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ANTITRUST DEVELOPMENTS IN M&A

In this article, the authors describe how newly appointed leaders at the FTC and DOJ have set their sights on implementing once-in-a-generation alterations to the U.S. antitrust landscape, including new substantive approaches and recent procedural and policy changes. Next, they turn to changes in antitrust merger policies in select jurisdictions around the world. They close with practical considerations for transactions in this evolving antitrust merger review environment.

By Richard Hall and Daniel K. Zach*

Major changes are taking place in antitrust merger enforcement in the United States and abroad. While only a small percentage of M&A activity is affected by competition issues, the number of deals facing scrutiny by the Federal Trade Commission ("FTC"), the Antitrust Division of the Department of Justice ("DOJ"), and international enforcement agencies is growing. Deals that are investigated by these agencies face increasing delays and difficulties to close.

Newly appointed leaders at the FTC and the DOJ have their sights set on implementing once-in-a-generation alterations to the U.S. antitrust landscape. Both agencies are exploring new substantive theories that have never been tested with courts, and are implementing burdensome policies and procedures that have already begun to impact transactions, and more significant changes appear to be on the horizon. The evolution of antitrust regulation is not limited to the U.S., as stricter merger review processes around the world are affecting the ability and also the timing of parties to consummate transactions.

While it would be impossible to identify all the significant changes taking place, we highlight many of the biggest developments thus far at the FTC, DOJ, and select foreign antitrust authorities, and discuss other major changes currently under consideration. We also describe practical considerations firms should keep in mind when evaluating M&A opportunities in this environment, and we highlight some ways in which companies are already responding to the increasing uncertainty and new risks faced by dealmakers.

CHANGING U.S. ANTITRUST MERGER ENFORCEMENT

Last summer, President Biden explained that he viewed the last 40 years of U.S. antitrust enforcement as a failure and vowed to reduce the trend of corporate consolidation.[1] He issued an Executive Order that set several priorities for U.S. antitrust enforcers and other government agencies, and called on the FTC and the DOJ to "enforce the antitrust laws vigorously" while highlighting that "the law allows them to challenge prior

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[1] President Joseph R. Biden, Jr., *Remarks at Signing of 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/.

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bad mergers that past Administrations did not previously challenge."[2]

To implement his antitrust agenda, President Biden appointed a number of high-ranking government officials who believe in a new and progressive antitrust philosophy. Self-described "neo-Brandeisians," like Tim Wu, President Biden's Special Assistant for Technology and Competition Policy, believe that U.S. antitrust policy needs to be fundamentally transformed. In 2018, Mr. Wu wrote in his book, *The Curse of Bigness*, that: "We live in an age of extreme corporate concentration, in which global industries are controlled by just a few giant firms — big banks, big pharma, and big tech."[3] According to Mr. Wu, "[t]he priority for neo-Brandeisian antitrust is the reform of merger review."[4]

President Biden appointed Lina Khan — a like-minded scholar — to the FTC's top position. Chair Khan has written and spoken extensively about her views on how antitrust enforcement should change and that the FTC needs "to address rampant consolidation and the dominance that it has enabled across markets."[5] At the DOJ, recently appointed Assistant Attorney General Jonathan Kanter has warned against "the harms of anticompetitive consolidation across the many dimensions of the modern economy."[6] Referencing the DOJ's threat to sue to block the now abandoned merger between shipping equipment companies Cargotec and Konecranes — even after both companies had offered to divest part of their businesses — AAG Kanter stated that his agency would rather reject a settlement and litigate than let the public bear the risk that divestures fail.[7] AAG Kanter stressed that the DOJ is "[m]ore committed than ever to litigating" and is investing additional resources in its litigation capabilities.[8] While not everyone shares their perspective,[9] Attorney General Merrick Garland publicly remarked that "too many industries have become too consolidated over time,"[10] and both Chair Khan and AAG Kanter are working together on major efforts — such as revising FTC/DOJ merger guidelines — which could have an enormous and lasting impact on how mergers are investigated and challenged in the U.S.

These newly appointed FTC and DOJ leaders have already begun to target the policy and enforcement efforts of their respective agencies on the areas identified by the White House. President Biden indicated that "enforcement should focus in particular on labor markets, agricultural markets, healthcare markets (which includes prescription drugs, hospital consolidation, and

[2] Exec. Order No. 14,036, § 1, 86 Fed. Reg. at 36,988.

[3] Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (2018).

[4] *Id*.

[5] FTC Chair Lina M. Khan, *Vision and Priorities for the FTC* (September 22, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf.

[6] Assistant Attorney General Jonathan S. Kanter, *Remarks on Modernizing Merger Guidelines* (January 18, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-modernizing-merger-guidelines.

[7] Assistant Attorney General Jonathan S. Kanter, *Opening Remarks at 2022 Spring Enforcers Summit* (April 4, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers.

[8] *Id.*

[9] For example, FTC Commissioners Christine Wilson and Noah Philips, both Republicans, have referred to certain recent agency policy changes as "a gratuitous tax on merger activity." FTC Commissioners Christine S. Wilson and Noah J. Philips, *Dissenting Statement Regarding the Statement of the Commission on Use of Prior Approval Provisions in Merger Orders* (October 29, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598095/wilson_phillips_prior_approval_dissenting_statement_102921.pdf.

[10] Attorney General Merrick B. Garland, *Remarks at the Roundtable on Promoting Competition and Reducing Prices in the Meatpacking Industry* (January 3, 2022), www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-roundtable-promoting-competition-and.

insurance), and the tech sector."[11] With respect to labor markets, the DOJ brought the first labor monopsony case in many years when it sued to block the proposed acquisition of book publisher Simon & Schuster by Penguin Random House in November 2021.[12] In a speech last December, Chair Khan explained that the FTC was "redoubling our commitment to investigating potentially unlawful transactions or anticompetitive conduct that harm workers," noting that "we must scrutinize mergers that may substantially lessen competition in labor markets."[13] Attorney General Garland echoed these views, stating that "protecting American workers from anticompetitive labor practices and employer concentration is central to the Justice Department's antitrust enforcement and advocacy work."[14]

In line with the President's call for more vigorous enforcement against consolidation in the agricultural industry, last November the DOJ also sued to block the proposed merger between U.S. Sugar and Imperial Sugar.[15]

In the healthcare sector, the DOJ recently sued to block UnitedHealth Group's proposed vertical integration with Change Healthcare. DOJ's complaint alleges that the proposed $13 billion transaction would harm competition in commercial health insurance markets, as well as in the market for a vital technology used by United's rivals to process health insurance claims.[16] Attorney General Garland commented that the DOJ is "committed to challenging anticompetitive mergers, particularly those at the intersection of health care and data."[17]

The FTC is also continuing to bring hospital merger cases regularly. On the heels of other recent challenges,[18] in February, the agency sued to stop the now abandoned merger of Rhode Island's two largest health care providers, Lifespan Corp. and Care New England Health System.[19]

In the pharmaceutical industry, while some recent matters have still resulted in consent agreements,[20] Chair Khan's FTC remains committed to the "Multilateral Pharmaceutical Merger Task Force," first launched under her predecessor amid concerns that the agency's past reviews of pharmaceutical mergers have been

[11] The 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/.

[12] U.S. Department of Justice, *Justice Department Sues to Block Penguin Random House's Acquisition of Rival Publisher Simon & Schuster* (November 2, 2021), https://www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon.

[13] FTC Chair Lina M. Khan, *Remarks at the Joint Labor Workshop of the Federal Trade Commission and the Department of Justice* (December 6, 2021), www.ftc.gov/system/files/documents/public_statements/1598791/remarks_of_chair_lina_ m_khan_at_the_joint_ labor_workshop_final_139pm.pdf.

[14] U.S. Department of the Treasury, *New Treasury Report Finds Corporate Concentration, Anti-competitive Practices Have Stifled Wages for Workers and Reduced their Power in the Marketplace* (March 7, 2022), https://home.treasury.gov/news/press-releases/jy0634.

[15] U.S. Department of Justice, *Justice Department Sues to Block U.S. Sugar's Proposed Acquisition of Imperial Sugar* (November 23, 2021), https://www.justice.gov/opa/pr/justice-department-sues-block-us-sugar-s-proposed-acquisition-imperial-sugar.

[16] U.S. Department of Justice, *Justice Department Sues to Block UnitedHealth Group's Acquisition of Change Healthcare* (February 24, 2022), https://www.justice.gov/opa/pr/justice-department-sues-block-unitedhealth-group-s-acquisition-change-healthcare.

[17] *Id*.

[18] In the matter of *Hackensack Meridian Health, Inc. and Englewood Healthcare Foundation*, the FTC filed an administrative complaint and authorized a suit in federal court to block Hackensack Meridian Health, Inc.'s proposed acquisition of Englewood Healthcare Foundation. On August 4, 2021, the FTC obtained a preliminary injunction halting the acquisition during the pendency of an FTC administrative trial. On March 22, 2022, the Third Circuit Court of Appeals affirmed the district court's preliminary injunction. *FTC v. Hackensack Meridian Health, Englewood Healthcare Foundation*, 3rd U.S. Circuit Court of Appeals No. 21-2603.

[19] FTC, *FTC and Rhode Island Attorney General Step in to Block Merger of Rhode Island's Two Largest Healthcare Providers* (February 17, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/02/ftc-rhode-island-attorney-general-step-block-merger-rhode-islands-two-largest-healthcare-providers.

[20] FTC, *FTC Requires Generic Drug Marketers ANI Pharmaceuticals, Inc. and Novitium Pharma LLC to Divest Rights and Assets to Two Generic Products as Condition of Merger* (November 10, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-requires-generic-drug-marketers-ani-pharmaceuticals-inc-novitium-pharma-llc-divest-rights-assets.

ineffective.[21] The Task Force's goal is to look for "fresh approaches that fully analyze and address the varied competitive concerns" that pharmaceutical mergers could raise.[22]

FTC and DOJ leadership remain on the lookout for anticompetitive acquisitions in the tech sector. Chair Khan and fellow Democrats voted to issue an amended complaint in the FTC's ongoing federal antitrust case against Meta, which was initiated in 2020, and challenges, among other conduct, Facebook's 2012 and 2014 respective acquisitions of Instagram and WhatsApp.[23] While the types of challenges to tech mergers that the agencies' new leaders plan to bring on their own remain to be seen, matters currently being investigated may shed more light on their approach in the near future. For example, Microsoft's proposed $68 billion acquisition of game studio Activision Blizzard raises a number of interesting antitrust issues, and the FTC's review has already attracted Congressional attention.[24] There are also indications that, going forward, agency leaders intend to review tech mergers using new theories of harm, some of which may be unconnected to the core antitrust principles that have gained bipartisan consensus over the past several decades,[25] and they may open more investigations into transactions even if they fall below HSR reporting thresholds.[26]

New Substantive Approaches Being Explored

FTC and DOJ leaders appear likely to continue pursuing many of the enforcement approaches used by their predecessors, including challenging acquisitions of nascent threats by monopolists, reviewing transactions to evaluate if they are potential "killer acquisitions," and challenging vertical mergers. The agencies also appear poised to explore the use of entirely new theories to evaluate and possibly challenge mergers. For example, in public statements, Chair Khan and AAG Kanter have expressed concern about "moat-building" and data-aggregation strategies by digital platforms, cross-market effects, negative effects caused by private equity firm acquisitions, and a host of other issues. They have also expressed deep skepticism that past remedies accepted by their agencies have been successful in preventing harm, and they are working together to assess whether existing merger guidelines published by the FTC and the DOJ should be revised. If the agencies were to significantly modify their guidance, it would be a landmark event that could substantially alter how mergers are investigated and ultimately challenged in U.S. courts. However, the soundness of many of the theories being considered for inclusion in new guidelines remains unclear, as does the likely reaction of courts to new approaches that are untethered to existing case law.

Chair Khan and AAG Kanter appear poised to continue their predecessors' approach of challenging large firms when they acquire nascent threats to their

[21] Former FTC Commissioner Rohit Chopra described FTC's traditional overlap analysis as "narrow, flawed, and ineffective" and as "allowing pharmaceutical companies to further exploit their dominance, block new entrants, and harm patients in need of life-saving drugs." Rohit Chopra, *Dissenting Statement in the Matter of AbbVie, Inc. / Allergan plc* (May 5, 2020), 0169_dissenting_statement_of_commissioner_rohit_chopra_in_the_matter_of_abbvie-allergan_redacted.pdf.

[22] FTC, *FTC Announces Multilateral Working Group to Build a New Approach to Pharmaceutical Mergers* (March 16, 2021), www.ftc.gov/news-events/press-releases/2021/03/ftc-announces-multilateralworking-group-build-new-approach.

[23] FTC, *FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme to Crush Competition After String of Failed Attempts to Innovate* (August 19, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/08/ftc-alleges-facebook-resorted-illegal-buy-or-bury-scheme-crush-competition-after-string-failed.

[24] The Wall Street Journal, *Four U.S. Senators Cite Microsoft-Activision Deal Concern in FTC Letter* (March 31, 2022), https://www.wsj.com/articles/u-s-senators-pressure-ftc-to-review-microsoft-activision-merger-11648741204.

[25] On March 31, 2022, FTC Chair Khan explained that "the particular business strategies that digital markets reward require us to look beyond concepts like foreclosure and exclusion when trying to cognize harm, especially in the context of merger investigations. For example, when a dominant platform

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pursues an acquisition as a way to overtake emerging rivals in still-nascent markets, foreclosure may not be a likely tactic. Instead of cutting off access, the strategy requires swift integration and rapid scaling of the acquired product so that the firm can quickly establish a strong foothold. The deal can still facilitate the maintenance of a monopoly — and therefore be illegal — but the precise mechanism may look different from some of the traditional concepts that antitrust enforcers look to." FTC Chair Lina M. Khan, *Remarks at the Charles River Associates Conference, Competition & Regulation in Disrupted Times* (March 31, 2022), www.ftc.gov/system/files/ftc_gov/pdf/CRA%20speech.pdf.

[26] FTC Chair Lina M. Khan, *Remarks Regarding Non-HSR Reported Acquisitions by Select Technology Platforms* (September 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596332/remarks_of_chair_lina_m_khan_regarding_non-hsr_reported_acquisitions_by_select_technology_platforms.pdf.

business. These cases rely on a different statute — Section 2 of the Sherman Act, which prohibits certain actions by monopolists — than the one used to challenge most anticompetitive mergers, Section 7 of the Clayton Act. The FTC brought the first such case — *Questcor* — in 2017.[27] Since then, both the FTC and the DOJ have pursued additional cases using this theory, which is at the center of the FTC's ongoing litigation against Meta. In a sign that FTC and DOJ leaders intend to keep pursuing these types of cases, they announced that, as part of their evaluation of the merger guidelines, the agencies would "seek input on potential updates to the guidelines' discussion of potential and nascent competitors, which may be key sources of innovation and competition."[28]

FTC and DOJ leadership also continue to express concern about "killer acquisitions," which occur when incumbents buy firms or assets that might compete with them in the future, and the acquiring company shelves or kills the product in development post-merger.[29]

Similarly, both agencies are continuing to challenge vertical acquisitions. Just prior to Chair Khan's appointment, the Commission voted for the first time in decades to challenge a vertical merger in the *Illumina/Grail* case.[30] The FTC has challenged two more proposed vertical mergers[31] under Chair Khan's leadership, and the DOJ challenged another earlier this year.[32]

While they have continued to pursue vertical merger challenges, Chair Khan and AAG Kanter do not agree with their predecessors about how best to provide guidance about the agencies' review of such transactions. In September 2021, shortly after Chair Khan's appointment, the FTC withdrew its approval of the 2020 DOJ/FTC Vertical Merger Guidelines, claiming that they "include unsound economic theories that are unsupported by the law or market realities," and that they were withdrawn "to prevent industry or judicial reliance on a flawed approach."[33] While the DOJ has not withdrawn its approval, AAG Kanter stated that "[t]he Antitrust Division shares the FTC's substantive concerns regarding vertical merger guidelines."[34]

Chair Khan and AAG Kanter are also exploring theories of harm that substantially diverge from the analytical approaches used to evaluate mergers by courts and past administrations. For example, both have said they are concerned about "moat-building or data-aggregation strategies by digital platforms," as well as "the cross-market effects of a transaction."[35] In this context, AAG Kanter has explained that the DOJ's interpretation of "moat-building" is that tech companies

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[27] *FTC, et al. v. Mallinckrodt ARD Inc., et al*., Civil Action No. 1:17-cv00120 (D.D.C.), FTC File No. 1310172 (January 30, 2017).

[28] U.S. Department of Justice and FTC, *Justice Department and Federal Trade Commission Seek to Strengthen Enforcement Against Illegal Mergers* (January 18, 2022), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-strengthen-enforcement-against-illegal.

[29] Assistant Attorney General Jonathan S. Kanter, *Remarks at the Charles River Associates Conference, Competition & Regulation in Disrupted Times* (March 31, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york ("The strategy is simple — buy up any firm that shows even a modest potential to develop into a competitive threat.").

[30] FTC, *FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail* (March 30, 2021), https://www.ftc.gov/news-events/press-releases/2021/03/ftc-challenges-illuminas-proposed-acquisition-cancer-detection.

[31] FTC, *FTC Sues to Block $40 Billion Semiconductor Chip Merger* (December 2, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/12/ftc-sues-block-40-billion-semiconductor-chip-merger; FTC, *FTC Sues to Block Lockheed Martin Corporation's $4.4 Billion Vertical Acquisition of Aerojet Rocketdyne Holdings Inc*. (January 25, 2022),

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https://www.ftc.gov/news-events/news/press-releases/2022/01/ftc-sues-block-lockheed-martin-corporations-44-billion-vertical-acquisition-aerojet-rocketdyne.

[32] U.S. Department of Justice, *Justice Department Sues to Block UnitedHealth Group's Acquisition of Change Healthcare* (February 24, 2022), https://www.justice.gov/opa/pr/justice-department-sues-block-unitedhealth-group-s-acquisition-change-healthcare.

[33] FTC, *Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary* (September 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary.

[34] Assistant Attorney General Jonathan S. Kanter, *Remarks on Modernizing Merger Guidelines* (January 18, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-modernizing-merger-guidelines.

[35] *Id.*; FTC Chair Lina M. Khan, *Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement* (January 18, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599783/statement_of_chair_lina_m_khan_regarding_the_request_for_information_on_merger_enforcement_final.pdf.

are believed to use exclusionary strategies to protect their "core monopoly from entry and disruption," taking advantage of powerful network and feedback effects across digital ecosystems.[36] Similarly, Chair Khan has asserted that companies may be able to leverage their dominance in one sphere to advantage a separate line of business, for example, because a transaction increases their overall bargaining power.[37] However, it is so far unclear what evidence would cause the agencies to file a complaint based on such theories and whether courts would be willing to block mergers based on theories with little or no grounding in economic literature or case law. The same is true of arguments concerning the impact that acquisitions by private equity firms may have on competition, a topic that is also of interest to European antitrust regulators.[38]

Another significant difference between current and former agency leaders is their views on remedies. Both Chair Khan and AAG Kanter have stated publicly that they believe many past remedies accepted by their agencies have failed and more mergers should be challenged in court rather than settled. For example, AAG Kanter suggested that the DOJ may in the future seek to block transactions where traditionally it might have pursued a structural remedy such as divestitures.[39] Similarly, Chair Khan has expressed skepticism about the effectiveness of both behavioral and divestiture remedies.[40]

Some of these new theories and approaches to remedying harm may find a place in agency revisions to their merger guidelines. On January 18, 2022, the FTC and the DOJ announced that they were "soliciting public input on ways to modernize federal merger guidelines to better detect and prevent illegal, anticompetitive deals in today's modern markets."[41] In the request for information issued by the agencies to gather input for possible revisions, the FTC and the DOJ asked a host of questions related to: (1) potential and nascent competition; (2) monopsony power and labor markets; (3) innovation and IP; (4) digital markets; and (5) remedies.[42] Recent statements by agency officials indicate not only that the agencies may revise things like how they evaluate harm to innovation or the effect of mergers on labor markets,[43] but they may also be considering changes to the very distinction that has historically existed between horizontal and vertical mergers.[44]

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[36] Assistant Attorney General Jonathan S. Kanter, *Remarks at the Charles River Associates Conference, Competition & Regulation in Disrupted Times* (March 31, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-cra-conference.

[37] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L. J. 710 (2017).

[38] FTC, *Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave* (September 28, 2021), https://www.ftc.gov/enforcement/competition-matters/2021/09/making-second-request-process-both-more-streamlined-more-rigorous-during-unprecedented-merger-wave; Nicoletta Rosati, Pietro Bomprezzi, Massimiliano Ferraresi, Annalisa Frigo and Michela Nardo, *Common Shareholding in Europe* (2020), https://publications.jrc.ec.europa.eu/repository/handle/JRC121476.

[39] Assistant Attorney General Jonathan S. Kanter, *Address Before the New York State Bar Association* (January 24, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york ("Therefore, in my view, when the division concludes that a merger is likely to lessen competition, in most situations we should seek a simple injunction to block the transaction. It is the surest way to preserve competition").

[40] FTC Chair Khan wrote in a public letter to Senator Elizabeth Warren that "[w]hile structural remedies generally have a stronger track record than behavioral remedies, studies show that divestitures, too, may prove inadequate in the face of an unlawful merger. In light of this, I believe the antitrust agencies should more frequently consider opposing problematic deals outright." FTC Chair Lina M. Khan, *FTC Chair Khan Shares Warren's Concerns About Giant Defense Industry Mergers* (August 12, 2021), https://www.warren.senate.gov/oversight/letters/new-ftc-chair-khan-shares-warrens-concerns-about-giant-defense-industry-mergers.

[41] U.S. Department of Justice and FTC, *Justice Department and Federal Trade Commission Seek to Strengthen Enforcement Against Illegal Mergers* (January 18, 2022), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-strengthen-enforcement-against-illegal.

[42] *Id.*

[43] For example, in announcing the agencies' plan to consider revisions to the merger guidelines, FTC Chair Khan stated that "[w]hile the current merger boom has delivered massive fees for investment banks, evidence suggests that many Americans historically have lost out, with diminished opportunity, higher prices, lower wages, and lagging innovation." FTC Chair Lina M. Khan, *Statement Regarding the Request for Information on Merger Enforcement* (January 18, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599783/statement_of_chair_lina_m_khan_regarding_the_request_for_information_on_merger_enforcement_final.pdf.

[44] In a recent speech, FTC Chair Khan, while explaining her views on antitrust issues in tech markets, stated that "[t]he multi-

Depending on how, if at all, the agencies revise their merger guidelines, the impact on dealmakers in the United States could be enormous. With current leadership poised to begin pursuing several new approaches, and appearing to be less amenable to remedies, companies should expect that their interactions with the agencies in future investigations may differ significantly from their past experiences. In many cases — far more than in the past — parties should expect the agencies to seek to block their deals outright.

Recent Procedural and Policy Changes

While the agencies appear to still be evaluating whether to make changes to the guidelines that govern the substantive analysis of mergers, they have already begun implementing procedural and policy changes that have introduced significant uncertainty and risks for companies during the merger review process. The most impactful procedural change to date has been the FTC's repeal of its long-standing 1995 Policy Statement on prior approval provisions in consent decrees and the introduction of a new Policy Statement on that topic in October 2021.[45] Under the new policy, parties that settle a merger investigation must agree in the settlement that they will seek the FTC's approval before consummating any future transaction in markets identified in an FTC order.[46] FTC prior approval requirements remain in place for a minimum of 10 years and cover even transactions that fall below the HSR threshold. Additionally, the FTC now requires *buyers* of divested assets to agree to obtain prior approval for any future sale of the assets they acquire in divestiture orders.[47] Such provisions may be a deal-breaker for some prospective divestiture buyers. FTC Commissioner Wilson has warned that the FTC's new policy could have the effect of discouraging parties to engage in the types of deals that previously proceeded with straightforward remedies, because parties may be unable to find a buyer for divested assets that is willing to accept an FTC prior approval obligation. She also warned that the government's investigation of a proposed merger under a prior approval provision may be much different than a similar investigation under the HSR Act, in part because the FTC can take "as long as it likes."[48]

The FTC and the DOJ have also suspended granting early termination of the HSR waiting period. Previously, the agencies would regularly grant early termination if their review was completed and it was determined they would take no enforcement action. With that option off the table, all parties should now expect to wait a minimum of 30 days between filing HSR and closing, even if the deal is clearly unproblematic.

Finally, both the FTC and the DOJ now issue "close-at-your-own-risk letters" after HSR deadlines expire in certain matters. The FTC claims this is because a large volume of deals is straining agency resources. It is important to note that the letters do not prevent closing or alter agency authority in any way. But they create uncertainty for parties about future agency action, without identifying why the agency may have concerns today. FTC Commissioner Wilson stated that "HSR review now faces death by a thousand cuts," criticizing the policy to issue close-at-your-own-risk letters as an

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dimensional ways in which different lines of business may be interlinked can also render outdated frameworks that still try to analyze relationships as 'horizontal' or 'vertical,' straining in particular current approaches to investigating mergers." FTC Chair Lina M. Khan, *Remarks at the Charles River Associates Conference, Competition & Regulation in Disrupted Times* (March 31, 2022), www.ftc.gov/system/files/ftc_gov/pdf/CRA%20speech.pdf.

[45] FTC, *Statement of the Commission on the Use of Prior Approval Provisions in Merger Orders* (October 25, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf. FTC described the prior suspension of prior approval/prior notice provisions in merger settlements as having "made it more difficult and burdensome to deter problematic mergers and acquisitions." Moreover, FTC stated publicly, in response to parties abandoning a deal in the face of FTC resistance, that "it is disappointing that the FTC had to expend significant resources to review this transaction when we previously filed suit in 1995 to block the same combination" and that "this is representative of the type of transaction that should not make it out of the boardroom." FTC, *FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers* (October 25, 2021), https://www.ftc.gov/news-events/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive.

[46] FTC, *FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers* (October 25, 2021), www.ftc.gov/news-events/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive.

[47] *Id*. at 3.

[48] FTC Commissioners Christine S. Wilson and Noah J. Philips, *Dissenting Statement Regarding the Statement of the Commission on Use of Prior Approval Provisions in Merger Orders* (October 29, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598095/wilson_phillips_prior_approval_dissenting_statement_102921.pdf.

unnecessary injection of uncertainty into markets and potentially chilling deal activity.[49]

CHANGES IN ANTITRUST MERGER POLICIES IN SELECT JURISDICTIONS AROUND THE WORLD THAT COULD IMPACT U.S.-FOCUSED M&A

Non-U.S. regulators are also adjusting their merger review processes in ways that could have significant consequences for dealmakers. We highlight a few of the significant changes taking place around the world, focusing on those developments that may impact U.S.-focused transactions, particularly in the tech and pharmaceutical sectors.

On March 26, 2021, the European Commission ("EC") published a new policy allowing it to accept referral requests from Member States to review a transaction, even if that transaction falls below European turnover thresholds.[50] The EC subsequently used its new policy to review Illumina's acquisition of Grail, even though Grail has no European turnover. The EC's policy lists several factors which make a below-threshold review more likely, including transactions where the target: (1) is a start-up or recent entrant with significant competitive potential; (2) is an important innovator; (3) has access to competitively significant assets (such as for instance raw materials, infrastructure, data, or intellectual property rights); or (4) provides products or services that are key inputs for other industries. In its assessment, the EC may also take into account whether "the value of the consideration received by the seller is particularly high compared to the current turnover of the target." From a practical perspective, parties to transactions that may be perceived as having a possible effect on future or innovation competition need to be aware that the EC may insert itself in the deal process, subjecting them to a legal obligation to suspend closing, even if there is no European turnover.

For deals in the tech space, the proposed EU Digital Markets Act could mean additional delays and uncertainty. Under the proposal, a digital "gatekeeper" would be obliged to notify the EC of certain mergers or acquisitions in the digital sector, even if the target has *de minimis* European turnover.[51] Similarly, the UK is considering introducing a new regulatory regime with specific merger rules and mandatory reporting requirements for digital companies.[52] Comparably, the Australian authority is considering steps to incentivize digital tech companies to notify their deals in advance, notwithstanding Australia's voluntary merger control regime.[53] Amendments to the Turkish merger control regime require "technology undertakings" (including pharmaceutical and tech companies) to notify certain acquisitions in Turkey, even if the target does not generate turnover in Turkey.[54] The cumulative impact of these policy changes is that multi-jurisdictional filings have become much more likely in certain industries, which in turn is a driver for longer outside dates.

Another expected policy change is likely to result from the EC's modernization of its 1997 Market Definition Notice, a policy document that sets out how the EC will analyze the boundaries of the market where companies compete.[55] The EC's modernization effort is focused on: (1) digital markets; (2) the use and purpose of the SSNIP[56] test in defining relevant markets; (3) the

[49] FTC Commissioner Christine S. Wilson, *Statement Regarding the Announcement of Pre-Consummation Warning Letters* (August 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf.

[50] European Commission, *Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases* (March 26, 2021), https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf.

[51] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)* (December 15, 2020), https://ec.europa.eu/info/sites/default/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf.

[52] UK Government, *Consultation on a New Pro-Competition Regime for Digital Markets* (July 20, 2021), https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets.

[53] Australian Competition & Consumer Commission, *Digital Platform Services Inquiry – Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services* (February 28, 2022), https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry.pdf.

[54] Turkish Competition Authority, *Communiqué No. 2022/2* (March 4, 2022).

[55] European Commission, *Competition: Commission publishes findings of evaluation of Market Definition Notice* (July 12, 2021), https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3585.

[56] The SSNIP test assesses what would happen if a hypothetical monopolist in a proposed market would implement a "small significant non-transitory increase in price" ("SSNIP"). If, in response to the price increase, the reduction in sales of the

assessment of geographic markets in conditions of globalization and import competition; (4) quantitative techniques; (5) the calculation of market shares; and (6) non-price competition, including innovation. Adoption of the new notice will likely take place in the course of 2022.

From a deal-making perspective, parties need to be aware that there is no certainty that the EC's new notice will be perfectly aligned with any revised FTC/DOJ merger guidance, which may create challenges in crafting a uniform message to regulators across jurisdictions.

PRACTICAL CONSIDERATIONS IN THIS EVOLVING ANTITRUST MERGER REVIEW ENVIRONMENT

The antitrust environment for M&A is changing drastically, both in the U.S. and beyond. To address their concerns about consolidation across industries, the U.S. antitrust agencies are already attempting to discourage certain transactions from being agreed to in the first place;[57] putting parties through more burdensome, extensive, and time-consuming review processes; requesting longer timing agreements due to the increasing length of agency investigations; and showing greater willingness to go to court to block transactions, if necessary. Therefore, negotiating antitrust efforts commitments in deals with heightened antitrust risk is extremely important. Parties need to consider the interaction of antitrust efforts commitments, reverse break fees, outside dates and commitments to litigate, while understanding that the most effective way to balance these considerations may vary by situation.

First, if a transaction is linked to an industry or theory of harm being focused on by the White House or agency leaders, expect longer and less predictable investigation timelines and close agency scrutiny. As a result, deal practitioners should be considering longer "outside dates" in M&A agreements, and target companies should be considering "ticking fees" to increase the purchase price in the event of excessive delays. Parties should also expect the reviewing agency to request additional information and documentary material from each party (a "Second Request"). If the parties receive Second Requests, the waiting period is extended to 30 days from the date on which both parties certify "substantial compliance" with the request. In this context, parties may need to think carefully before signing an M&A agreement about the conditions under which they would be willing to enter into a "timing agreement" with the issuing agency. A timing agreement, among other things, provides the reviewing agency with assurance that parties will not consummate the transaction before a certain date, historically often about 60 days after the parties to a deal certify substantial compliance with their Second Requests.[58] In return, the agency would often work with parties to narrow the scope of the Second Request and focus some of their effort on evaluating potential remedies that the Commission might accept.

Recently, the FTC has been asking for more time following substantial compliance — frequently 90 to 120 days. Moreover, the agency often asks for extensions, which parties provide because the alternative is to have the FTC sue to block the deal in court. This dynamic provides the agency, in a number of instances, the ability to effectively block a transaction by running the clock and causing parties to abandon (without having

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product would be small enough that a hypothetical monopolist would find it profitable to impose such an increase in price, then a relevant market can be defined.

[57] Recent public statements by FTC officials have repeatedly criticized parties for attempting transactions that "should not have made it out of the boardroom" and that have wasted FTC resources expended on reviewing a transaction that the FTC believes is clearly anticompetitive. *See, e.g.*, FTC, *FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers* (October 25, 2021), https://www.ftc.gov/news-events/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive; FTC, *FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers* (July 21, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter; FTC, *Statement Regarding Berkshire Hathaway Energy's Termination of Acquisition of Dominion Energy, Inc.'s Questar Pipeline in Central Utah* (July 13, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/statement-regarding-berkshire-hathaway-energys-termination.

[58] A timing agreement "does not affect the statutory expiration of the Hart-Scott-Rodino waiting period. Regardless of the commitments made in the timing agreement, the HSR waiting period expires 30 days after the parties certify substantial compliance with the Second Request. (These periods may differ in a cash tender or bankruptcy filing.) Additional time provided by the parties beyond this 30-day waiting period is by agreement, and does not alter this statutory provision." Bruce Hoffman, *Timing is Everything: The Model Timing Agreement* (August 7, 2018), https://www.ftc.gov/enforcement/competition-matters/2018/08/timing-everything-model-timing-agreement.

to go to court and prove the merger is illegal). While not signing a timing agreement may provide parties more flexibility to force the FTC to make a decision about the merits of a transaction, it causes the agency to focus only on doing what is necessary to build the case for a potential court challenge. This may prevent parties from exploring viable settlement opportunities that would allow their merger to proceed. In the current environment, with the agencies analyzing a broader set of competitive theories and more skeptical of remedies, parties to a transaction need to carefully evaluate whether the timing agreement strategies that may have been used in the past are the most effective approach today. When evaluating and comparing offers, sellers may also need to assess more carefully whether they require a reverse termination fee to account for these new risks and possible challenges by the agencies.

Deal counsel should also consider whether the agencies may view their client's transaction as a good "test case" for applying a new theory of harm. Counsel should carefully assess any labor monopsony issues a merger may raise, and expect the reviewing agency to ask about the merged firm's plans for layoffs or wage reductions. For deals in the tech sector, parties should expect questions about innovation incentives, bundling strategies, and anticompetitive "moat-building." Antitrust efforts commitments should be drafted to reflect the agencies' increased appetite to litigate and the reduced likelihood that remedies will be accepted. For example, many sellers of small, innovative firms should evaluate whether they need strong commitments — including a requirement to litigate against a governmental authority — if they are being purchased by larger, incumbent firms. Conversely, buyers may seek to steer the process towards filing HSR based on a non-binding letter of intent. That way, if the deal attracts in-depth scrutiny, the parties can walk away with as little difficulty and delay as possible.

FTC and DOJ's procedural changes to the merger review process also should not be ignored. We have seen parties modify closing conditions in response to the uncertainty introduced by the FTC and the DOJ practice of sending "close-at-your-own-risk" letters.[59] The FTC's prior approval policy has also caused some parties to negotiate express language in their efforts covenants disclaiming the need to accept a prior approval obligation, subject (at times) to certain limitations.[60] Similarly, deal parties should consider if their transaction will be reviewed by non-U.S. regulators, and the potential impact on timing if that happens. The fact that a target company does not have any European turnover or presence is no longer a guarantee that the EC will not interfere. [...] The parties should discuss and agree on, prior to signing an M&A agreement, the transactional impact of any "close-at-your-own-risk" letter or "prior approval" requirement, and appropriately document that agreement in the "efforts" covenant and closing conditions.■

[59] Some deal parties are modifying the closing conditions in their M&A agreement in response to the uncertainty introduced by antitrust agencies' "close-at-your-own-risk" letters. For example, deal parties have specifically agreed that such letters either do, or do not, result in the failure of closing conditions. In one M&A agreement, the HSR closing condition was modified to provide the purchaser with an option to delay closing by 30 days upon receipt of an FTC letter, after which purchaser was obligated to close the transaction.

[60] The FTC's "prior approval" policy has caused some deal parties to negotiate express language relating to a potential need for the purchaser to agree to seek prior approval of future transactions, subject (at times) to certain limitations. For example, deal parties have modified the "efforts" covenants in M&A agreements to reflect specifically that the purchaser either is, or is not, obligated to agree to a "prior approval" requirement requested by the FTC as part of a settlement.