FTC must be mindful of helping firms avoid accountability, even indirectly.

If you can read the blog's commentary on the "unintended consequences" of informal agency interpretations without muttering a few expletives under your breath, you're a better person than I am. But be that as it may, effective September 27, 2021, the Bureau says that it will begin to recommend enforcement action for companies that fail to file when retirement of debt is part of the deal consideration. Here's the Bureau's updated position on debt repayment.

Antitrust Risks: Dealing with the New Environment

The Biden Administration has adopted an aggressive posture toward antitrust enforcement, and this Wilson Sonsini memo reviews the latest developments at the FTC & DOJ and discusses their implications for M&A. The memo says that the close scrutiny of "Big Tech" is likely to continue over the long-term, and that concerns about acquisitions that eliminate nascent competitors have already led to challenges to several deals, and that regulators are closely reviewing the impact of transactions on labor markets.

The memo also says that parties will find it increasingly difficult to resolve regulatory challenges to deals. Behavioral remedies are increasingly off the table, and any settlement is likely to require divestiture of a stand-alone business to a well-financed competitor. All of this means that the merger review process is going to be much more difficult to navigate and approvals more difficult to obtain. In this environment, the memo offers the following takeaways for companies considering acquisitions:

> – Consider Deal Certainty Carefully: An attractive premium is only truly attractive if a deal can close. Potential targets must be cognizant that antitrust risk could make any offer to acquire illusory.
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> – Ensure That the Acquisition Agreement Protects Your Interests: Sellers must be sure that the buyers will take the necessary steps to ensure their deals close (e.g., make divestitures, litigate, pay a break fee if the deal is blocked), and buyers must be aware that expansive divestiture demands could result in a remedy that frustrates the purpose of the deal or, worse, requires the divestiture of the buyer's own assets to get the deal closed in light of agency concerns.
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> – Plan for a Prolonged Review: The agencies also are demanding more time to complete their reviews. Anticipate reviews that last three months or more longer than in previous administrations. The FTC recently announced that its staff is overwhelmed with the volume of HSR notifications and that reviews are taking longer than normal as a result.
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> – Be Wary That the FTC May Conduct a Post-Close Review: On August 3, 2021, the FTC announced that given the volume of M&A activity, in some instances, the agency would continue its reviews beyond the time allotted under the HSR Act. Thus, a deal could conceivably receive clearance from the agencies, close, and subsequently be investigated and potentially subject to remedies or eventual FTC challenge.

The FTC is signaling a hard line, but some companies may be willing to call the agency's bluff. In August 2021, Illumina closed its acquisition of Grail despite a pending FTC administrative proceeding to block the deal, and a Bloomberg article published that month suggests that, given the FTC's limited resources, other companies may be willing to do the same.

FTC Rescinds Vertical Merger Guidelines

In September 2021, – a little more than a year after adopting the first overhaul of its Vertical Merger Guidelines in 40 years - the FTC voted to rescind them. Here's an excerpt from this Cadwalader memo:

> On September 16, 2021, the FTC voted 3-2 to withdraw its support for the Vertical Merger Guidelines, which were jointly adopted by the FTC and the

> Antitrust Division of the U.S. Department of Justice ("DOJ"), and the Commission's commentary on vertical merger enforcement. The FTC's rescinding of policies without issuing new guidance, coupled with the destabilizing blows to the premerger notification filing program under the Hart-Scott-Rodino Act that we discussed recently, leaves merging parties in the lurch, forcing them to navigate the merger review process in the dark.
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> To add to the confusion, the FTC and DOJ may be applying different policies with regard to vertical mergers, as the DOJ Acting Assistant Attorney General Richard A. Powers issued a statement hours after the FTC's vote that, although the Department is reviewing the Vertical Merger Guidelines, they currently remain in place at the DOJ.

The memo notes that the DOJ is currently reviewing both the Horizontal Merger Guidelines and the Vertical Merger Guidelines "to ensure they are appropriately skeptical of harmful mergers," and says that while significant policy changes may be deferred until after Jonathan Kanter is confirmed to head the Antitrust Division of the DOJ, it already has identified several aspects of the Vertical Merger Guidelines that "deserve close scrutiny" and has pledged to work closely with the FTC to revise them as appropriate.

Antitrust Merger Review: There's a New Sheriff in Town

This September 2021 Fried Frank memo discusses the FTC's rapidly evolving approach to merger review and enforcement, and makes it clear that there's a new normal when it comes to the FTC's priorities. Here's the intro:

> In a memorandum issued to the Federal Trade Commission (FTC) staff last week, Lina Khan, the new Chair of the FTC, indicated that the agency's priorities and approaches in reviewing proposed M&A deals will differ from those in the past. Kahn stated that the FTC, rather than viewing its work in two "silos" relating to antitrust and consumer protection, will be reviewing deals "holistically" and taking an "integrated approach" to the harms that "Americans are facing in their daily lives."
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> She explained, for example, that the agency will focus on whether there are "power asymmetries" leading to "harms across markets, including those directed at marginalized communities," and whether the business models and structures used will "incentivize or enable" unlawful conduct. Further, she stated that, given "the growing role of private equity and other investment vehicles," the agency will "examine how these business models may distort ordinary incentives in ways that strip productive capacity and may facilitate unfair methods of competition and consumer protection

> violations," particularly when "these abuses target marginalized communities …."

The memo goes on to point out that the FTC's merger review won't be based solely on conventional market-based analysis, but will also involve an assessment of the broader societal impacts of a transaction. That appears to be already happening, as the memo notes that "in some deals the FTC has been seeking information during the second request stage of its investigations about topics such as unions, wages, the environment, corporate governance, franchising, diversity, and noncompete agreements."

As further evidence of the changing environment, the FTC's Bureau of Competition announced in a late-September blog post that it was implementing a number of changes to the second request process that were designed to make it more streamlined and more rigorous. While several changes are being made, the expanded approach to merger review outlined in Chair Khan's memorandum is front and center:

> First, we are seeking to ensure our merger reviews are more comprehensive and analytically rigorous. Cognizant of how an unduly narrow approach to merger review may have created blind spots and enabled unlawful consolidation, we are examining a set of factors that may help us determine whether a proposed transaction would violate the antitrust laws.
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> Providing heightened scrutiny to a broader range of relevant market realities is core to fulfilling our statutory obligations under the law. To better identify and challenge the deals that will illegally harm competition, our second requests may factor in additional facets of market competition that may be impacted. These factors may include, 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.

FTC Reinstates Prior Approval Policy

Prior to 1995, the FTC had a longstanding policy requiring divestiture orders entered in merger cases to include provisions mandating that respondents seek its prior approval for future acquisitions within certain markets for a period of 10 years. In July 2021, the FTC voted to reinstate that policy, and in October, the agency announced the issuance of this Prior Approval Policy Statement that sets forth the details of that policy. Here's an excerpt:

> Going forward, the Commission returns to its prior practice of including prior approval provisions in all merger divestiture orders for every relevant market where harm is alleged to occur, for a minimum of ten years. The Commission is less likely to pursue a prior approval provision against merging parties that abandon their transaction prior to certifying substantial compliance with the Second Request (or in the case of a non-HSR reportable deal, with any applicable Civil Investigative Demand or Subpoena Duces Tecum). This should signal to parties that it is more beneficial to them to abandon an anticompetitive transaction before the Commission staff has to expend significant resources investigating the matter.
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> In addition, from now on, in matters where the Commission issues a complaint to block a merger and the parties subsequently abandon the transaction, the agency will engage in a case-specific determination as to whether to pursue a prior approval order, focusing on the factors identified below with respect to use of broader prior approval provisions. The fact that parties may abandon a merger after litigation commences does not guarantee that the Commission will not subsequently pursue an order incorporating a prior approval provision.

The Statement goes on to address a list of factors that will be applied holistically to determine whether the FTC may decide to seek a prior approval provision that covers product and geographic markets beyond just the relevant product and geographic markets affected by the merger. It also says that the FTC will require buyers of divested assets in merger consent orders to agree to a prior approval for any future sale of those assets for a minimum of ten years.

The Rise of Hipster Antitrust: DOJ Brings Monopsony Case

Earlier this week, the DOJ announced that it had filed a lawsuit to block Penguin Random House's pending $2.175 billion acquisition of Simon & Schuster. Why? Here's what the DOJ's press release has to say about that:

> While smaller publishers occasionally win the publishing rights to anticipated top-selling books, they lack the financial resources to regularly pay the high advances required and absorb the financial losses if a book does not meet sales expectations. Today, Penguin Random House, the world's largest publisher, and Simon & Schuster, the fourth largest in the United States, compete head-to-head to acquire manuscripts by offering higher advances, better services and more favorable contract terms to authors. However, as the complaint alleges, the proposed merger would eliminate

> this important competition, resulting in lower advances for authors and ultimately fewer books and less variety for consumers.
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> The complaint alleges that the acquisition of Simon & Schuster for $2.175 billion would put Penguin Random House in control of close to half the market for acquiring publishing rights to anticipated top-selling books, leaving hundreds of individual authors with fewer options and less leverage. According to its own documents as described in the complaint, Penguin Random House views the U.S. publishing market as an "oligopoly" and its acquisition of Simon & Schuster is intended to "cement" its position as the dominant publisher in the United States.
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> Courts have long recognized that the antitrust laws are designed to protect both buyers and sellers of products and services, including, as relevant here, authors who rely on competition between the major publishers to ensure they are fairly compensated for their work. As the complaint makes clear, this merger will cause harm to American workers, in this case authors, through consolidation among buyers – a fact pattern referred to as "monopsony."

This was all pretty standard fare until the last paragraph – because as this Axios article notes, monopsony is a pretty unusual claim in an antitrust enforcement proceeding, and one with some significant potential implications. Here's an excerpt:

> The main harm being alleged in the complaint is a harm to workers — authors who could end up receiving less money when there are fewer bidders for their work. "This is the DOJ saying they are prepared to bring at least some labor side monopsony cases," says Rebecca Haw Allensworth of Vanderbilt Law School. "Even though the statutes and the case law would support the idea, it is a departure from how things have been going in the past 40 years."

This focus on monopsony as an area of concern for the antitrust laws has been derided as "hipster antitrust" by its critics, but the DOJ's lawsuit is just the latest sign that the concept is becoming mainstream. If you're interested in an in-depth look at how that happened, check out this blog by the FTC's former General Counsel.

Antitrust: Where's the Enforcement Surge?

Given the surge in HSR filings last fall & some of the fire-breathing statements coming out of the FTC in recent months, you'd expect to see a significant uptick in the agency's merger enforcement activity. According to the most recent edition of Dechert's merger investigation [timing tracker](), that doesn't seem to have happened:

> Given FTC warnings about a "surge" of HSR filings last Fall, which led the FTC and DOJ to suspend grants of early termination of the 30-day HSR waiting period in February, the data depict what might feel like the calm before a storm.
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> Assuming that the increase in overall HSR filings will lead to at least some uptick in the number of significant U.S. merger investigations, we would expect to begin seeing an increase in the number of significant U.S. merger investigations concluded as we reach a year after the initial surge begun. We have not seen that surge yet. To the contrary, the FTC did not file a single complaint or consent decree in the third quarter.

The report suggests that one of the reasons behind the absence of an enforcement surge is that the number of significant U.S. merger investigations concluded in 2021 is still behind historical averages. The disconnect between the surge in HSR filings last year and the lower number of completed investigations this year provides reason to believe that the duration of investigations is "ticking upwards."

According to the report, the upshot of all this is that parties to a significant deal should in the U.S. should plan on at least 12 months for the agencies to investigate their transaction and should also plan for another 7-9 months if they want to preserve their right to litigate an adverse agency decision.