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Antitrust and the 2024 U.S. elections: Is the past prologue?

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Alden F. Abbott
Senior Research Fellow
Mercatus Center, George Mason University, Arlington

Taylor Alexander
Associate
Rule Garza Howley, Washington, DC

Luis Blanquez
Partner
Bona Law, San Diego

Michael A. Carrier
Board of Governors Professor
Rutgers Law School, Camden

Steven Cernak
Partner
Bona Law, Chicago

Richard Dagen
Partner
Axinn, Veltrop & Harkrider, Antitrust Practice Group, Washington, DC

Lisl Dunlop
Partner
Axinn, Veltrop & Harkrider, Antitrust Practice Group, New York

Eleanor M. Fox
Professor Emerita
New York University School of Law

Deborah Garza
Vice Chair
Rule Garza Howley, Washington, DC

Abbott B. Lipsky, Jr.
Adjunct Professor
Antonin Scalia Law School, George Mason University, Arlington

Erich Makarov
Associate
Rule Garza Howley, Washington, DC

Maureen K. Ohlhausen
Former Acting Chairman and Commissioner
Federal Trade Commission, Washington, DC
Partner
Antitrust and Competition, Wilson Sonsini, Washington, DC

Leslie Overton
Partner
Axinn, Veltrop & Harkrider, Antitrust Practice Group, Washington, DC

Allan Shampine
Executive Vice President
Compass Lexecon, Chicago

Nathan Wilson
Executive Vice President
Compass Lexecon, Washington, DC

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ABSTRACT

As the U.S. elections approach, the future of antitrust enforcement is at a crossroads. Over the past four years, the Biden administration has shifted away from the traditional "consumer welfare" standard, embracing a more aggressive "neo-Brandeisian" philosophy that targets corporate power and broadens antitrust concerns to include labor, small businesses, and environmental issues. This departure from past norms has sparked intense debate, with supporters arguing it is a necessary response to growing corporate dominance, while critics warn it could stifle economic growth. With both major political parties expressing concerns over Big Tech—though from differing perspectives—the outcome of the 2024 election could significantly reshape U.S. antitrust policy. This collection of essays offers diverse insights into these developments and explores the potential long-term impacts on antitrust law in the U.S.

À l'approche des élections américaines, l'avenir des règles de concurrence est à un tournant. Au cours des quatre dernières années, l'administration Biden s'est éloignée de la norme traditionnelle du « bien-être des consommateurs », adoptant une philosophie plus agressive dite « néo-brandeisienne » qui cible le pouvoir des entreprises et élargit les préoccupations en matière de concurrence pour inclure les aspects liés à l'emploi, les petites entreprises et les questions environnementales. Cette divergence par rapport aux pratiques traditionnelles a déclenché un débat animé : certains y voient une réponse indispensable face à la montée en puissance des entreprises, tandis que d'autres craignent qu'elle ne freine la dynamique de croissance économique. Les deux principaux partis politiques expriment des préoccupations à propos des «Big Tech», bien que sous des angles différents. Le résultat des élections de 2024 pourrait ainsi remodeler en profondeur la politique de concurrence aux États-Unis. Cet ensemble d'articles propose un éventail de points de vue enrichissants sur ces évolutions et explore les impacts potentiels à long terme.

Foreword

Alden F. Abbott
aabbott@mercatus.gmu.edu
Senior Research Fellow
Mercatus Center, George Mason University, Arlington

I. Background

1. The 2020 U.S. election ushered in the most dramatic change in U.S. antitrust enforcement policy since the decade following the 1990 election. A bipartisan consensus dating to the 1990s that "consumer welfare" was the touchstone of antitrust enforcement was rejected by new leadership at the Federal Trade Commission (FTC) and Department of Justice (DOJ). President Biden proclaimed the consumer welfare focus a "40-year failed experiment" in July 2021 and called for a "whole of government" approach to reinvigorate supposedly lax antitrust enforcement.[1]

2. Following the White House lead, Biden administration FTC Chair Lina Khan and DOJ Assistant Attorney General for Antitrust Jonathan Kanter promoted antitrust guidance that was far more skeptical of mergers and large company size. They also prioritized as possible antitrust concerns new non-traditional issues such as protection of small business, labor, the environment, and civil rights. Furthermore, the FTC claimed novel authority to regulate "unfair" competition, issuing a sweeping rule banning virtually all non-compete agreements in employment contracts. In public statements and guidelines, the FTC and DOJ signaled a far more aggressive approach that was skeptical of economic justifications for business conduct that had played a significant role in antitrust oversight during recent decades. Some commentators dubbed the new approach "neo-Brandeisian" antitrust, paying homage to early 20th-century Supreme Court Justice Louis Brandeis, who decried "the curse of bigness."

3. It is currently unclear to what extent the 2024 elections will serve as a referendum on the relative merits of the "consumer welfare-oriented" versus "neo-Brandeisian" antitrust enforcement philosophies. Recently, concerns about alleged big business competitive abuses have been voiced both by Democratic and Republican politicians.[2] Thus, the precise path that U.S. antitrust enforcement will take in the near future may be viewed as "up for grabs."

4. Accordingly, this volume of essays by *Concurrences* on antitrust and the 2024 election could not be more timely. It is authored by leading competition law scholars and practitioners representing a wide variety of perspectives on the import of recent key U.S. antitrust developments. It presents a set of highly sophisticated and informative evaluations that can profitably inform key U.S. enforcers and legislators as they grapple to further refine American antitrust policy in an increasingly interconnected global economy.

II. Essays

5. The dramatic and controversial shift in U.S. antitrust enforcement philosophy under the Biden administration does have its American academic supporters. Professor Emeritus Eleanor Fox of New York University Law School, a noted expert on comparative competition policy, offers a full-throated defense of the Biden administration's antitrust program. According to Professor Fox, against all odds, Biden antitrust has lastingly changed the American antitrust conversation. She stresses that the pro-corporate bias of U.S. antitrust since the Reagan Revolution in 1981, reflected in a Justice Scalia-led Supreme Court majority in the new millennium, has been exposed. The framing of complaints, the argumentation before courts, and new merger guidelines operationalize a modern antitrust law and economics that is realistic about corporate power and the winners and losers from its exercise. Although it would take legislative action or a changed majority of Supreme Court Justices to bring Biden policy frontally into law, the common U.S. understanding has been changed and has been brought into closer alignment with the rest of the world.

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

2 *See*, e.g., S. Palma and J. Fontanella-Khan, JD Vance and Kamala Harris scramble US dealmakers' election strategies, *The Financial Times* (July 25, 2024) (antitrust "*practitioners* (. . .) *consider Harris to be potentially more moderate than Vance, who is seen as an economic populist who could double down on the antitrust policies initiated by Biden's trustbusters*"), https://www.ft.com/content/6be260f4-daeb-441c-97c3-67be65242797.

6. An essay by Scalia Law School professor Tad Lipsky (formerly a leading antitrust practitioner and senior government official) provides a critical counterpoint to the Fox position on Biden administration antitrust. Lipsky's article briefly describes the main thrust of Biden antitrust policy, which he argues was shaped primarily by an extreme faction of congressional Democrats. He explains how, if continued, the current policy would materially reduce standards of living in the U.S. and globally. He posits that a Republican victory in the 2024 election would likely reduce the Biden policy's negative impact, but might not eliminate it entirely. Ideally, according to Lipsky, the "antitrust mutineers" will be cast away from the ship of state, and economic rationality will return to command of the bridge.

7. Prominent American antitrust attorneys Deborah Garza (a former acting assistant attorney general for antitrust), Taylor Alexander, and Erich Makarov of Rule Garza Howley assess similarities and differences between the likely antitrust agendas of the two major presidential candidates. According to the authors, whoever wins the presidential race in 2024, it appears we will see a continuation of efforts to break up "Big Tech." Both the Trump and Harris campaigns have sounded a populist tone, promising to challenge "Wall Street" and confront corporate power. They both appear to believe that market dominance by a few Big Tech companies is impeding innovation and the growth of "little tech." But they also come from different perspectives that will likely inform specific enforcement choices. The Trump camp, for example, would use antitrust laws to challenge "woke" corporations it believes use market power or collusion to advance liberal social mores like diversity, equality and inclusiveness (DEI) and suppress speech from the right. The Harris camp is more likely to focus on labor issues and competition in the healthcare and agriculture sectors.

8. Attorneys Luis Blanquez (a former European Competition Commission official) and Steve Cernak (current head of the American Bar Association Antitrust Section) of Bona Law suggest that FTC Chair Lina Khan may have "already won" in resetting U.S. antitrust policy. They explain that the last three years have seen a significant shift in U.S. antitrust enforcement: an aggressive merger enforcement agenda, targeting Big Tech companies with several high-profile monopolization cases, and a renewed enforcement of the Robinson-Patman Act. Blanquez and Cernak argue that a new administration is unlikely to return to policies that marked the administrations prior to Trump. While a new administration might not completely mimic these actions of the Biden administration, they do mark a dramatic and permanent shift in antitrust enforcement.

9. Economists Nathan Wilson and Allan Shampine of Compass Lexecon argue that the U.S. antitrust agencies during the Biden administration have exhibited two faces. According to the authors, on the one hand, there has been a significant amount of very standard enforcement activity that has not always received much discussion. On the other hand, there have also been many areas where the agencies have taken steps far outside of past practice, which take them into territory that is controversial within the context of economics.

10. Senior antitrust attorneys Lisl Dunlop, Leslie Overton, and Richard Dagen of Axinn, Veltrop & Harkrider evaluate the new focus on private equity in Biden administration healthcare antitrust enforcement. Previously, when evaluating the potential antitrust risk associated with potential buyers, a sale to private equity investors was generally considered to pose a much lower antitrust risk than a sale to an industry incumbent. The same is not true today. Pursuant to the White House's 2021 Executive Order on Promoting Competition in the American Economy and its announcement of a "whole of government" approach, the federal antitrust agencies partnered closely with the Department of Health and Human Services (HHS) on examining the role of private equity investment and its impact on competition in the healthcare industry. The concerns surrounding private equity investment can be seen in investigations and enforcement actions against corporate roll-ups. The authors conclude that it is uncertain whether this enforcement focus of the Biden administration would be continued by a new administration of either party.

11. Wilson Sonsini attorney Maureen K. Ohlhausen (former acting chairman of the FTC) assesses FTC federal court litigation during the Biden administration under the leadership of Chair Lina Khan. According to Ohlhausen, the record suggests that the Commission's wins and losses in key competition matters during the Biden administration hold important lessons for how the FTC under the next administration can assess and improve its strategy to ensure that it makes the most of its capabilities to advance the Commission's competition mission. In particular, Ohlhausen argues that a return to the agency's historically bipartisan approach to enforcement will help the future FTC to win more cases and thereby achieve better outcomes for consumers and more efficient use of public resources, which will in turn shore up support for the FTC in key constituencies, such as Congress, where the agency has faced unusually strong criticism during Chair Khan's tenure.

12. Professor Michael A. Carrier of Rutgers focuses on antitrust issues in the pharmaceutical industry. According to Carrier, pharmaceutical antitrust enforcement in the Biden administration has pushed the boundaries. Previously focused on conduct such as "reverse payment" settlements, "product hopping," and "citizen petitions," the FTC has put on the top of its list three targets: improper patent listings in the "Orange Book" maintained by the U.S. Food and Drug Administration (FDA), more aggressive merger enforcement, and pharmacy benefit managers (PBMs). He concludes that it will be worth watching how these enforcement efforts develop in the next administration. ■

A lasting legacy of the Biden administration? Excising neoliberalism from US antitrust

Eleanor M. Fox*
eleanor.fox@nyu.edu
Professor Emerita
New York University School of Law

I. Introduction

1. The approach of the US presidential election provides occasion to reflect on the contribution of Biden administration antitrust. This essay focuses on one contribution—a feature that is only one part of Biden antitrust and one that cannot be ascribed to Biden antitrust alone. The contribution is a powerful blow to the neoliberal presumptions embedded in the last quarter-century of US antitrust case law. The blow, mightily enabled by enforcers and scholars pre-Biden era, stems from the Biden antitrust plank of aggressive enforcement (even on traditional grounds), and from Biden administration rhetoric that has brought the debate from a technocratic argument to a public issue. Consensus has shifted from a trust in business and the market[1] to a realistic appraisal that markets do not (almost) always work, they do not tend to self-correct, businesses do get, keep and exercise power, and businesses' rosy narrative about the pure good they bring to markets and consumers deserve to be met with a healthy degree of skepticism.

2. The critics of Biden antitrust focus on the enforcers' socio-political agenda, often called the neo-Brandeis agenda: using antitrust to protect small business, workers, and farmers, and to break up big businesses. This distracts attention from the bulk of the agencies' work—virtually all of the Department of Justice (DOJ) antitrust and most of the Federal Trade Commission (FTC) antitrust—which is more aggressive enforcement on market terms (not in terms of social values). More aggressive enforcement necessarily entails overturning the neoliberal presumptions in the law—a project that has wide support in both expert and non-expert communities.

3. I call the growing consensus to excise neoliberal presumptions a paradigm shift. It is, however, a qualified shift, for the US Supreme Court majority is not on board, and the dysfunctional Congress cannot be expected to adopt legislation to match the law to the new common understanding.

4. For more than a quarter century, economic law of the United States has been in the grips of neoclassical microeconomic theory. The law has embraced Washington Consensus premises (which are also the premises of neoliberalism or laissez-faire), and clung to them long after the world declared the Washington Consensus is dead.[2]

5. It was not always so. From the end of World War II (and pockets of time before), through the 1950s, 1960s and much of the 1970s, US antitrust had a tradition of skepticism towards private power. It stood ready to control it in the interests of the powerless and in the name of safeguarding competition.[3] Beginning in the late 1970s and into the 1980s, coincident with lower trade barriers, growing overregulation, and the Reagan presidency, the paradigm shifted from skepticism of business power to trust in business.[4] Through the years, many enforcers at both the DOJ and the FTC fought the neoliberal paradigm from a centrist platform, but they did not dampen the neoliberal trajectory of the law.

* The author thanks Harry First and Daniel Francis for their very helpful comments. A version of this paper is also being published by *ProMarket*, a publication of Stigler Center, University of Chicago Booth Business School, under the title: Nudging the Antitrust Paradigm: The Fight to Overcome Neoliberalism.

1 *See* B. Mueller, The Arc of Antitrust: A Text-based Measure of Antitrust Policy Beliefs and Attitudes, *Stanford Computational Antitrust*, Vol. 4, 2024, pp. 107–152, https://law.stanford.edu/wp-content/uploads/2024/07/The-Arc-of-Antitrust.pdf.

2 E.g., D. Rodrik, Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank's *Economic Growth in the 1990s: Learning from a Decade of Reform*, *J. Econ. Lit.*, Vol. 44, No. 4, 2006, pp. 973–987.

3 in *The Paranoid Style in American Politics and Other Essays*, Harper & Row, New York, 1964; Vintage Books, New York, 2008, pp. 188–237.

4 *See* E. Fox, The Decline, Fall and Renewal of U.S. Leadership in Antitrust Law and Policy, *CPI Antitrust Chronicle* (Apr. 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4097141.

6. Today, we are on the cusp of a new shift. The rumblings are not brand new. We heard them in the US presidential election of 2016 and more clearly in the election of 2020. The digital economy had emerged, and, with it, the Big Tech gatekeepers. The new digital giants provided huge benefits but presented huge social and economic perils.[5] In the antitrust space alone, there was an outpouring of literature to the effect that antitrust is standing by while the economy is concentrating, the elites are getting richer, inequality is growing, and neither the market nor antitrust is working for the people.[6]

7. The new movement—the neo-Brandeis movement—called out the feebleness of the law to grapple with the economic realities of private power.[7] But, so too did numerous experts and policymakers who are not neo-Brandeisians; they are a diverse group; they may identify themselves as traditionalists, progressives, or centrists.[8] I shall call them "centrists" for simplicity.

8. Joe Biden, elected president in 2020, laid out a plan "*to reverse these dangerous trends* [of economic consolidation and exploitation]."[9] He appointed Jonathan Kanter and Lina Khan to do the job for antitrust. They and their teams at the DOJ and FTC have made headway in pushing away from neoliberal antitrust. (They have also championed projects tailored to distinctively neo-Brandeisian goals that are not a part of this essay.)

9. This essay explores:

– What was/is the old paradigm?

– What does the new paradigm entail?

– Can there really be a paradigm shift while the Supreme Court is an outlier?

II. What was/is the old paradigm?

10. The old paradigm may be variously called Washington Consensus, laissez-faire, or Chicago School (right wing). At its extreme, which describes recent Supreme Court jurisprudence, it entails the following elements (well known to most readers but necessary to set this stage):

– Markets work (if government stays out) and are self-correcting.

– Business is efficient and is the only reliable source of knowledge, skill and insight into being efficient.

– Businesses may try to get and use market power, but that is hard to do; the market will catch them. It is especially hard absent a cartel or the helping hand of government.

– Government (including antitrust enforcement) is inefficient, clumsy, and prone to protecting inefficient firms from competition and chilling incentives to compete and innovate. Therefore, antitrust should take a light hand in disciplining business, and should be especially reluctant to condemn unilateral (non-conspiratorial) acts, i.e., reluctant to invoke the law against monopolization.

11. Here are some of the rules, standards, principles and presumptions that derive from this worldview:

– Since markets are self-correcting and government errors are not, we should not worry about failing to challenging conduct and transactions that could be anticompetitive, and should be especially cautious before challenging anything.

– Apart from hard-core cartels, it should be very hard to prove an antitrust violation.

– Antitrust should prohibit very little. It should prohibit only conduct that artificially limits output and raises prices, and where defendant lacks a good business purpose.

– Distributive goals are not relevant to antitrust. If winners win more than losers lose, the conduct or transaction is efficient.[10] Exploitative conduct is not and should not be reachable by antitrust. Exploitation is merely redistributive, and antitrust authorities are not price regulators.

– A very large market share, even monopoly-sized, does not tend to prove market power.

– High economic concentration does not tend to prove less competition.

– To help anchor these premises, perceptions, and conclusions, the goal of antitrust should be articulated as consumer or total welfare.[11]

III. The shift

12. The shift away from the Washington Consensus and neoliberal worldview is not just an antitrust phenomenon. It was not even led by antitrust. The chinks in the armor of the Washington Consensus began to appear not long after the industrial West imposed the Washington

5 S. Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, PublicAffairs, New York, 2019.

6 *See*, e.g., Z. Teachout, *Break 'Em Up: Recovering Our Freedom from Big Ag, Big Tech, and Big Money*, St. Martin's Press, New York, 2020; M. Stoller, *Goliath: The 100-Year War Between Monopoly Power and Democracy*, Simon & Schuster, New York, 2019.

7 *See* L. Khan, The New Brandeis Movement: America's Antimonopoly Debate, *J. European Competition Law & Practice*, Vol. 9, Issue, 3, 2018, pp. 131–132.

8 *See* C. Shapiro, Antitrust: What Went Wrong and How to Fix It, *Antitrust*, Vol. 35, No. 3, Summer 2021, pp. 33–45; W. Kovacic, Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law & Policy?, *Antitrust*, Vol. 35, No. 3, Summer 2021, pp. 46–56.

9 Executive Order on Promoting Competition in the American Economy (July 9, 2021).

10 Kaldor-Hicks efficiency.

11 *See*, e.g., F. Easterbrook, The Limits of Antitrust, *Texas L. Rev.*, Vol. 63, No. 1, 1984, pp. 1–40.

Consensus on developing countries, producing unemployment and unrest in the absence of pro-poor and local-specific policies.[12] Washington Consensus lost luster in the world at about the turn of the 21st century. It lost most of its remaining vitality in the financial crisis of 2007–2008. Last year, David Wallace-Wells wrote in the *New York Times*: "America's 'Neoliberal' Consensus Might Finally Be Dead."[13] The *New Statesman* was even more definitive: "The Washington consensus is dead."[14] These observations were made in a macroeconomic context. Antitrust is the microeconomic counterpart of the Washington Consensus—a connection that surprisingly seems not to have been made.

13. Several months ago, the *Washington Post* reported: "*The first stirrings of discontent with the prevailing antitrust consensus appeared during the merger mania of the early 2000s*."[15] These were the first public stirrings of discontent, for centrists were already debating the conservative turn in the case law, in technocratic jargon. Neo-Brandeisians arose with fanfare and a public face. The neo-Brandeisians had no quarter for either the conservatives or the centrists. They believed that centrist policymakers were "*too concerned with placating Big Business*"; we needed revolution.[16]

14. Neo-Brandeisians argued that antitrust had been co-opted by corporate power and elite lawyers and policymakers for forty years, that monopolies were everywhere—especially among the ranks of Big Tech—and were untouched by antitrust, that the consumer welfare guide to antitrust was a cover for the status quo; any business conduct could be justified.[17]

15. Meanwhile, the centrists—quieter and less flamboyant—were and are equally determined to take the laissez-faire premises out of US antitrust. But they are not aligned with neo-Brandeis, not radical, not on board with the use of antitrust to protect small business, and adamant about saving the consumer welfare standard or a version of it that rejects infusion of antitrust with social-political values.[18]

16. It took these two schools (although antagonists), with Biden enforcers on the platform, to spotlight and excise Washington Consensus antitrust from the common understanding.

12 *See* J. Stiglitz, *Globalization and its Discontents*, Norton, New York, 2002.

13 D. Wallace-Wells, America's 'Neoliberal' Consensus Might Finally Be Dead, *NY Times* (May 25, 2023). *See* D. Leonhardt, New Centrism is on the Rise in U.S. Politics: Common Ground Over Mistrust of Free Market, *NY Times* (May 17, 2024).

14 A. Nagle, The Washington consensus is dead, *New Statesman* (Mar. 18, 2023). *See* Rodrik, *supra* note 2.

15 S. Pearlstein, The education of Lina Khan, whose superpower is busting monopolies, *Washington Post* (May 14, 2024).

16 Ibid.

17 *See* L. M. Khan and S. Vaheesan, Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents, *Harv. L. & Pol'y Rev.*, Vol. 11, No. 1, 2017, pp. 235–294.

18 *See* Shapiro, *supra* note 8.

IV. The Biden enforcers

1. How they have pushed the paradigm

17. It is necessary to look closely at what the Biden enforcers have done and are doing in the space of aggressive antitrust on market grounds. To be sure, they are working in other spaces, including fairness and pro-smallness; the FTC issued a major policy statement on unfair methods of competition,[19] and issued a contested rule against non-compete clauses in employment contracts,[20] but that is not where I detect a lasting legacy. I would cite two aspects of the Biden enforcers' work indicative of their fight for stronger antitrust on market terms: the cases they bring and the Merger Guidelines. Aspects of each may not be sufficiently "market," but the center of gravity decidedly is about making markets work better for the people (especially consumers) they are supposed to serve.

1.1 The cases

18. Virtually all of the complaints that the Biden enforcers have filed allege traditional violations. It is not true, as critics assert, that the Biden enforcers have abandoned the consumer. The complaints all pinpoint consumer harm except in the cases that concern only upstream restraints (such as anticompetitive practices in labor markets), and even then they allege traditional market harms—growth and use of market power and suppressing competition. In court and on motions, the Biden enforcers back up their arguments with modern court decisions, even while also invoking earlier ones. When economic expertise is necessary, they choose distinguished economists who are well reputed as experts; predictably, not individuals who still embrace Washington Consensus presumptions.

19. When the FTC sued Amazon some months ago, it did not allege harms from low prices, as did Lina Khan in her famous Yale student article, Amazon's Antitrust Paradox.[21] The FTC alleged high-price harms to consumers from Amazon's practices on its platform, such as punishing rivals that charge lower prices elsewhere.[22] The FTC and the DOJ have pending cases against all of the Big Tech gatekeepers, some inherited from the Trump administration. All allege harms to consumers.

19 Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022).

20 FTC Non-compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024), enjoined on grounds that the FTC does not have power of substantive rule-making and, as arbitrary and capricious (Aug. 19, 2024), likely to be appealed.

21 L. Khan, Amazon's Antitrust Paradox, *Yale L.J.*, Vol. 126, No. 2, 2017, pp. 710–805.

22 *FTC v. Amazon*, complaint (W.D. Wash. Nov. 2, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/1910134amazonecommercecomplaintrevisedredactions.pdf.

20. The agencies have presented novel theories and have invoked old Supreme Court case law. For example, in the case of Meta's acquisition of Within, a leading virtual reality fitness app developer, the FTC invoked a 1970s Supreme Court case on loss of future competition. While the FTC failed to prove its factual case—that Meta would probably have entered the virtual fitness market and added competition but for the acquisition—the court endorsed the FTC's roadmap and paved the way for challenges to mergers based on loss of future (potential) competition, even in nascent markets.[23] In the case of the DOJ and states against Google for monopolization of the search market, the DOJ pursued a substantially traditional case—with cutting-edge foreclosure aspects—against Google's paying device makers billions of dollars a year for the exclusive right to preload Google search on their devices, tying up the most efficient avenue for entry and expansion for rivals; and the DOJ won at trial. It was the states that alleged the novel theory of Google's duty of providing "feature parity" to rivals. (But note, this was also a market theory; it was not about non-market social values.) The states' claim was dismissed.[24]

21. *Amazon*, *Meta/Within*, and *Google* are representative of the cases brought on grounds of harm to the market, and not on non-market facets of the neo-Brandeis agenda.

1.2 The 2023 Merger Guidelines

22. The 2023 Merger Guidelines story is a similar story of trying to make the law more aggressive and excise the conservative perspective, all within a pro-market context. The story requires a bit of history. The DOJ issued its first merger guidelines in 1968, pulling together lessons from the Supreme Court merger cases. The 1960s and early 1970s Supreme Court cases were tough on mergers. The Reagan Revolution (in the early 1980s) reversed the paradigm (dropping entirely the mainstay analysis for mergers that lessened the competition between leading rivals, later reintroduced as unilateral effects). In the years to follow, the agencies updated the merger guidelines by increments. The Biden officials set about to change the narrative.

23. The 2023 guidelines' process began with the assembly of a team, which included distinguished economists at the head; then came a published draft; a period of listening, consultation, criticism and debate; and the final guidelines, which responded substantially to the criticism.

24. The guidelines are solely about market harms, not about protecting small business. When labor markets are touched—which is simply an elaboration of an issue raised in the prior (2010) guidelines—they are based on market analysis. Critics of the 2023 guidelines complain that thresholds for concern about market concentration are too low, that burdens are shifted too easily, and that new issues are raised without specific guidance, such as extending dominance to an adjacent market. Each of these technical points can be debated within the frame of what is good aggressive merger analysis, but the criticism is not about non-market neo-Brandeisian values.

1.3 What never happened?

25. There are two defining characteristics of neo-Brandeisian philosophy: (i) calls for equity for all stakeholders, including farmers, small business, and workers, and (ii) calls for deconcentration of business—"break 'em up." The Biden enforcers have pursued these objectives in their case enforcement (principally) only to the extent that the values are coextensive with market-focused law, such as in labor markets. To be sure, the administration has been much more alert than previous administrations to harms in labor markets. It has vigorously sought to protect workers from employers' buyer cartels (no-poach agreements).[25] It stopped a major merger—*Penguin/Simon & Schuster*—on grounds of harms to writers from bulked-up buyer power of the highly concentrated big publishers.[26] These are competition harms.

26. In sum, aggressive antitrust on its own market terms—which means stripping away the neoliberal perspective from market analysis—is a major feature of neo-Brandeis philosophy; it is a major feature of Biden enforcers' commitment; and it is as well a desideratum of the centrists— who, by definition, have a different concept of the endpoint of the shift.

V. Lasting legacy

27. The Washington Consensus presumptions and assumptions are summarized in part II, above. The new consensus repudiates every one of them.

28. While much uncertainty surrounds America's political future, and America's political future will have a big bearing on the future and stability of the paradigm shift, the sum of the two schools or movements described in this essay has changed the conversation in a lasting way. The laissez-faire ideologies have been exposed not only as inaccurately depicting economic reality but also as tilting the scales in favor of elites and against the people. The members of the new consensus must deal with the inconvenient fact that the laissez-faire premises have been baked into the base of substantive US antitrust law. The specific antitrust rules of law—on predation, on refusals to deal, on exclusionary practices—all derive from the base. And the Supreme Court is not likely to change these foundational values.

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23 *FTC v. Meta Platforms (Within Unlimited)*, ___F. Supp.___ (N.D. Cal. 2023).

24 *United States and States v. Google L.L.C.*, Case No. 20-cv-3010 (APM) (D.D.C. Aug. 5, 2024), Dkt. No. 1033.

25 *See* remarks of AAG Kanter at the Fordham Competition Law Institute's International Antitrust Law and Policy Conference (Sept. 22, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-fordham-competition-law.

26 *United States v. Bertelsmann SE*, 646 F. Supp. 3d 1 (D.D.C. 2022).

29. Is there still room to claim that consensus has shifted in a meaningful way? Four reasons support a cautious yes.

30. First, the shift is a qualified shift. Second, laissez-faire philosophy has been significantly rejected in the United States and most of the world. US antitrust is just now catching up. This context and environment are bound to affect thinking and analysis. Third, one can take on the mantle of AAG Kanter and declare: We do the best we can in the context we find. As Kanter has vowed, the DOJ will look for and develop the best facts, and, wherever possible, factually distinguish the neoliberal Supreme Court precedent.[27] Good facts go a long way.[28] Well-articulated complaints that tell a compelling story in plain English go a long way. Fourth, US antitrust enforcers now speak the same language on power and its abuse as their counterparts around the world. Although the consensus of the community, more or less, is no match for the opinions of the Supreme Court, the US is finally back in the world conversation. ■

27 J. Kanter speeches at the Fordham Competition Law Institute's International Antitrust Law and Policy Conference, 2022 and 2023, https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-keynote-fordham and https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-fordham-competition-law.

28 *See Duke Energy Carolinas v. Duke Energy Corp.*, ___F. 4th___ (4th Cir., Aug. 4, 2024), threading the *Trinko* needle to support liability.

The "progressive" antitrust mutiny: On course for the economic doldrums

Abbott B. Lipsky, Jr.*
alipskyj@gmu.edu
Adjunct Professor
Antonin Scalia Law School, George Mason University, Arlington

I. Introduction

1. In 1890, the Sherman Act launched the world's first comprehensive system of limits on anticompetitive business conduct. In 1974, based on more than eighty years of common-law evolution, the Supreme Court began to acknowledge economic analysis as a guide to antitrust law interpretation—an approach supported by extensive scholarship, a broad consensus of the antitrust community, and the fundamental goal of the law: to protect competition to attain "*the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress*."[1] During the past half-century, guided by this consensus approach, the U.S. extended its leadership as the "*wealthiest, most innovative nation in history*."[2]

2. Recently, however, a radical challenge to this consensus has emerged. In 2016, the final year of the Obama administration, Attorney General Lynch gave a high-profile speech to the antitrust bar, emphasizing "*economic justice*"—rather than "*the greatest material progress*"—as a fundamental antitrust goal.[3] Nine days later, President Obama's Council of Economic Advisers (CEA) published a report broadly questioning U.S. competitive success, suggesting profits were excessive, industries too concentrated, and competition weak, according to several "indicators."[4] This accompanied announcement of an executive order by President Obama, Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy.[5] On the same day, a "progressive"-Democrat-aligned advocacy group published a detailed and approving analysis of the CEA report and the executive order.[6] Three days later, the *New York Times* began to publish adulatory articles.[7]

3. Senior Congressional Democrats (including arch-progressive Massachusetts Senator Elizabeth Warren) appeared in Berryville, Virginia, on July 24, 2017, to announce a "Better Deal" initiative, echoing the same themes and recommending strengthened antitrust enforcement.[8] Upon acquiring a majority of the House in 2019, Democrats—supported by "progressive" advocacy groups like the Open Markets Institute (formed in 2017) and progressive-Democrat-aligned media—used similar themes to mount a radical attack on U.S. antitrust. Upon inauguration, President Biden enthusiastically supported the attack. Indeed, several of the antitrust officials he appointed were acolytes of the Democratic-Party legislators who led the uprising in the 116th Congress.

* The views expressed herein are solely those of the author and do not intentionally coincide with those of Antonin Scalia Law School or any other person or entity.

1 *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 4 (1958).

2 Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/#:~:text=The%20executive%20order%20I'm,for%20workers%20and%20consumers%20alike.

3 AG L. E. Lynch, Address to the 64th Annual American Bar Association Antitrust Law Spring Meeting (Apr. 6, 2016), https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-keynote-luncheon-address-during-64th-annual.

4 Council of Economic Advisers, Benefits of Competition and Indicators of Market Power (Apr. 2016); https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf.

5 https://obamawhitehouse.archives.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers.

6 A. Schechter, The White House Acknowledges: The U.S. Has a Concentration Problem; President Obama Launches New Pro-Competition Initiative, *ProMarket* (Apr. 15, 2016), https://www.promarket.org/2016/04/15/the-white-house-acknowledges-the-u-s-has-a-concentration-problem-president-obama-launches-new-pro-competition-initiative/

7 P. Krugman, Robber Baron Recessions, *NY Times* (Apr. 18, 2016), at A21; C. Sagers, Everyone Wants to Get Tough on Antitrust Policy, But Not Really, *NY Times* (Apr. 29, 2016); https://www.nytimes.com/2016/04/30/business/dealbook/everyone-wants-to-get-tough-on-antitrust-policy-but-not-really.html. An extensive and closely similar critique of U.S. competition had been floated just weeks earlier by *The Economist* magazine (The Problem with Profits (Mar. 26, 2016), https://www.economist.com/leaders/2016/03/26/the-problem-with-profits; Too Much of a Good Thing (Mar. 26, 2016), https://www.economist.com/briefing/2016/03/26/too-much-of-a-good-thing). The novel and discordant substance as well as the coincident timing of these publications strongly suggest some foreknowledge of the CEA report and coordination among the different authors.

8 "[M]*any of its proposals carry the imprint of the Elizabeth Warren/Bernie Sanders wing: get tough on monopolies* (. . .)." M. Cottle, Democrats Pitch a Kinder, Gentler Populism, *The Atlantic* (July 31, 2017); https://www.theatlantic.com/politics/archive/2017/07/the-struggle-to-sell-a-better-deal/535410/.

4. Biden and his antitrust officials are now in open mutiny against the antitrust mainstream and the Supreme Court. They have returned to long-discredited antitrust rules for business conduct, including structural presumptions and prescriptive prohibitions (especially for digital platforms) of many common practices long recognized as competition-enhancing in many (if not all) circumstances. These positions repudiate both time-tested understandings of market competition and a half-century of sound, widely accepted Supreme Court precedents based on those understandings.[9]

5. Like other marauders, the agencies' methods often include heavy pressure on enforcement targets, including derogation of procedural protections and due process rights.[10] Recent agency statements are laced with tendentious versions of antitrust history, policy, law, and economics, as well as castigation of the Supreme Court[11] and the business community.[12] Although so far unsuccessful in changing any substantive statute or persuading the judiciary to question any established position, three years of noisy agitation have damaged the U.S. and global economies and threaten to impose far greater harm in the future. By any name—"Progressive," "Hipster," "neo-Brandeisian" or "Pirate" antitrust—this attack represents a destructive deviation in enforcement. It should be terminated at the earliest opportunity, before its mistakes become even more damaging and difficult to rectify.[13]

9 The various assertions about U.S. competition problems can be charitably described as sharply disputed. M. K. Ohlhausen, Does the U.S. Economy Lack Competition?, *Criterion J. Innovation*, Vol. 1, 2016, pp. 47–63; https://www.criterioninnovation.com/articles/ohlhausen-does-the-us-economy-lack-competition.pdf. G. J. Werden and L. M. Froeb, Don't Panic: A Guide to Claims of Increasing Concentration, *Antitrust Magazine* (2018), available at https://ssrn.com/abstract=3156912 or http://dx.doi.org/10.2139/ssrn.3156912. There may be valid complaints about various aspects of the global upheaval wrought by rapid progress in digital technologies. The most prominent of such complaints, however—loss of privacy and data security, deception, political bias—have never been identified as concerns targeted by antitrust law. There are distinct legal regimes applicable to each such area.

10 A clear example is the agencies' immediate suspension of "early termination" of waiting periods for structural transactions notified for Hart-Scott-Rodino review, customarily granted to avoid unnecessary government interference with notified transactions that obviously pose no competitive threat. The suspension was originally imposed— fifteen days following Biden's inauguration—based on "*the confluence of an historically unprecedented volume of filings during a leadership transition amid a pandemic*," Press Release, Fed. Trade Comm'n, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination. Whatever its initial merits, the suspension is still in effect, even though the transition and the pandemic ended years ago, and global merger activity declined during 2023 to its "*lowest level in over a decade*." M. Flaherty, Global Mergers and Acquisitions Hit Lowest Level in a Decade, *Axios* (Dec. 28, 2023).

11 As Acting FTC Chair Rebecca Kelly Slaughter stated in response to the Court's decision against the FTC in *AMG Capital Management v. FTC*, 593 U.S. 67 (2021), "*the Supreme Court ruled in favor of scam artists and dishonest corporations, leaving average Americans to pay for illegal behavior*." Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in AMG Capital Management LLC v. FTC (Apr. 22, 2021); https://www.ftc.gov/news-events/news/press-releases/2021/04/statement-ftc-acting-chairwoman-rebecca-kelly-slaughter-us-supreme-court-ruling-amg-capital. This assessment of a decision that was both unanimous and widely anticipated attempts to infuse a clear-cut question of statutory interpretation with class concepts and political themes embraced by the "progressives."

12 A. Malik, FTC Chair Lina Khan tells TechCrunch the agency is pursuing the 'mob bosses' in Big Tech, *TechCrunch* (June 11, 2024); https://techcrunch.com/2024/06/11/ftc-chair-lina-khan-says-the-agency-is-going-after-the-mob-bosses-in-big-tech/

13 Defects in government controls on competition are notoriously persistent and difficult to correct. The serious economic damage inflicted by federal railroad regulation, initiated in 1887, was not well recognized until almost eighty years later, and meaningful reform did not begin until 1976. Railroad Revitalization and Regulatory Reform Act, Pub. L. 94-210 (Feb. 5, 1976), 90 Stat. 31. Fortunately, the comprehensive economic regulatory system for railroads (and other transportation modes) was largely dismantled, but it was not fully addressed until 108 years later (1995), when the Interstate Commerce Act was repealed and the Interstate Commerce Commission abolished. Economic regulation of commercial aviation originated in the 1920s and was not eliminated for sixty-five years, with repeal of the Federal Aviation Act, abolition of the Civil Aeronautics Board and preemption of state economic regulation of commercial aviation. Other regulated sectors follow this pattern.

II. The voyage from 1890 to 2021

6. In its earliest Sherman Act cases (1890–1911), the Supreme Court puzzled over the law's notably brief and general prohibitions on agreements in restraint of trade and monopolization. This culminated in the 1911 *Standard Oil*[14] decision that announced a "rule of reason" for conduct other than naked cartels and vertical price agreements.[15] Even though *Standard Oil* ordered dissolution of the then-largest enterprise in history, the Rockefeller oil trust, the decision sparked public demands for even stricter control of business. An electoral sweep by progressive Democrats in 1912 placed Woodrow Wilson in the White House and produced the Clayton Act and the Federal Trade Commission Act in 1914, enhancing antitrust enforcement options. The Federal Trade Commission (FTC) had a slow start, however, and had barely set to work when U.S. entry into World War I led to pervasive federal control and nationalization of many key industries, displacing competition and antitrust enforcement. Although the federal government relinquished economic control of most industries after the war, antitrust remained guarded through Wilson's period of severe disability (1919–1921) and the three Republican administrations that followed (1921–1933).

7. Franklin D. Roosevelt (FDR), first inaugurated as president in 1933 at the most desperate hour of the Great Depression, opposed competition and antitrust enforcement, believing they would prevent economic recovery. He quickly secured passage of the National Industrial Recovery Act of 1933 (NIRA), which suspended antitrust law and required cartelization of industry.[16] FDR was forced to seek a new path, however, when the Supreme Court held NIRA unconstitutional in 1935.[17] Enter FDR's loyal crony (from New York politics), attorney Robert H. Jackson. Appointed by FDR as a federal tax prosecutor, Jackson zealously pursued FDR's arch-enemy, Andrew W. Mellon. One of America's first, most successful and prolific new-venture sponsors

14 *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). Two weeks later, the Court applied the rule of reason to dissolve the tobacco monopoly. *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

15 Naked cartels have been automatically condemned throughout U.S. antitrust history, beginning with *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), and *United States v. Joint Traffic Association*, 171 U.S. 505 (1898). Parties engaging in cartel conduct are not allowed to present any defenses on the issue of competitive effect, since such an effect is conclusively presumed. This rule was clarified in *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). The Supreme Court first referred to it as a per se rule in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), adopting the term used in the decision under review, 105 F.2d 809 (7th Cir. 1939). Automatic condemnation of vertical price agreements was the rule announced in *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911). It was soon narrowed by *United States v. Colgate Co.*, 250 U.S. 300 (1919), however, then further limited by several later cases, e.g., *Monsanto Co. v. Spray-Rite Svc. Corp.*, 465 U.S. 752 (1984), *Bus. Electr. Corp. v. Sharp Electr. Corp.*, 485 U.S. 717 (1988), and ultimately overruled in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

16 National Industrial Recovery Act of 1933, Pub. L. No.73-67 (June 16, 1933), 48 Stat. 195.

17 *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

(Mellon was key to launching Alcoa, Carborundum Corp., Gulf Oil, and Koppers, Inc., inter alia), Mellon had served as treasury secretary for all three Republican presidents preceding FDR (Harding, Coolidge, and Hoover). FDR publicly vilified Mellon, labeling him the "*master mind among the malefactors of great wealth*," a phrase borrowed from a speech given decades earlier by President Theodore Roosevelt. Jackson failed to persuade a grand jury to indict Mellon, so he pursued a civil tax fraud allegation instead. Mellon was fully vindicated, but succumbed to cancer just months before the final decision. Jackson also became FDR's chief advocate before Congress for the court-packing plan. Despite the proposal's broad unpopularity and consequent failure, FDR rewarded Jackson by appointing him assistant attorney general (AAG) for antitrust in 1937.

8. Jackson helped persuade FDR to reverse field and support competition and antitrust—a turning point in antitrust history. During Jackson's brief time in the Antitrust Division,[18] he revitalized antitrust, launching pathbreaking cases that turned into noteworthy government victories, including *Associated Press v. United States*[19] and *United States v. Alcoa*[20] (seeking to break up a major company sponsored by Mellon). Jackson groomed Yale law professor Thurman Arnold as his successor, who carried on Jackson's aggressive approach from 1938 to 1943, galvanizing the Antitrust Division and launching it into battle on many new fronts. With support from progressive judges (Learned Hand, Felix Frankfurter, William O. Douglas), Arnold and successors exiled the rule of reason to a small and shrinking island. The surrounding ocean of antitrust doctrine teemed with per se rules (horizontal and vertical agreements) or strong presumptions of illegality (structural transactions and monopolization).[21] As this wave crested, the Supreme Court exalted the clarity of the per se rule and categorically rejected and even mocked the use of economics in antitrust.[22]

9. The New Deal created many programs and agencies involving (inter alia) prescriptive sectoral economic regulation of finance, agriculture, energy, telecommunications, and transportation by air, rail, road and water. In the 1960s, President Johnson added more "Great Society" responsibilities to government, and President Nixon added still more regulatory mandates and agencies (e.g., Consumer Product Safety Commission (CPSC), Environmental Protection Agency (EPA), Occupational Safety and Health Administration (OSHA)). Eventually, the U.S. economy drifted toward collapse.[23] Stagflation struck the U.S. in the late 1960s, and the economy turned for the worse after three "Nixon Shocks" of 1971 (federal wage and price controls, a 10% surcharge on imports, and permanent suspension of dollar-gold convertibility). The economy finally plunged in 1980 at the end of President Carter's term. Inflation and interest rates hit record highs (14.6% CPI inflation rate; 20% federal funds rate; 18.6% mortgage rate), as did unemployment (11%—still a post-Great-Depression record except for three months during the government-mandated pandemic shutdowns of 2020) early in President Reagan's first term. U.S. budget and trade deficits soared, and U.S. companies lost ground to Asian and European competitors in a variety of important sectors (e.g., consumer electronics, automobiles).

10. Devastation of the economy led to critical reassessment of many policies, including the strict, prescriptive antitrust rules imposed during the thirty-five-year reign of Jackson-Arnold thought. Many such critiques were based on then-novel understandings of industrial organization,[24] supported by new insights from related disciplines such as public choice analysis and law and economics. The new contributions identified the disadvantages of command-and-control regulation not only by rigid economics-blind antitrust rules, but also by prescriptive administrative regulation of critical sectors.[25] Reagan appointees at the antitrust agencies (AAG William F. Baxter, FTC Chairman James

18 In 1938, after barely a year as AAG, FDR appointed Jackson solicitor general, then attorney general in 1940. FDR then nominated Jackson to the Supreme Court in 1941, privately committing to elevate him to Chief Justice at the first opportunity (although the commitment was not honored). Jackson's wise admonitions regarding the danger of mixing prosecution with politics remain valid and are especially persuasive given his involvement in the practice. Historian David Cannadine's assessment of the tax case against Mellon concludes that it was a baseless, vindictive, and politically motivated effort by FDR. D. Cannadine, *Mellon: An American Life*, A. A. Knopf, New York, 2006, at 405–445. FDR's vilification of and targeted legal attacks on successful businesses and their leaders have clear parallels with the present.

19 326 U.S. 1 (1945).

20 148 F.2d 416 (2d Cir. 1945).

21 Ironically, although the antitrust views expressed by legendary progressive lawyer Louis Brandeis inspire the "neo-Brandeisian" movement of today, as a Supreme Court Justice, he provided the still-classic formulation of the rule of reason, *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918), and applied it thoughtfully even to broad horizontal agreements in critical industries, e.g., *Standard Oil Co. v. United States*, 283 U.S. 163 (1931) ("*Cracking* case"). His progressive views of antitrust were largely (although not entirely) absent during his service as a Justice. K. G. Elzinga and M. Webber, Louis Brandeis and Contemporary Antitrust Enforcement, *Touro L. Rev.*, Vol. 33, No. 1, 2017, pp. 277–321, https://digitalcommons.tourolaw.edu/lawreview/vol33/iss1/15.

22 *United States v. Topco Assocs.*, 405 U.S. 596, 609–610 n.10 (1972): "*Without the* per se *rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act. Should Congress ultimately determine that predictability is unimportant in this area of the law, it can, of course, make* per se *rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach*."

23 Antitrust and prescriptive sectoral economic regulation were not the only contributing factors. Macroeconomic policies, intellectual property policies, a series of oil crises, and a variety of other legal and policy developments contributed to economic stress.

24 E.g., H. J. Goldschmid, H. M. Mann and J. F. Weston (eds.), *Industrial Concentration: The New Learning*, Little Brown, Boston, 1974.

25 First considered by the administration of President John F. Kennedy, sectoral deregulation won strong bipartisan support during the 1970s. The first significant deregulatory legislation (Railroad Revitalization and Regulatory Reform Act, Pub. L. No. 94-210 (Feb. 5, 1976), 90 Stat. 31) became law under President Gerald Ford. Deregulation of commercial aviation, interstate motor carriage and other surface transport modes occurred under President Jimmy Carter. Carter appointed respected economist and deregulation advocate Prof. Alfred E. Kahn as chairman of the Civil Aeronautics Board and then advisor to the President and chairman of the White House Council on Wage and Price Stability—"Inflation Czar." Presidents Ronald Reagan, George H. W. Bush, and Bill Clinton also supported deregulation. The Civil Aeronautics Board was abolished in 1985 under President Reagan, and the Interstate Commerce Commission was abolished in 1995 under President Clinton.

C. Miller III, and FTC Commissioner George Douglas[26]) and in the federal judiciary (e.g., Judges Robert Bork, Frank Easterbrook, Douglas Ginsburg, Richard Posner, and Antonin Scalia), facilitated diffusion of the new learning. Many such appointees had made important scholarly contributions in these fields.

11. In 1974, the Supreme Court cracked open the door to economics that it appeared to have closed firmly in *United States v. Arnold, Schwinn & Co.*,[27] and *United States v. Topco Assocs*.[28] In *United States v. General Dynamics Corp.*,[29] for the first time since passage of the Celler-Kefauver amendments to the Clayton Act in 1950, the Court rejected a government merger challenge, relying on economic analysis.[30] Then, in 1977, the Court explicitly adopted sound economics as the basis for formulating antitrust rules (in the context of vertical restraints),[31] and reemphasized that antitrust protects competition, not competitors.[32] Since then, the Court has emphasized economic analysis in antitrust evaluation of marketplace conduct (aside from cartels, which remain per se illegal), and denied recognition to antitrust objectives distinct from attaining "*the greatest material progress*" (e.g., dispensing "economic justice"). The Court's objective, economics-based approach has penetrated every facet of antitrust doctrine—bedrock substantive principles as well as standing rules, evidentiary burdens, standards for dismissal and summary judgment, and for admissibility and evaluation of expert economic testimony.

III. The progressive antitrust mutiny

12. President Biden and his progressive antitrust appointees have tried to throw the past fifty years of antitrust into the dumpster. In 2021, Biden termed the half-century reign of economically rational antitrust an "*experiment* [that] *failed*," despite recognizing in the same statement that the U.S. is the "*wealthiest, most innovative nation in history*."[33] He blamed the "*misguided philosophy of people like Robert Bork*" for the enduring consensus on the utility of economics.[34] Such accusations notwithstanding, acceptance of economics by the Supreme Court and the antitrust community was not the act of one individual. Bork had built upon decades of scholarship that ultimately led to broad recognition that many per se rules and heavy presumptions of liability that emerged in the Jackson-Arnold phase (1937–1972) were unsupportable and economically damaging, based on real-world experience. President Bide—perhaps eager to demonize an old nemesis[35]—omits to mention that one of the first, most enthusiastic and influential proponents of using economics in antitrust was a Democrat, Donald F. Turner. A Harvard law professor with a Ph.D. in economics, he was appointed AAG for antitrust by President Lyndon Johnson in 1965 and served until 1968. He advocated the use of sound economic research and the exclusion of non-economic factors from consideration in antitrust enforcement.[36] Other prominent Democrats, including former Justices Ruth Bader Ginsburg and Stephen G. Breyer (a former special assistant to Turner at the Antitrust Division), among many others, also consistently supported the economic approach.[37]

13. Because the mutineers' rejection of the last half-century of Supreme Court antitrust decisions has been truly comprehensive, it would be difficult to describe in less-than-book-length form all the positions and practices that have been keelhauled or forced to walk the plank. Fortunately, sufficient critical literature already exists on the various changes, including (i) the rejection of material progress as the objective of antitrust; (ii)

26 Miller and Douglas were already respected economists when appointed. Although Baxter spent nearly his entire career as a law professor at Stanford Law School, he made significant and enduring contributions to antitrust economics. His intensive study of electronic fund transfer systems in the 1970s (W. F. Baxter, P. H. Cootner and K. E. Scott, *Retail Banking in the Electronic Age: The Law and Economics of Electronic Funds Transfer*, Allanheld, Osmun & Co., Montclair, 1977) led him to become the first to identify the phenomenon of "two-sided markets," and to analyze their unique and sometimes unexpected competitive implications. W. F. Baxter, Bank Interchange of Transactional Paper: Legal and Economic Perspectives, *J.L. & Econ*., Vol. 26, No. 3, 1983, pp. 541–588. Baxter's approach is now the accepted framework for antitrust analysis of digital platforms (including e-commerce and social media platforms, multi-party payment systems, and other similar economic sectors that have become increasingly preeminent in the digital economy). Baxter was once described by Prof. A. Michael Spence, co-recipient of the 2001 Nobel Memorial Prize in Economics and a Baxter colleague at Stanford in the 1970s, as one of the best microeconomists of his generation.

27 388 U.S. 365 (1967) (all vertical restraints deemed per se illegal).

28 405 U.S. 596 (1972).

29 415 U.S. 486 (1974).

30 The Court rejected the government's contention that shares in the relevant market (coal supply) should be measured by past production, finding instead that the appropriate measure is available reserves (i.e., coal available to meet future supply commitments). In 1974 the Court also rejected a second government merger case, holding that the facts did not support the government's potential competition theory. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974).

31 *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58–59 (1977) ("*departure from the rule of reason standard must be based upon demonstrable economic effect, rather than – as in* Schwinn *– upon formalistic line drawing*"; "[A]*n antitrust policy divorced from market considerations would lack any objective benchmarks*").

32 *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc*., 429 U.S. 477, 489 (1977) (rejecting sufficiency of "but-for" causation of competitor harm by antitrust violation to establish standing; antitrust standing requires "*injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful*").

33 Remarks by President Biden, *supra* note 2.

34 Ibid.

35 Judge Bork—singled out for personal vilification in the President's statement—was denied a seat on the Supreme Court in 1987, following vitriolic attacks on the nominee at Senate Judiciary Committee hearings chaired by then-Senator Biden.

36 Turner was arguably the most influential antitrust scholar of his time. He co-wrote the leading treatise on antitrust law—still the most-cited antitrust work. D. F. Turner and P. Areeda, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Little, Brown and Company, Boston, 1978. His other influential works include C. Kaysen and D. F. Turner, Antitrust Policy: An Economic and Legal Analysis, Harvard University Press, Cambridge, 1959, and P. Areeda and D. F. Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, *Harv. L. Rev*., Vol. 88, No. 4, 1975, pp. 697–733. Consideration of economic analysis by the Antitrust Division long predates Turner, but Turner brought far greater discipline and consistency in relying on economic analysis, and in avoiding non-economic considerations in antitrust enforcement.

37 For analysis of attempts to misattribute the fifty-year antitrust consensus to Judge Bork and the "Chicago School" alone, *see* W. E. Kovacic, The Chicago Obsession in the Interpretation of US Antitrust History, *U. Chi. L. Rev*., Vol. 87, No. 2, 2020, pp. 459–494.

the rejection of economics-based merger enforcement policy (sufficient to induce criticism even from the Obama-administration authors of such policies);[38] (iii) a baseless but dogged refusal to acknowledge that conduct involving horizontal cooperation generally deserves more intense scrutiny than that involving vertical and conglomerate relationships, plus a long list of novel and burdensome procedural impositions on the merger review process.[39] The antitrust assault on the leading technology companies has also been extraordinary. Without awaiting the outcome of major antitrust cases already in progress, the mutineers have advocated new legislation to impose unprecedented restrictions (e.g., line-of-business restrictions; prohibitions on "self-preferencing"; mandatory access to "essential" platform resources) on digital platform companies, despite their having generated extraordinary new competitive offerings and economic growth as technology has progressed.

14. Although there are plenty of fish in the progressive antitrust barrel, the discussion of recent enforcement policy requires recognition of the most obvious and fundamental problems with the current agency approach. Specifically, the central tenets of the antitrust mutiny clearly ignore fundamental realities of economic policy that have manifested themselves repeatedly over the last century and more. There is powerful, consistent, and unrebutted historical evidence that the interventionist antitrust approach is on balance inferior to the prevailing economics-based approach:

– The European Union (EU) (following the path set in 1957 by its main predecessor, the European Economic Community (EEC)) chose more interventionist competition-law ideas, explicitly incorporating non-economic objectives such as "market integration," and adopting legal provisions allowing greater scope for prescriptive intervention in business conduct than would be considered appropriate under an economics-based approach (e.g., adopting "unfairness" as a legal limit on unilateral dominant-firm pricing and other terms of trade). The costs and disruptions attributable to this approach have been intensified by the EU's legal structure, which entrusts enforcement to a unitary bureaucracy that affords limited due process rights to enforcement targets (as distinct from reliance on carefully structured proceedings before a separate and independent judiciary, as in the U.S.). First, the EEC and now its successor, the EU, have significantly lagged the U.S. in economic growth and innovation, including over the period that President Biden identifies as the U.S. "*experiment* [that] *failed*" by adopting a "*misguided philosophy*." Specifically, in 1981, GDP in each of the U.S. and the EU[40] stood at about USD 3 trillion, while in 2020 U.S. GDP reached USD 21 trillion and the EU reached only USD 15 trillion (all figures adjusted for inflation). As to innovation, despite decades of effort to make itself "*fit for the digital age*," the EU has no significant leading entries in the digital sectors that have revolutionized commerce and society with their new products and services. U.S. firms clearly lead the global list of major advanced-technology businesses,[41] with Asia not far behind, while the EU can claim only ASML Group (Dutch chip-fabrication device leader), SAP (German enterprise software company), and Spotify (Swedish music distribution platform) as its representatives on the leader board.[42]

– After almost 100 years of experience with prescriptive sectoral regulation of major U.S. industries (telecommunications and energy, as well as interstate transportation of passengers and cargo by rail, road, air, ocean, and inland waterway, as well as petroleum pipelines), a broad consensus of scholars and policy experts recognized the powerful and consistent tendency of such regulation to restrict competition, impede innovation, raise prices and suppress output. As public recognition of the profound defects in prescriptive sectoral regulation grew in the years leading up to and following the Carter economic meltdown, Congress overwhelmingly rejected regulatory approaches and returned many sectors to competition maintained by antitrust enforcement. It repealed the Interstate Commerce Act and the Federal Aviation Act, and abolished the Interstate Commerce Commission and the Civil Aeronautics Board. Energy and communications regulation were reformed to focus more closely on instances of demonstrated market failure, and to address them with targeted (rather than comprehensive) government intervention. At present, after nearly fifty years of additional experience with deregulatory changes initiated in the 1970s, it is apparent that substantial long-run improvements in economic performance resulted.[43]

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38 J. Furman and C. Shapiro, How Biden Can Get Antitrust Right, *Wall Street Journal* (July 27, 2023), https://www.wsj.com/articles/how-biden-can-get-antitrust-right-khan-ftc-justice-department-guidelines-11364639; "[A] *draft* [of revised merger guidelines] *released last week focuses on outdated legal precedents and a presumption that growth by large and successful firms is undesirable. Regulators should revise the draft to focus more on economic analysis that is consistent with case law and the goal of protecting consumers and workers*."

39 *See*, e.g., J. H. Beales III and T. J. Muris, Achieving Change at the Federal Trade Commission: Success and Failure (May 2024), https://cei.org/wp-content/uploads/2024/05/Achieving-Change-at-the-Federal-Trade-Commission.pdf.

40 Since the EEC expanded as it became the EU (from six to twenty-eight nations—twenty-seven following Brexit), the "EU" figures provided include all nations that eventually became EU members (including the UK), to assure consistent comparison. (Member States joining since 1993 include Austria (1995), Bulgaria (2007), Croatia (2013), Cyprus (2004), Czech Republic (2004), Estonia (2004), Finland (1995), Hungary (2004), Latvia (2004), Lithuania (2004), Malta (2004), Poland (2004), Romania (2007), Slovakia (2004), Slovenia (2004), and Sweden (1995). EU economic performance might have improved had present Member States joined at some earlier date.)

41 As of this writing, the six largest technology firms (by market capitalization) are all American, as are numbers eight and nine on the list. TSMC (Republic of China) is seventh, and Tencent (People's Republic of China) is tenth. Thirty-six of the top fifty are American.

42 *See generally*, G. A. Manne, Why US Antitrust Law Should Not Emulate European Competition Policy: A Comparative Look at Competition Law Approaches to Monopoly and Abuse of Dominance in the US and EU, Statement Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights (Dec. 19, 2018); https://www.judiciary.senate.gov/imo/media/doc/Manne%20Testimony.pdf.

43 *See* C. S. Wilson and K. Klovers, The Growing Nostalgia for Past Regulatory Misadventures and the Risk of Repeating These Mistakes With Big Tech, *J. Antitrust Enforcement*, Vol. 8, Issue 1, 2020, pp. 10–29.

– Governments relying on the strictest forms of economic control—Cuba, North Korea, the Soviet Union, and Venezuela—created widespread poverty as their economies face-planted. By contrast, the "Tigers" of Southeast Asia—Hong Kong, the Republic of China, Singapore, and South Korea—developed rapidly over the same period, based on a relatively pure market model (Hong Kong) or competition mixed with various flavors of government guidance. The People's Republic of China and the Socialist Republic of Vietnam avoided the fate of kindred Communist nations (like Cuba and the Soviet Union) by allowing substantial private economic activity and successfully negotiating for access to the global trading system.

15. With these realities all weighing against the contention that economics-based antitrust "failed," it is difficult to identify a credible substantive economic policy basis for the progressive antitrust mutiny. On the contrary, it seems the U.S. system has repeatedly demonstrated superiority in producing economic growth and innovation. One can argue about the precise causal relationships, and some specific elements of present-day antitrust law may be subject to sound criticism and in need of marginal adjustment, but those elements do not by any stretch justify the full-on contempt for present Supreme Court law now exhibited by agency leadership.

16. There is, by contrast, a far more plausible alternative explanation for the antitrust approach now taken by the agencies, but it is political rather than economic. In his 2020 campaign for the Democratic presidential nomination, candidate Biden placed fourth in the first-in-the-nation Iowa caucuses and fifth in the New Hampshire primary that followed. Next, Biden finished second in the Nevada caucuses, but well behind Senator Bernie Sanders, who won all three early contests. After Nevada, Democrats faced the likelihood that a predicted Sanders victory in the fourth contest, in South Carolina, would assure his nomination. However, it was widely recognized that Sanders' substantive position—e.g., advocating fully nationalized healthcare and elimination of private health insurance, endorsement of "democratic socialism,"[44] and support for substantial additional taxation of both businesses and individuals—created doubts regarding his electability. These circumstances led key Democratic leaders—e.g., influential South Carolina Democrat Rep. James Clyburn—to endorse Biden.

17. It seems likely that the crucial endorsements received in South Carolina required Biden to commit to staff his administration with appointees sympathetic to policy preferences of Sanders and like-minded colleagues such as Senator Elizabeth Warren. This would explain Biden's nomination of academic and progressive activist Lina Khan to the FTC. She had been legal director of the Open Markets Institute—a committed progressive advocacy group founded in 2017—and then senior counsel of the House Judiciary Committee, charged with writing the Report on Competition in the Digital Economy, a majority staff report based on extensive congressional hearings conducted in the 116th Congress (2019–2020).[45] Biden appointed Tim Wu, a Warren acolyte and mentee, to a new position on Biden's National Economic Council, responsible for developing a "whole of government" approach to competition policy. Wu was a Khan mentor and Columbia Law School faculty colleague, known as a progressive critic of the antitrust mainstream. Wu had been a candidate for lieutenant governor of New York in 2014, running alongside gubernatorial candidate Zephyr Teachout—another progressive and Khan mentor. This political explanation—as distinct from any identifiable framework of economic policy analysis—seems to explain how the antitrust mutiny originated.[46]

18. Biden antitrust policy, reflecting approaches with a consistent and long-running record of profound real-world failure, has begun to have some major consequences. First, the professional standing of the FTC has suffered acutely.[47] Second, both agencies' antitrust approach, openly contemptuous of the longstanding and widely accepted Supreme Court approach to antitrust, places them at risk of backlash from the public and Congress. Third, it is likely that the agencies' relentless hostility to structural transactions in general and its aggressive campaign to complicate and delay the review process have discouraged potentially beneficial transactions. The market for corporate control, involving trillions of dollars annually, helps assure efficient deployment of productive assets and is perhaps the most effective source of discipline on inefficient management. Thus, the Biden merger policy is both excessively expensive and a danger to economic growth.

44 Sanders has repeatedly signaled support for Cuba, the former Soviet Union, Venezuela, and other aggressively anti-private enterprise nations, although he denies it when confronted. He affirmatively advocates "democratic socialism," claiming that this is a model of government found in Scandinavian countries. But there is no such policy in Scandinavia. D. Schatz, Bernie Sanders is wrong on democratic socialism in Sweden, and everywhere else, NBC News THINK (Mar. 15, 2020), https://www.nbcnews.com/think/opinion/bernie-sanders-wrong-democratic-socialism-sweden-everywhere-else-ncna1158636.

45 *See* A. B. Lipsky, Jr., The Investigation of Competition in Digital Markets: Looking in the Wrong Forest?, *CPI Antitrust Chronicle* Special Edition (Jan. 2021), pp. 42–48, https://www.competitionpolicyinternational.com/wp-content/uploads/2021/01/ANTITRUST-CHRONICLE-SPECIAL-EDITION-WINTER-2021-US-REPORT-ON-DIGITAL-MARKETS-CPI.pdf.

46 Conceptual roots of the Biden administration antitrust policy are analyzed in C. S. Wilson and A. S. Cella, Deconstructing the Worldview of the Neo-Brandeisians Through Marxism and Critical Legal Studies, *George Mason L. Rev.*, Vol. 29, Issue 4, 2022, p. 961.

47 Committee on the Judiciary, House of Representatives, Abuse of Power, Waste of Resources, and Fear: What Internal Documents and Testimony from Career Employees Show About the FTC Under Chair Lina Khan, Interim Staff Report (Feb. 22, 2024).

19. Finally, the U.S. agencies' former moderating impact on scores of foreign antitrust agencies has been lost. This impact was achieved through dialogue and cooperation over many years in numerous specific cases and in many other activities of leading international antitrust organizations such as the Economic Co-operation and Development (OECD) Competition Committee and the International Competition Network. For decades, the U.S. agencies were effective advocates for economic rationality in the formulation of substantive rules and for antitrust enforcement procedures that respect due process. Now, however, the U.S. agencies give license to and even encourage the worst instincts of other agencies around the world, supporting interventionist approaches based on hostility to business (especially large businesses such as the digital platforms and in other sectors such as pharmaceuticals) and vigorous but analytically questionable attacks on business competition in many forms.

IV. Going forward

20. To prevent further damage to the U.S. and global economies—which could be severe, threatening the continued innovation[48] so essential to future economic growth and a tolerably peaceful domestic and international order—the U.S. agencies require a change in enforcement approach. Biden and his incumbent agency leaders operate in apparent disregard of the fact that it was the economic approach—championed by "*people like Robert Bork*" and many others from diverse political orientations—that helped rescue the U.S. from the disastrous Carter-era economy and allowed the U.S. to extend its lead as the "*wealthiest, most innovative nation in history*." Antitrust agency leadership should possess and demonstrate awareness and understanding of the 134 years of common-law evolution of antitrust doctrine and its relationship to the ultimate objective of ensuring continued "*material progress*." Agency leadership should also commit to implement the most relevant lessons of this experience: Antitrust works best when based on sound, empirically driven economic analysis, implemented within a rational framework that respects the procedural rights of those investigated for or accused of antitrust violations. As the U.S. puts its own house in order, it should work to reclaim its international credibility as an advocate for sound policy, which it has squandered since 2021. The objective for the next administration should be to champion sound economic analysis rather than to vilify and purge it, and to apply balanced procedures and preserve and enhance due process rather than defy or end-run sound protections against government overreaching that are embodied in our legal system and in prior agency practice, and to lead efforts to advocate the same internationally. ■

48 In antitrust policy discussion, it bears constant emphasis that innovation has made the largest single contribution to improvements in the global standard of living over the last several centuries. Innovation has allowed the human population to expand from one to eight billion while the extreme poverty rate has declined from 94% to 10%. Years ago, economists Robert Solow and Moses Abramovitz independently estimated that as much as 80–85% of economic growth since the onset of the Industrial Revolution has been attributable to innovation. Although subsequent estimates may have suggested a somewhat lower figure, there can be no serious dispute about the fundamental importance of avoiding antitrust (or other) policy approaches that threaten to impede innovation. Competition is an essential spur to innovation, but there is no clear relationship between (for example) industry structure or firm size and the rate of innovation. Judgments about the effect of particular industry structures or business practices on innovation must be made case-by-case, and the risk of chilling innovation must always be considered before taking any step that could expand the scope or magnitude of antitrust liability.

When well-meaning antitrust policy goes astray

Taylor Alexander
alexander@rulegarza.com
Associate
Rule Garza Howley, Washington, DC

Erich Makarov
makarov@rulegarza.com
Associate
Rule Garza Howley, Washington, DC

Deborah Garza
garza@rulegarza.com
Vice Chair
Rule Garza Howley, Washington, DC

1. Whoever wins the presidential race in 2024, it appears we will see a continuation of efforts to break up "Big Tech." Both the Trump and Harris campaigns have sounded a populist tone, promising to challenge "Wall Street" and confront corporate power. They both appear to believe that market dominance by a few Big Tech companies is impeding innovation and the growth of "little tech." But they also come from different perspectives that will likely inform specific enforcement choices. The Trump camp, for example, would use antitrust laws to challenge "woke" corporations it believes use market power or collusion to advance liberal social mores like diversity, equality and inclusiveness (DEI) and suppress speech from the right. The Harris camp is more likely to focus on labor issues and competition in the healthcare and agriculture sectors.

2. This article takes a closer look at what the candidates have said about antitrust, proposes principles that should apply to any antitrust enforcement program and assesses the Biden administration's record against those principles.

I. A Harris antitrust agenda: From progressive policies to a more mainstream approach

3. The Harris campaign appears to be staking out a slightly different approach from the Biden administration in some areas. While not pulling back entirely from Biden's progressive agenda, Harris would perhaps temper it.

4. Asked whether Harris would shift away from the Biden administration approach toward one that is less hostile to transactions in general, Harris' campaign surrogate, Maryland Governor Wes Moore, responded, "*I think we will*." He predicted that Harris would seek to foster "*real capital and liquidity flow*," supporting both business growth and competition. He explained: "*As the vice president is thinking about a future-facing administration, there are going to be different dynamics that are going to require different philosophies. There will be different sociopolitical and just political dynamics that* [are] *going to require a different set, a different lens and a different vision*."[1]

5. It is possible to over-read Moores' statement. However, the Harris campaign appears to be making a concerted effort to assure the business community that it would step back from the more radical progressive approach that has troubled even former Obama and Clinton enforcers. In a statement on her first 100-day agenda, Harris referenced "*creating a stable business environment with consistent and transparent rules*," "*encouraging innovative technologies while protecting consumers*" and "*cut*[ting] *red tape and needless bureaucracy*."[2]

6. As a political document responding to populist sentiment, however, Harris' 100-day agenda also perpetuates a "bad guy" caricature of private equity and "big food." Among other things, Harris has promised to "*advance the first-ever federal ban on price gouging on food and groceries*," "*crack down on unfair mergers and acquisitions that give big food corporations the power to jack up* (. . .) *prices and undermine* (. . .) *competition*."

1 Governor Moore's Comments can be found at https://www.cnbc.com/2024/08/07/kamala-harris-tim-walz-antitrust-regulation-wes-moore-election.html.

2 Press Release, Vice President Harris Lays Out Agenda to Lower Costs for American Families (Aug. 16, 2024), https://mailchi.mp/press.kamalaharris.com/vice-president-harris-lays-out-agenda-to-lower-costs-for-american-families.

7. Harris' price gouging ban provoked immediate bipartisan criticism. Federal price controls have been tried before, in 1971 by Richard Nixon, to disastrous effect. Harris surrogates quickly clarified the proposal (or walked it back). They explained the intent is merely to enact federal legislation that mirrors state laws prohibiting "price gouging" in emergency situations.[3] Harris may also have had in mind the Price Gouging Prevention Act of 2024,[4] introduced by Elizabeth Warren. That legislation would prohibit companies with sales of at least USD 100 million from charging "*grossly excessive prices*" as defined by the Federal Trade Commission (FTC) at times of market disruption. Even as limited, however, the proposal is problematic to the extent that it would punish companies responding to market demand and supply and exacerbate shortages by silencing market price signals.

8. In general, renewed enforcement of the Robinson-Patman Act in the grocery and drug spaces and other efforts to provide a profit floor to small businesses are bound to result in higher prices for consumers, not lower.

II. A Trump antitrust agenda: Return to a traditional approach to antitrust or antitrust populism?

9. The Trump campaign, while denouncing the idea of price controls, has also sounded a populist note. Trump has promised to bring down the prices of food, insurance, energy and housing "*very quickly*" by "*regulation and having a tremendous supply*."[5] The campaign has not explained what regulation Trump has in mind. Although he presumably did not mean price controls, it is hard to imagine what other kinds of regulation would "very quickly" reduce prices in those sectors. Possibly, he meant "deregulation." Removing restrictions on domestic oil drilling and regulations that make it more costly for small businesses to compete could eventually lead to lower prices by increasing supply, depending on other market conditions and economic policies. Eliminating unreasonable government impediments to competition is a laudable enforcement goal with bipartisan support that has been echoed by the Harris campaign.

10. Trump's running mate, J. D. Vance, is an outspoken "Khanservative"—a Republican who supports the aggressive enforcement positions taken by the FTC under Chair Lina Kahn. In his words, the FTC Chair is "*one of the few persons*" in the Biden administration who has done "*a pretty good job*." Vance has expressly endorsed dumping Robert Bork's consumer welfare standard as a touchstone for sound antitrust enforcement. He used the platform of the Republican National Convention in August to pronounce, "[w]*e're done, ladies and gentlemen, catering to Wall Street. We'll commit to the working man*." He blamed high housing prices on "*Wall Street barons* [who] *crashed the economy*" and put builders out of business, concluding: "*We need a leader who's not in the pocket of big business, but answers to the working man, union and non-union alike. A leader who won't sell out to multinational corporations, but will stand up for American companies and American industry*."[6]

11. Vance also advocates breaking up Big Tech companies like Google and Meta. (Trump brought the *AdTech* monopolization case against Google in 2020.) According to Vance, the market "dominance" of large incumbent companies in network industries limits the ability of start-ups to succeed, stifles competition and suppresses wages. He has explained: "*We want to ensure that new entrants can change* (. . .) *things* [up] *to promote as much competition as possible, and you actually want to separate all of these market verticals as much as possible* [referring to Google's ownership of YouTube and Meta's ownership of WhatsApp and Instagram] (. . .) *That's where I think antitrust is probably the most useful way to think about a solution*."[7]

12. Vance appears to be influenced in part by his venture capital experience and ties to big players in "little tech" and in part by the belief that large companies can influence political outcomes by suppressing unpopular speech. In early 2024, he tweeted that a Google break-up was "*long overdue*," asserting that "*monopolistic control of information in our society resides with an explicitly progressive technology company*."[8] In addition, the Heritage Foundation's Project 2025 recommends that the FTC establish a DEI/ESG Collusion Task Force to investigate whether companies, especially private equity, are collusively using the promotion of DEI and ESG (environmental, social, and governance) policies to "*meet targets, fix prices, or reduce output*."[9]

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3 *See* J. Stein, Kamala Harris allies say plan to ban 'price gouging' has been misconstrued, *Washington Post* (Aug. 20, 2024), https://www.washingtonpost.com/business/2024/08/20/kamala-harris-price-gouging-proposal/. For a Survey of State Price Gouging Laws, *see* https://www.findlaw.com/consumer/consumer-transactions/price-gouging-laws-by-state.html.

4 [S.3803], available at https://www.congress.gov/bill/118th-congress/senate-bill/3803/text.

5 C. Savage, M. Haberman and J. Swan, Trump Vows to Lower Prices. Some of His Policies May Raise Them, *NY Times* (June 8, 2024), https://www.nytimes.com/2024/06/08/us/politics/trump-2025-inflation.html?smid=nytcore-ios-share&referringSource=articleShare&sgrp=c-cb&ngrp=mnn&pvid=1932D661-3114-488A-A397-D12E80838E5C.

6 A transcript of Senator Vance's speech at the Republican National Convention can be found at https://www.nytimes.com/2024/07/17/us/politics/read-the-transcript-of-jd-vances-convention-speech.html

7 Senator Vance's comments can be found at https://www.yahoo.com/news/trump-vp-pick-may-signal-194626157.html.

8 Senator Vance's tweet can be found at https://X.com/JCVance1/status/1761041871617278246.

9 Heritage Foundation, Project 2025 Mandate for Leadership at 873, https://static.project2025.org/2025_MandateForLeadership_FULL.pdf

III. Features of an optimal antitrust policy

13. After nearly four years of an enforcement regime that has dedicated its efforts to challenging many established principles of antitrust law, it may be time to ask: what is the optimal antitrust enforcement policy?

14. It is undisputed that "[t]*he American promise of a broad and sustained prosperity depends on an open and competitive economy*,"[10] that the "*lack of competition drives up prices for consumers*,"[11] and that "[i]*nadequate competition holds back economic growth and innovation*."[12] Regardless of school of thought or political party, it is evident that the antitrust laws seek to foster a competitive American economy. But when the platitudes are set aside and the time comes to formulate concrete principles of antitrust enforcement, many of the choices made by the Biden administration can hardly be said to have strengthened the nation's economy.

15. The optimal antitrust enforcement policy should focus on harnessing the power of the free market by eliminating both private and governmental restraints that unreasonably stifle competition. Antitrust enforcement regime should correct and discourage artificial market distortions without engaging in regulatory interventionism that counterproductively limits innovation, growth, and efficiency. Sound antitrust enforcement exhibits at least the following four attributes: enforcement transparency (1.), reasoned and impartial fact-based enforcement (2.), regulatory humility (3.) and a recognition of the limits of antitrust (4.).

1. Transparency

16. Regulatory transparency is a hallmark of any effective enforcement system. It builds trust in government and the regulatory regime and increases compliance and enforcement efficiency by enabling companies and individuals to conform their behavior to the law. To the extent it enables the monitoring of results, periodic evaluations and frank discussion of objectives and results, transparency can also lead to more optimal enforcement policy. In the antitrust context in particular, where conduct is largely governed by the rule of reason, clear and consistent enforcement standards with well-articulated bases facilitate economic growth by enabling companies to structure their transactions and determine corporate strategy.

17. There are several ways that antitrust enforcement agencies can provide transparency. Most importantly, the agencies must be clear about the standards they apply in enforcement decisions. This can be achieved, for example, by the issuance of enforcement guidelines that accurately reflect those standards and the law as currently applied by the courts. Pre-2023 merger guidelines issued by the U.S. Department of Justice (DOJ) and the FTC were accepted by both the courts and—to a large extent—the business community because they offered clear guidance tied to a coherent framework and sound economic reasoning. Even as those guidelines continued to evolve, from the 1982 and 1984 guidelines to those issued in 1992 and 2010, there was substantial consistency through both Republican and Democratic administrations.

18. In addition to clear and well-reasoned guidelines, agencies should consider regularly publishing statements explaining enforcement decisions, including—to the extent possible—decisions not to challenge high-profile or controversial transactions.

2. Fact-based, impartial enforcement

19. Just as any other type of law, the antitrust laws must be enforced based on the facts in a politically unbiased manner. Disparate application of the antitrust laws opens the door to corruption. Agencies can become overly reliant on (or captured by) the viewpoints of certain interest groups in formulating policy and making enforcement decisions. Disfavored companies and even entire industries may find themselves targeted by the agencies based primarily upon complaints from a coalition of special interest groups.

20. Agency powers should be exercised exclusively on the basis of reliable evidence. Enforcement actions that are designed to serve a distinctly political purpose, single out a particular industry for disfavored treatment, or penalize certain persons for actions unrelated to competition undermine trust in the law and imperil successful enforcement overall.

21. Sound economic analysis not only supports fair and effective antitrust enforcement but also contributes to a competitive marketplace that benefits consumers through lower prices, improved quality, and greater innovation. It ensures that agency decisions are grounded in objective, empirical evidence rather than conjecture or ideology. Moreover, an economics-oriented approach helps reduce both Type I (overdeterrence or punishing efficient conduct that is not anticompetitive) and Type II errors (under-deterrence or failing to recognize anticompetitive conduct). Overreach especially can stifle legitimate business practices and innovation. Transactions that could provide significant pro-competitive benefits for consumers are bound to be blocked when agencies rely on overly rigid presumptions based on market share thresholds, for example.

10 Executive Order on Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

11 White House Competition Council, https://www.whitehouse.gov/competition/.

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

22. Rigorous economic analysis also allows the agencies to devise remedies—when necessary—that are both effective and minimally disruptive to the economy. By employing sound economics and developing an objective understanding of the industries they regulate, the agencies can devise targeted interventions that address anticompetitive conduct without imposing unnecessary burdens on the market. This precision helps maintain the right balance between necessary intervention and the prevention of Type II errors.

3. Regulatory humility*

23. Good policy does not always equate to aggressive and antagonistic action against "big business." Consumers suffer when an enforcer's primary goal is to "win" against companies by maximizing the number of investigations, lawsuits, and failed transactions. Overdeterrence frustrates the efficient allocation of resources and discourages economic growth.

24. Regulatory humility does not mean "don't enforce the antitrust laws." Rather, it is a prescription for ensuring prudent enforcement of the laws in a manner that benefits consumers in both the short and long term, recognizing that unwise government intervention in the market can have the most lasting and damaging long-term effects.

25. Antitrust enforcers accordingly should acknowledge the limitations of the information available to them, the complexity of the industries they are regulating, and the potentially adverse consequences their decisions could have on the entities they regulate. They must take care to understand how markets function, the incentives at play for the regulated parties, and the potential for unintended consequences of their decisions.

26. Importantly, enforcers should fully consider short-term and long-term costs and benefits of enforcement decisions and strive to avoid situations where the "cure" may cause more harm to competition than the alleged antitrust violation.

4. Recognizing the limits of antitrust law

27. Related to regulatory humility is a recognition that the antitrust laws are poor tools for addressing economic and social issues not directly related to restraints of trade.[13]

28. Antitrust enforcers and courts have become more adept at predicting the consequences for competition arising from behaviors like price fixing, exclusivity arrangements that foreclose competition and consolidation through mergers and acquisitions (M&A). But they lack the metrics, expertise and authority to try to make political judgments and address issues like "too big to fail," income inequality, diversity and inclusion and environmental issues, which are properly reserved to legislators and sectoral regulators. The U.S. antitrust enforcement agencies have also correctly rejected such other issues as a basis for not challenging transactions that would otherwise be anticompetitive. Using antitrust law to resolve non-competition issues also dilutes the focus and resources of the agencies, leading to less effective oversight of real competitive concerns, and by politicizing the enforcement of antitrust laws undermines public trust in their administration.

IV. The Biden administration's antitrust record

29. Leadership appointments can be key to achieving policy objective and effective enforcement. The appointments of Lina Khan to chair of the FTC and Jonathan Kanter to assistant attorney general (AAG) for the Antitrust Division have certainly been consequential. Chair Khan originally made waves with her widely discussed article, Amazon's Antitrust Paradox, which heavily criticized Amazon's practices and argued that "*the current framework in antitrust—specifically its pegging competition to 'consumer welfare,' defined as short-term price effects—is unequipped to capture the architecture of market power in the modern economy*."[14] Following the release of her article, Chair Khan served as counsel to the House Judiciary Committee's Subcommittee on Antitrust, Commercial and Administrative Law, which investigated competition in digital markets.

30. AAG Kanter had built a career representing clients battling Google for alleged monopolistic exclusion. Both were backed by Sen. Elizabeth Warren, who is known for her aggressively progressive stance on antitrust and regulation. And both appear to have had the full backing of the White House in making major substantive and process changes to enforcement, discouraging M&A and bringing monopoly cases against Big Tech companies.

31. The Biden administration's antitrust record has been largely lauded by progressives as reinvigorating what they have characterized as lax antitrust enforcement. The administration's adherence to the principles of transparency, impartiality, and regulatory humility, however, is open for debate.

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* We acknowledge and thank former FTC Commissioner Maureen Ohlhausen for her development of this principle in the antitrust context. *See*, e.g., Regulatory Humility in Practice: Remarks by FTC Commissioner Maureen K. Ohlhausen (Apr. 1, 2015), https://www.ftc.gov/system/files/documents/public_statements/635811/150401aeihumilitypractice.pdf.

13 *See* F. H Easterbrook, The Limits of Antitrust, *Texas L. Rev.*, Vol. 63, No. 1, 1984, pp. 1–40, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2152&context=journal_articles.

14 L. Khan, Amazon's Antitrust Paradox, *Yale L.J.*, Vol. 126, No. 2, 2017, pp. 710–805.

1. Whole-of-government approach and competition executive order

32. Early in his presidency, President Biden signaled the emphasis his administration would place on antitrust policy through the appointment of a competition policy advisor within the White House and issuance of the Executive Order on Promoting Competition in the American Economy ("Executive Order") with a long list of directions to the executive branch and independent agencies.[15] Among other things, the Executive Order required cooperation amongst agencies with overlapping jurisdiction and authority.

33. In theory, a government-wide approach can lead to more competitive markets by helping to eliminate regulation that actually restrains competition, ensuring that public interest determinations adequately consider effects on competition and reducing the risk that market actors must deal with potentially conflicting policies of various regulators. Since the Executive Order was issued, there have been various memoranda of understanding issued between the DOJ and other agencies, indicating that they will cooperate on competition-related matters.[16]

34. Whether this understanding of the need for increased cooperation will result in cognizable benefits will depend on (i) whether there is actual follow-through by the agencies, which is difficult to measure given the non-public nature of most investigations, and (ii) whether the principles and policies guiding the cross-agency decision-making are designed and enforced with transparency, fact-based impartiality, and regulatory humility. Without these goals in mind, cooperation between the agencies could simply produce misguided enforcement of the antitrust laws and confusion for businesses.

2. Revoking prior long-standing guidance

35. Many of the Biden administration's major "victories" have involved revocation—with and without replacement—of prior long-standing bipartisan agency guidance and the promulgation of new competition and filing rules by the FTC with wide-sweeping effects on the economy.

36. In November 2022, for example, the FTC rescinded its bipartisan 2015 policy statement with respect to the enforcement of Section 5 of the FTC Act against unfair methods of competition[17] and replaced it with guidance that proclaims a much broader Section 5 authority than embraced by either prior administrations or the courts.[18] The 2015 statement limited the use of Section 5 to conduct that would violate the antitrust laws. Under the new policy, that is not the case.

37. Under the new policy, Section 5 would expressly be used to challenge conduct that does not violate the antitrust laws but is nevertheless deemed by a majority of the FTC commissioners to be unfair or potentially anticompetitive. Unlike under the Clayton Act or Sherman Act, the statement takes the position that, in enforcing Section 5, the FTC need not prove market power or actual harm to competition. Rather, it will challenge conduct that "*have the tendency to ripen into violations of the antitrust laws*" as well as conduct that is deemed to be "*coercive, exploitative, collusive, abusive, deceptive* [or] *predatory*" or that involves "*the use of economic power of a similar nature*" and "*tend*[s] *to negatively affect* [competition]."[19]

38. In her dissenting statement, then-Commissioner Wilson correctly describes how the new policy fails the test for optimal antitrust enforcement.[20] "*In the past, both the FTC and its sister agency, the Antitrust Division of the Department of Justice, have issued clear and constructive guidance on enforcement policies and practices. The Policy Statement that the Commission issues today takes a very different approach. Instead of a law enforcement document, it resembles the work of an academic or a think tank fellow who dreams of banning unpopular conduct and remaking the economy. It does not reflect the thinking of litigators who know that legal precedent cannot be ignored, case-specific facts and evidence must be analyzed, and the potential for anticompetitive effects must be assessed. It does not reflect the approach of experienced policy makers who recognize the necessity of considering the business rationales for, and benefits of, conduct so that agency action does not harm consumers and the economy. And it does not exhibit the input of those with counseling and in-house experience who understand the need to provide workable rules so that 'honest businesses' can map the boundaries of lawful conduct*."[21]

39. The FTC has taken a similarly broad view of its rulemaking authority, enacting a nationwide ban on the use of employee noncompete agreements with a narrow

15 Executive Order on Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

16 A list of interagency memoranda of understanding between the Department of Justice and other agencies can be found at https://www.justice.gov/atr/interagency-memoranda-understanding.

17 Statement of Chairwoman Ramirez and Commissioners Brill, Wright, and McSweeny On the Issuance of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735381/150813commissionstatementsection5.pdf

18 Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Commission File No. P221202, at 1 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf

19 Ibid. at 13, 9.

20 Dissenting Statement of Commissioner Christine S. Wilson Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" (Nov. 10, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-of-commissioner-wilson-on-policy-statement-regarding-section-5

21 Ibid. at 2.

exception for existing non-competes binding high-level executives.[22] In so doing, the FTC was implementing a direction in the Executive Order that encouraged the FTC to exercise its statutory rulemaking authority under Section 5 to "*curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility*."

40. Commissioners Holyoak and Ferguson dissented, questioning the FTC's legal authority to promulgate legislative rules for unfair methods of competition.[23] Beyond this critical threshold question, their dissents note the FTC's failure to abide by principles of sound antitrust enforcement. Commissioner Holyoak, for example, explained that she would support the FTC's prosecution of anticompetitive non-compete agreements, "*where the facts and law support such enforcement*." She explained: "*That is why I am particularly disappointed that the Commission dedicated the Commission's limited resources to a broad rulemaking that exceeds congressional authorization and will likely not survive legal challenge. Those resources would be better used to identify and prosecute—including in collaboration with States' attorneys general—anticompetitive non-compete agreements using broadly accepted theories of antitrust harm*."

41. The non-compete rule is an example of Chair Khan's broader desire to use more per se rules and presumptions and a general hostility to a rule-of-reason-based analysis—an approach that fails to recognize the limits of antitrust and illustrates a willingness to sacrifice efficiency and consumer welfare. The rule fails to take into consideration or offer even limited carve-outs for the scenarios where non-competes serve a procompetitive purpose, such as protecting trade secrets. As Commissioner Holyoak observed, employee non-compete clauses present complex policy issues. There are benefits in addition to costs for both the employer and employee that will vary in different contexts. An absolute ban may maximize employee mobility but can also result in less training for employees and upward mobility within a company as employers have less incentive to invest in their employees.

42. The non-compete ban is currently being challenged in multiple district courts.

43. The Biden administration appeared to make a concerted effort to discourage M&A activity. In addition to employing "big is bad" rhetoric complaining about deals that "should never have left the boardroom," the DOJ adopted a "just say no" policy against merger remedies, the FTC adopted a policy of ten-year pre-approval clauses in merger settlements giving the FTC the unilateral ability to block future mergers and acquisitions without judicial or administrative proceedings, the two agencies issued new merger guidelines that provided more uncertainty than guidance, and the FTC proposed sweeping changes to the Hart-Scott-Rodino (HSR) Act pre-merger notification and report form that would dramatically increase the regulatory timeline and cost of even mergers and acquisitions that pose no anticompetitive issues. Taken together, these actions appear to have had their intended effect of significantly slowing down capital transactions.

44. In late 2023, the FTC and DOJ released updated merger guidelines, replacing both the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines.[24] The new guidelines, in many ways, represent a fundamental rejection of agency merger enforcement policy as it had evolved since 1982 through Republican and Democratic administrations, based on advances in economic learning and experience applying the guidelines.

45. For example, the 2023 guidelines eschew the concept of consumer welfare as a bulwark against applying the antitrust laws to protect competition rather than competitors, demote the role of economic analysis and roll concentration presumptions back to 1982 levels. The updated merger guidelines create a presumption of dominance for mergers that create a combined market share of more than 30%, eschew "safe harbors" and fail to provide meaningful guidance for the treatment when these lower levels of concentration would not result in an illegal presumption. The guidelines also embrace a series of either novel theories of harm or theories that have been previously discredited like perceived potential competition or whether the relevant market exhibits a "*trend toward consolidation*."

46. The FTC has not yet released the final HSR form change rule, though its release has at times been described as imminent. It could be that those rules went a step too far even for the administration. In fact, the proposed changes would turn what Congress intended to be a minimally intrusive pre-merger notification process into a burdensome, second-request style endeavor for all deals, regardless of their size or potential for competitive harm. The Chamber of Commerce estimates that the average time spent preparing for an HSR filing will increase from 54.3 hours to 194.6 hours, while the total cost would increase by over USD 430,000 (with an estimated increase of USD 2.3 billion across all filings in a single year).[25] The rule would likely create the inverse of progressives' intended effect: allow only the largest deals where the companies have the most resources to proceed, while increasing costs and deterring M&A amongst small-to-medium-sized firms, for whom the costs associated with even completing the proposed HSR filing would be prohibitive.

22 16 CFR § 910.

23 Dissenting Statement of Commissioner Melissa Holyoak, Joined by Commissioner Andrew N. Ferguson, *In the Matter of the Non-Compete Clause Rule* (June 28, 2024), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-melissa-holyoak-joined-commissioner-andrew-n-ferguson-matter-non.

24 U.S. Dep't of Just. and Fed. Trade Comm'n, Merger Guidelines (Dec. 18, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

25 S. P. Kothari, The US Antitrust Agencies' NPRM re Additional Information Requirements for HSR Filings (Sept. 26, 2023), https://www.uschamber.com/assets/documents/20230926-Kothari-Report.pdf.

V. Likely impact of the Biden administration and thoughts for the future

47. Overall, the Biden administration has had a mixed record in applying the principles of transparency, impartiality, and regulatory humility. The expansions of agency power under the administration, removal or updates to long-standing guidance, and the willingness to pursue novel theories of harm, have added to uncertainty around antitrust enforcement. The Biden antitrust enforcers have relied heavily on selective interpretations of legislative history, and it is evident that many of the current antitrust enforcers see the FTC (and to a lesser extent, the DOJ) as having the right tools to fix a host of perceived social and economic ills. But antitrust law has its limits, and so does antitrust enforcement.

48. As the impact of many of the Biden administration's antitrust initiatives is still yet to be seen, the legacy of the Biden administration's initiatives will largely depend on the outcome of cases considering the FTC's non-compete ban, the scope of its competition rulemaking authority generally and the extent to which courts adopt the approach of the 2023 Merger Guidelines. The merger guidelines may not be persuasive with courts to the extent they lean heavily on decades-old precedent to support while ignoring more recent lower court cases; the agencies will still have to make their cases with the facts and economics. And, of course, it depends on whether the next administration chooses to continue the direction of the Biden administration. ■

Has Lina Khan already won? New administration unlikely to fully reverse Biden administration

Luis Blanquez
luis.blanquez@bonalawpc.com
Partner
Bona Law, San Diego

Steven Cernak
steven.cernak@bonalawpc.com
Partner
Bona Law, Chicago

I. Introduction

1. In past changes of administration, high-level predictions about upcoming antitrust enforcement were easier to make. Republican administrations might have less non-price-fixing enforcement; Democrat administrations might have more. No matter who won, the enforcement would stay within a broad consensus that began to form nearly fifty years ago.

2. Not so this year. That broad consensus is gone, and the Overton window of politically acceptable antitrust enforcement has drastically shifted toward greater enforcement over the last four to eight years. A Trump II administration's antitrust approach would not look like Reagan's (or even either Bush's) and a Harris one would not mimic Clinton's or even Obama's.

3. Instead, the change in enforcement personnel at all levels and the renewed popular interest in antitrust likely mean more continuity with the recent increase in enforcement, no matter who wins. Below, we review a few areas where enforcement priorities have changed and explain why they are unlikely to revert to the prior consensus in the next four years.

II. The Biden administration antitrust roadmap

4. During the last three years, we have seen a significant shift in U.S. antitrust enforcement: (i) an aggressive merger enforcement agenda, (ii) the targeting of Big Tech companies with several high-profile monopolization cases, and (iii) the possibility of a renewed enforcement of the Robinson-Patman Act (RPA). These moves have dramatically changed the antitrust landscape in the U.S. A new administration is unlikely to completely reverse them.

1. An aggressive merger enforcement agenda

5. The Department of Justice (DOJ) and Federal Trade Commission (FTC) have been particularly active and aggressive on the merger control front, highlighting that increased concentration of market power leads to limited consumer choices and higher prices.

6. The Hart-Scott-Rodino Act ("HSR Act") requires the parties of a transaction to submit certain information and documents and then wait for approval before closing a transaction. The HSR Act notification requirements[1] generally apply—as of today—to mergers over USD 119.5 million. The FTC and DOJ then have 30 days to determine if they will allow a merger to proceed or seek much more detail through a "second request" for information. In practice, this means that only a fraction of mergers need to be notified to the authorities for their analysis, and from those, an even smaller number require an in-depth or "second request investigation." But under

1 The HSR Act notification requirements apply to transactions that satisfy the specified "size of transaction" and "size of person" thresholds. These thresholds are adjusted annually to reflect changes in the U.S. gross national product. First, one of the parties to the transaction must be in commerce in the United States or otherwise affect U.S. commerce. Second, the acquiring party must be acquiring securities, non-corporate interests, or assets of the target in excess of USD 119.5 million—the "size of transaction" threshold. A notification is thus not required when the value of the voting securities and assets is below this threshold. Third, if the transaction exceeds USD 119.5 million but does not exceed USD 478 million, then the "size of the parties" threshold kicks in and at least one party involved in the transaction must have annual net sales or total assets of at least USD 239 million, and the other party must have annual net sales or total assets of at least USD 23.9 million. Transactions valued at more than USD 478 million are reportable regardless of the size of the parties, unless an HSR Act exemption applies.

the Biden administration, the antitrust enforcers set a new all-time high for merger challenges:[2] "*A complete assessment of the FTC's success in stopping harmful mergers reveals that of the 38 mergers challenged during my tenure as Chair, 19 were abandoned, another 14 were settled with divestitures, and two are pending a final outcome*."[3]

7. In addition, the Biden administration has withdrawn the previous vertical merger guidelines from the Trump administration, and on December 18, 2023, the FTC and DOJ released the final new merger guidelines,[4] listing more and different reasons why the agencies will challenge mergers. They list thirteen different factors, violation of any one of which could be a reason to try to stop the merger. For example, the prior guidelines often started with market definition and concentration levels but then analyzed further to see if those factors really would lead to competitive harm. These new draft guidelines, by contrast, (i) expand the ways markets might be defined; (ii) return to lower thresholds for determining when markets are "highly concentrated" and the transaction will significantly increase concentration; and (iii) explain that mergers involving highly concentrated markets or firms with 30% or more share of the market almost certainly will be challenged without further analysis. Also, transactions in markets trending toward consolidation will be challenged. Finally, mergers that substantially reduce competition in labor markets will also be challenged.

8. The above, when considered alongside the proposed changes to the reporting requirements under the HSR Act,[5] which should be finalized soon, formalize the interventionist approach of the current administration. In other words, under a potential similar Harris administration, expect more transactions to receive scrutiny, and more extended investigations to become commonplace and burdensome. Meanwhile, dealmakers are holding some deals back in hope of a more lenient approach in the next administration.

2. Big tech companies in the crosshairs of antitrust enforcers

9. Big Tech companies have also been on the agencies' radar during the current Biden administration. First, both the FTC and DOJ have filed high-profile monopolization cases, sometimes together with state attorneys general. Some lawsuit examples: Apple (smartphones[6]), Google (Google Search[7] and Google Ad Technology[8]), and Amazon (online retail[9]) or Meta.[10] In that final suit, the wide-ranging suit alleged the company was illegally maintaining its personal social networking monopoly through a years-long course of anticompetitive conduct, including its 2012 acquisition of up-and-coming rival Instagram, its 2014 acquisition of the mobile messaging app WhatsApp, and the imposition of anticompetitive conditions on software developers—to eliminate threats to its monopoly.

10. And the agencies did not stop there, because as part of their roadmap, the enforcers also challenged significant acquisitions, such as in the case of *Meta/Within*,[11] *Nvidia/Arm Ltd.*[12] or *Microsoft/Activision*,[13] among many others.

11. And last but not least, the antitrust agencies have also recently decided to get a closer look at the Big Tech's access to the AI ecosystem. Indeed, as a result of such a hostile environment, both for the industry as a whole and merger enforcement in particular, Big Tech companies seem to be developing new and creative strategies to get involved in the AI industry, without having to acquire any companies and face the enforcers.[14]

12. These tactics have raised some eyebrows at the agencies.[15] The FTC and DOJ have also agreed to split duties to investigate potential antitrust violations of Microsoft, OpenAI, and Nvidia.[16] The DOJ will lead

2 L. Nylen, Biden Antitrust Enforcers Set New Record for Merger Challenges, *Bloomberg* (Dec. 18, 2023), https://news.bloomberglaw.com/mergers-and-acquisitions/biden-antitrust-enforcers-set-new-record-for-merger-challenges.

3 Letter From Chair Khan to Rep. Tiffany Regarding Merger Challenges (Nov. 3, 2023) at 2, https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/letter-chair-khan-rep-tiffany-regarding-merger-challenges.

4 U.S. Dep't of Just. and Fed. Trade Comm'n, Merger Guidelines (Dec. 18, 2023), https://www.justice.gov/atr/2023-merger-guidelines.

5 Press Release, Fed. Trade Comm'n, FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review.

6 Press Release, U.S. Dep't of Just., Justice Department Sues Apple for Monopolizing Smartphone Markets (Mar. 21, 2024), https://www.justice.gov/opa/pr/justice-department-sues-apple-monopolizing-smartphone-markets.

7 Press Release, U.S. Dep't of Just., Justice Department Sues Monopolist Google For Violating Antitrust Laws (Oct. 20, 2020), https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws.

8 Press Release, U.S. Dep't of Just., Justice Department Sues Google for Monopolizing Digital Advertising Technologies (Jan. 24, 2023), https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies.

9 Press Release, U.S. Dep't of Just., Justice Department Sues Monopolist Google For Violating Antitrust Laws (Oct. 20, 2020), https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws.

10 Press Release, Fed. Trade Comm'n, FTC Sues Facebook for Illegal Monopolization (Dec. 9, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization.

11 S. Cernak and L. Blanquez, Meta/Within Merger Antitrust Opinion: Cutting Edge Tech, Vintage Precedent, Bona Law (Feb. 14, 2023]), https://www.theantitrustattorney.com/meta-within-merger-antitrust-opinion-cutting-edge-tech-vintage-precedent/.

12 Press Release, Fed. Trade Comm'n, Statement Regarding Termination of Nvidia Corp.'s Attempted Acquisition of Arm Ltd. (Feb. 14, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/02/statement-regarding-termination-nvidia-corps-attempted-acquisition-arm-ltd.

13 S. Cernak and L. Blanquez, The FTC Keeps Digging Its Own Grave: Microsoft-Activision Merger Deal Can Move Ahead Says Federal Judge in California, Bona Law (July 14, 2023), https://www.theantitrustattorney.com/the-ftc-keeps-digging-its-own-grave-microsoft-activision-merger-deal-can-move-ahead-says-federal-judge-in-california/.

14 L. Blanquez, Mergers & Acquisitions, AI and Antitrust: The New Creative Ways for Big Tech to Enter the AI Market and Avoid HSR Rules (July 21, 2024), https://www.theantitrustattorney.com/mergers-acquisitions-ai-and-antitrust-the-new-creative-ways-for-big-tech-to-enter-the-ai-market-and-avoid-hsr-rules/#more-2628.

15 Assistant Attorney General Jonathan Kanter Remarks at the Promoting Competition in Artificial Intelligence Workshop (May 30, 2024), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-promoting-competition.

16 J. Sisco, Feds set stage for antitrust probes of Nvidia, Microsoft and OpenAI, *Politico* (June 6, 2024) https://www.politico.com/news/2024/06/06/federal-antitrust-probes-nvidia-microsoft-openai-00161973.

the Nvidia investigation, and its leading position in supplying the high-end semiconductors underpinning AI computing, while the FTC is set to probe whether Microsoft and its partner OpenAI have unfair advantages with the rapidly evolving technology, particularly around the technology used for large language models. Previously, in January 2024, the FTC opened an inquiry[17] into the investments of Big Tech companies that provide cloud services to smaller AI companies like OpenAI and Anthropic. The FTC also sent letters[18] to Alphabet, Amazon, Anthropic, Microsoft, and OpenAI, requiring the companies to explain the impact these investments have on the competitive landscape of generative AI.

13. Again, a continuation of a Democrat administration after the upcoming elections would mean Big Tech not being "off the hook" for a long time.

3. Renewed enforcement of the Robinson-Patman Act

14. For several decades, federal enforcement of the RPA has been dormant, and only a few private lawsuits under the Robinson-Patman Act were filed every year. But things seem to have drastically changed more recently. In September 2022, FTC Commissioner Bedoya made one of his first speeches[19] and called for a "*return to fairness*" when enforcing the antitrust laws. In particular, he called for renewed enforcement of the Robinson-Patman Act.

15. Since then, the FTC has started several Replace with: RPA investigations. One was part of a broader inquiry into the role of large retailers, wholesalers, and consumer goods suppliers in the 2021 supply chain disruptions and how those were harming consumers and competition in the U.S. economy.[20] Other investigations with an RPA angle include those of the soda and liquor industries, in particular against Southern Glazer's Wine & Spirits LLC ("Southern"). This FTC's investigation analyzes whether Southern had violated the RPA by selling wine and spirits of like grade and quality to small independent retailers for higher prices than it would sell wine to large chain retailers. According to published reports, a lawsuit is expected imminently.[21]

17 Press Release, Fed. Trade Comm'n, FTC Launches Inquiry into Generative AI Investments and Partnerships (Jan. 25, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-launches-inquiry-generative-ai-investments-partnerships.

18 E. David, FTC investigating Microsoft, Amazon, and Google investments into OpenAI and Anthropic, *The Verge* (Jan. 25, 2024), https://www.theverge.com/2024/1/25/24050693/ftc-investigating-microsoft-amazon-google-investments-openai-anthropic.

19 Prepared Remarks of Commissioner Alvaro M. Bedoya, "Returning to Fairness," Midwest Forum on Fair Markets: What the New Antimonopoly Vision Means for Main Street (Sept. 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf.

20 Press Release, Fed. Trade Comm'n, FTC Launches Inquiry into Supply Chain Disruptions (Nov. 29, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-launches-inquiry-supply-chain-disruptions

21 J. Sisco, FTC preparing lawsuit over alcohol pricing, *Politico* (June 3, 2024), https://www.politico.com/news/2024/06/03/ftc-lawsuit-southern-glazer-wine-spirits-00161323

16. On top of the public enforcement, several private lawsuits[22] provide now more evidence that the law is anything but gone, reinforcing the fact that the RPA has become a priority under the current administration, and in case of a new future win by the Democratic Party. Exactly how RPA's focus on competitive issues allegedly caused by certain price discounts would interact with any Harris policy on price gouging, which was recently announced, remains to be seen.

III. What an antitrust Trump administration would be able to change, if anything?

17. Would a Trump II administration change the antitrust focus? A look at antitrust actions in the Trump I administration and some views expressed by Vice Presidential candidate Sen. J. D. Vance make any drastic reduction in antitrust enforcement seem unlikely.

18. The first Trump administration already put a strong antitrust law enforcement in place. In some ways, it was even more aggressive than the Biden and Obama administrations.

19. Regarding merger review, the Trump administration challenged 27 mergers in 4 years, compared to 27 for the Biden administration in about 3.4 years, or 42 in the Obama administration over 8 years. The Trump administration had 5 litigation losses with 19 deals blocked or abandoned during its 4 years, compared to 6 losses for the Biden administration in just 3 years. When considering both blocked mergers and transactions abandoned, the merger win rate is 70%, the highest between the Bush, Obama, or Biden administrations.[23]

20. On the Big Tech front, things were not much different, and not just because of the Republican's focus on Big Tech political bias to limit conservative speech. Indeed, Big Tech companies were already at the crosshairs of antitrust enforcers, with the Trump administration bringing cases as important as the *AT&T/Time Warner* merger challenge, or several monopolization investigations against Apple, Amazon, Meta and Google, most of them currently making the news under the Biden administration.

22 *See U.S. Wholesale Outlet & Distrib. v. Innovation Ventures, LLC*, 2023 U.S. App. LEXIS 18474 (9th Cir. Cal., July 20, 2023); *L.A. International Corporation v. Prestige Brands Holdings, Inc. et al.*, No. 2:18-cv-06809 (C.D. Cal. Aug. 20, 2018).

23 *See* J. Wright, Trump Antitrust, The Sequel, *Competition on the Merits* (June 20, 2024), https://competitiononthemerits.substack.com/p/trump-antitrust-the-sequel.

21. And the nomination of Senator J. D. Vance (R-OH), a former lawyer and venture capitalist, as Trump's running mate—viewed by some as a maverick from traditional Republican economic views—only reinforces the idea of a vigorous antitrust enforcement agenda.

22. Vance previously worked at Peter Thiel's (PayPal's founder) Mithril Capital Management, and had his own venture fund, Narya Capital, backed by some key Silicon Valley people, the same ones who have been supporting his campaign. But his background has not stopped him from holding a strong position against at least some Big Tech companies, stating that they have too much economic power and influence in the politic arena, supporting the idea of breaking Google and Meta up.

23. Sen. Vance currently sits on the Senate Committee on Banking, Housing, and Urban Affairs, the Senate Committee on Commerce, Science and Transportation, and the Senate Special Committee on Aging. He helped introduce the bipartisan Stop Subsidizing Giant Mergers Act. This bill would end tax-free treatment for transactions exceeding USD 500 million during the prior three years. He also co-sponsored the Failed Bank Executives Clawback Act, a bill introduced by Democratic Sen. Elizabeth Warren of Massachusetts providing federal regulators authority to recoup up to three years of compensation when an insured financial institution is placed into Federal Deposit Insurance Corp. receivership.

24. Sen. Vance also openly supports the digital asset, cryptocurrency and Bitcoin space, as well as Lina Khan's work,[24] citing her as one of the sole Biden administration members "*doing a pretty good job*," especially as it relates to Big Tech companies. In fact, he voted to overturn the U.S. Securities and Exchange Commission's (SEC) Staff Accounting Bulletin 121 (SAB 121), which guides how banks should handle customers' crypto assets, requiring them to treat these assets as liabilities. The resolution passed, but President Biden ended up vetoing it.

25. Bottom line, Vance's potential aggressive stance on antitrust enforcement shows a growing tension in the party and seems to be a departure from more traditional previous Republican administrations. Trump populism and Vance populism are not the same. So, Vance's nomination, together with what we have seen before under the first Trump administration, and the drastic turn of events we have seen in the political and economic arena in the U.S. during the past eight years, means that the Bush or even the Reagan's liberal economic times are gone.

26. Expect an aggressive merger enforcement agenda, probably stronger than ever before. Those dealmakers currently waiting for a more friendly environment to close their transactions might have to still sit tight for a while. It is also expected that a new administration would carry on some, if not all, of the current monopolization cases against Big Tech companies, and most likely add some new investigations into the AI sector, where we have already seen some major moves by the same big players. On the other hand, we would also expect a new Trump administration to closely follow the rule of law and perhaps even returning to some version of the consumer welfare standard, departing from the current aggressiveness of antitrust enforcers, which some have named as "hipster antitrust." It might mean stepping back from FTC rulemaking that has generated constitutional concerns. Economic regulation in the new emerging crypto and digital assets industry might be kept to a minimum. An interesting question to be answered is if a Trump II administration would follow some populist tendencies and continue the revival of Robinson-Patman or return it to its previous dormant state.

IV. Conclusion

27. After the breakdown of the Chicago School consensus over the last several years, it would take a concerted effort to revive it. Neither new administration seems to want to lead such a difficult effort. Sure, likely there will be changes around the edges but, support it or not, the broad push of enforcement of the last several years seems likely to continue in at least some form. Time to get used to it. ■

24 R. Klar, Vance: Biden FTC chief is'doing a pretty good job', *The Hill* (Feb. 27, 2024), https://thehill.com/policy/technology/4491363-vance-biden-ftc-chief-is-doing-a-pretty-good-job/.

A tale of two approaches: Merger policy during the Biden administration

Allan Shampine*
ashampine@compasslexecon.com
Executive Vice President
Compass Lexecon, Chicago

Nathan Wilson
nwilson@compasslexecon.com
Executive Vice President
Compass Lexecon, Washington, DC

I. Introduction

1. Antitrust has received more press attention during the Biden administration than recent prior administrations.[1] Seemingly integral to the focus on antitrust has been the perception, nurtured by some at the agencies and beyond, that policy truly had changed in a dramatic way.[2] There is certainly some basis for this perception, not least in decisions that have increased the costs of pursuing deals that in prior years would receive short reviews owing to the absence of realistic theories of harm. However, though less commonly remarked upon, it also is the case that both the Federal Trade Commission (FTC) and Department of Justice (DOJ) have continued to prosecute their mandates in ways that would be familiar to practitioners with experience working with or against enforcers during prior administrations. Consequently, to paraphrase Dickens, antitrust policy under the Biden administration has been a tale of two approaches—the most radical of eras as well as the least.

2. In this note, we discuss the different activities of the FTC and the DOJ in relation to mergers over the last four years, focusing both on the less remarked upon "blocking and tackling" that continues to account for a significant amount of their activities as well as the novel initiatives that have distinguished both agencies during this administration. We begin in section II with a discussion of the agencies' actions challenging "standard" horizontal mergers, by which we mean those concerning competition based on existing products and services, as opposed to potential competition in the future. Then, in section III, we consider how the FTC and DOJ have acted with respect to cases involving potential competition. In section IV, we consider the agencies' approach to challenging vertical and other non-horizontal mergers. Section V looks more broadly at how the Biden administration's non-enforcement actions and choices reflect philosophical differences from prior administrations. We conclude in section VI.

II. Mergers of existing competitors

3. For the last several decades, investigating mergers in order to determine whether the parties' existing product or service offerings are important substitutes for each other has been a mainstay of both the DOJ's and FTC's antitrust enforcement programs. Notwithstanding that much press attention has centered on other aspects of the antitrust agencies' mission under the Biden administration,[3] it appears to remain the case that horizontal mergers remain agency staff's key focus. The FTC and DOJ have brought challenges to transactions in a wide variety of industries, including commodity

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1 For example, there have been multiple profiles of agency leaders in mainstream press outlets. *See*, e.g., S. Kolhatkar, Lina Khan's Battle to Rein in Big Tech, *The New Yorker* (Nov. 29, 2021), https://www.newyorker.com/magazine/2021/12/06/lina-khans-battle-to-rein-in-big-tech. *See also*, C. Jones, 'She's going to prevail': FTC head Lina Khan is fighting for an anti-monopoly America, *The Guardian* (Mar. 9, 2024), https://www.theguardian.com/us-news/2024/mar/09/lina-khan-federal-trade-commission-antitrust-monopolies. As well, *see* D. McCabe, The Trustbuster Who Has Apple and Google in His Sights, *NY Times* (Mar. 22, 2024), https://www.nytimes.com/2024/03/22/technology/jonathan-kanter-apple-antitrust.html.

2 *See*, e.g., Chair Khan's remarks in 2023 as synopsized by Georgetown Law, https://www.law.georgetown.edu/news/ftc-chair-lina-khan-discusses-the-promises-of-antitrust-at-georgetown-law/.

3 *See* footnotes 1 and 2.

products,[4] packaged produce,[5] health care providers,[6] and online advertising to health care providers,[7] but all based on similar antitrust theories to those advanced under the Trump, Obama, Bush, and Clinton administrations. In other words, complaints from both the FTC and DOJ have rooted their concern in an expectation that should the transaction be consummated, it would redound to the detriment of consumers (or suppliers) as a result of a reduction in existing horizontal competition.

4. Structural evidence (i.e., market shares and Herfindahl-Hirschman Index calculations) has been part of that assessment, just as it has been traditionally, but so too are arguments as to why and how consumers would be harmed. In other words, the same sort of competitive effects arguments seen in prior decades are still present, supported by the same three pillars of evidence as have been cited to for decades: documents, testimony, and economic modeling. Though the 2023 Merger Guidelines appear to place less emphasis on the hypothetical monopolist test (HMT), product and geographic markets in complaints brought under the Biden administration have still generally been defined using it as at least the guiding thought experiment if not an actual implementation. While qualitative evidence may be appealed to, such a consideration of "*Brown Shoe* factors" is not a radical departure from prior practice.[8]

5. There are differences in where various administrations have drawn the line as to what horizontal cases will be litigated. However, while the boundaries may vary, there is a common core of "blocking and tackling" horizontal merger analysis that has been fairly consistent across recent decades, including during the Biden administration. The complaints associated with many of the transactions challenged by the DOJ and FTC over the last four years, and the underlying rationales for why they were brought, would be broadly recognizable to practitioners of different eras.

6. Another commonality between the Biden administration and its predecessors is the record of the agencies in court on challenges involving traditional horizontal theories of harm. Notwithstanding several early losses, the agencies under the Biden administration have won many of their challenges of horizontal transactions, which is consistent with the agencies' record under prior administrations.[9] The fact that the rate of success in court appears similar is consistent with the underlying approaches being similar, as one might expect cases pushing the boundaries of economics and the law to have less success in the courts (and as seems to have happened, as we discuss next).[10]

III. Nascent competition

7. The agencies under the Biden administration have also scrutinized transactions to determine whether there are grounds to anticipate harms from acquisitions of firms that have not yet established themselves or their products in a relevant product market. Whether referred to as "potential competition," "nascent competition," or "killer acquisition" theories, the proposition that transactions involving parties with products under development could result in harm is not novel. On the contrary, the agencies have investigated and challenged deals on such grounds for many years.[11] Thus, it is not a noteworthy departure from historical norms for the FTC and DOJ under the Biden administration to have expressed concern over, and devoted investigative resources to, such transactions (or to challenge them).

8. What is noteworthy, in our view, is the Biden administration's increased emphasis on and changing standards for challenging potential competition transactions, which we believe represents a break with prior regimes. For example, the issue of large firms acquiring start-ups with the potential to challenge them received considerable explicit attention in the new

4 Press Release, U.S. Dep't of Just., Justice Department Sues to Block U.S. Sugar's Proposed Acquisition of Imperial Sugar (Nov. 23, 2021), https://www.justice.gov/opa/pr/justice-department-sues-block-us-sugar-s-proposed-acquisition-imperial-sugar.

5 Press Release, U.S. Dep't of Just., Fresh Express Abandons Proposed Acquisition of Dole's Packaged Salad Business in Response to Antitrust Division's Concerns (Mar. 28, 2024), https://www.justice.gov/opa/pr/fresh-express-abandons-proposed-acquisition-doles-packaged-salad-business-response-antitrust.

6 Press Release, Fed. Trad Comm'n, FTC and Rhode Island Attorney General Step in to Block Merger of Rhode Island's Two Largest Healthcare Providers (Feb. 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.

7 Press Release, Fed. Trad Comm'n, FTC Sues to Block IQVIA's Acquisition of Propel Media to Prevent Increased Concentration in Health Care Programmatic Advertising (July 17, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-sues-block-iqvias-acquisition-propel-media-prevent-increased-concentration-health-care.

8 *See*, e.g., discussion in J. Sandford, L. Smith and N. Wilson, Economics in the 2023 Merger Guidelines: Three Areas of Concern, in *US Merger Guidelines: A Review*, S. Sullivan (ed.), in collaboration with the CCIA, Concurrences, forthcoming (2024).

9 According to one recent article, the agencies won approximately two thirds of litigated merger challenges between 2001 and 2020. L. Billman and S. C. Salop, Merger Enforcement Statistics: 2001–2020, *Antitrust Law Journal*, Vol. 85, No. 1, 2023, pp. 1–66.

10 Of the mergers where the agencies litigated challenges based on horizontal theories involving extant products and services, the agencies unambiguously won three cases: *FTC v. IQVIA/Propel Media*; *DOJ v. Penguin Random House/Simon & Schuster*; and *DOJ v. American/JetBlue*. In contrast, the DOJ and FTC clearly lost two cases: *DOJ v. US Sugar/Imperial Sugar* and *DOJ v. Booz Allen/EverWatch*. The FTC did lose an additional case—*Novant/CHS*—at the district court stage. However, after the Fourth Circuit agreed to impose an injunction pausing the merger until it had considered the FTC's appeal, the parties abandoned the transaction. Subsequently, the district court opinion was vacated. Here, we exclude it from both the tally of defeats and victories. In *United Health/Change Healthcare*, the complaint technically contained a horizontal count. However, this concern was fairly clearly obviated by a fix entered into by the parties prior to trial. Therefore, we exclude it from the tally, and consider it in the context of non-horizontal challenges. More debatably, we also exclude the FTC's loss of its challenge to the *Altria/Juul Labs* joint venture, where the complaint alleged that Altria abandoned its electronic cigarette products as a transaction-specific effect of its investment in the then-more successful Juul products. We set this case to the side as one party's products had disappeared from the market.

11 *See*, e.g., discussion of a taxonomy of different types of potential competition cases in A. Sweeting, J. Schrag and N. Wilson, Not All Pre-Emptive Mergers Are Alike: A Classification of Recent Cases, *Competition Policy International* (Oct. 2020), https://www.competitionpolicyinternational.com/wp-content/uploads/2020/10/3-Not-All-Pre-Emptive-Mergers-Are-Alike-A-Classification-of-Recent-Cases-By-Andrew-Sweeting-Joel-Schrag-Nathan-Wilson.pdf.

Merger Guidelines, even getting its own "guideline."[12] By contrast, in the past, mergers that might have eliminated future competition between existing and under development products were simply recognized as another form of horizontal merger.[13] Moreover, the new guideline sets what strikes us as a low bar for establishing that there would be competition in the future (i.e., that the not-present party simply "*has sufficient size and resources to enter*").

9. The greater emphasis on the possibility for harm from the acquisition of nascent competitors may stem from the belief among Biden administration decision-makers that a higher proportion of acquisitions of small firms can be, and have been, harmful.[14] We believe this represents something of a departure from practice dating back to the 1980s. Though there is some economic evidence of harm from acquisitions that are sufficiently small as to not require notifications,[15] the argument that acquisitions of emerging firms by large ones are commonly harmful is controversial.[16]

10. In addition to public statements, there is evidence that the agency decision-makers under the Biden administration have had a lower evidentiary threshold for bringing a challenge when there is some possibility that the acquired party could eventually have competed with its acquiror.[17] The enforcement action that most strongly signals a change in the standards for bringing a nascent competition challenge was the FTC's challenge of Meta's acquisition of Within.[18] This matter primarily focused on the possibility of competition between Meta and Within in the context of virtual reality fitness games. At the time of the transaction, Meta had no product that competed with Within's Supernatural game. Moreover, it had no plans to develop one. However, the FTC argued that because of limited documentary evidence that Meta had considered entering, as well as the argument that Meta possessed the resources to develop such a game, competition would be harmed by the transaction, notwithstanding Within's lack of profitability and Meta's efficiency arguments.[19] The district court ultimately disagreed that there was, in fact, a potential competition harm from Meta's acquisition of Within.

11. In the aftermath of the FTC's loss, it is fair to question whether that case represents an outlier or a signal of a more generally hostile approach to acquisitions of small, potentially ultimately competing firms. There is some evidence that the latter is the case. For example, the case was in keeping with the heavier emphasis on such matters in documents such as the 2023 Merger Guidelines, which post-date it. Moreover, some statements from FTC officials following the decision seemed to argue that the defeat was actually a moral victory insofar as the court's opinion had solidified potential competition as a theory of harm, which would enable the Commission to bring more such challenges.[20] The Biden administration has also been clear that it is not deterred by losses and that the willingness to litigate will itself help deter transactions. Indeed, both Chair Khan and Assistant Attorney General Kanter have stated that losses are to be expected when attempting to make new law.[21]

IV. Vertical and non horizontal merger enforcement

12. Prior to the Trump administration's challenge of *AT&T/Time Warner*, there had not been a litigated vertical merger since the Nixon administration. Under the Biden administration, there already have been at least three litigated non-horizontal mergers: *UHC/Change*, *Illumina/GRAIL*, and *Microsoft/Activision*. *Meta/Within* could arguably represent a fourth as it had important vertical elements.[22] Separately, the FTC has brought an additional four complaints against non-horizontal mergers: *Nvidia/ARM*, *Lockheed/Aerojet*, *Amgen/Horizon*, and—very recently—*Sealy/Mattress Firm*. Of these, the parties abandoned their transactions twice

12 *See*, e.g., Merger Guidelines (2023), Guideline 4 (Mergers Can Violate the Law When They Eliminate a Potential Entrant in a Concentrated Market).

13 *See*, e.g., Horizontal Merger Guidelines (2010) at 1 ("*These Guidelines outline the principal analytical techniques, practices, and the enforcement policy of the Department of Justice and the Federal Trade Commission (the 'Agencies') with respect to mergers and acquisitions involving actual or potential competitors*").

14 *See*, e.g., J. Kanter, Keynote at CRA Conference (Mar. 31, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-cra-conference.

15 *See*, e.g., T. Wollmann, How to Get Away with Merger: Stealth Consolidation and its Effects on US Healthcare, *NBER Working Paper* w27274 (2020); C. Cunningham, F. Ederer and S. Ma, Killer acquisitions, *Journal of Political Economy*, Vol. 129, No. 3, 2021, pp. 649–702.

16 *See*, e.g., B. Hollenbeck, Horizontal mergers and innovation in concentrated industries, *Quantitative Marketing and Economics*, Vol. 18, No. 1, 2020, pp. 1–37; in the context of digital firms, *see* L. Cabral, Merger policy in digital industries, *Information Economics and Policy*, Vol. 54, 2021, 100866.

17 For example, news reports suggest that FTC officials overruled staff's recommendation in seeking to challenge Meta's acquisition of Within. *See*, e.g., Report: FTC Staff Objected to Chair's Decision to Sue Meta, PYMNTS (July 29, 2022), https://www.pymnts.com/legal/2022/report-federal-trade-commission-staff-objected-chair-decision-sue-meta/.

18 For details, *see* the FTC's complaint: https://www.ftc.gov/system/files/ftc_gov/pdf/D09411MetaWithinComplaintPublic.pdf.

19 *FTC v. Meta Platforms Inc.*, No. 5:22-CV-04325-EJD, 2023 WL 2346238 (N.D. Cal. Feb. 3, 2023), https://law.justia.com/cases/federal/district-courts/california/candce/5:2022cv04325/398508/570/.

20 *See* statement made at Keystone Conference by Deputy Director John Newman as reported in The Antitrust Agenda: At Keystone Conference, Kanter Warned about Big Tech as Vestager Struck Centrist Note, *The Capitol Forum* (Mar. 6, 2023), https://thecapitolforum.com/the-antitrust-agenda-at-keystone-conference-kanter-warned-about-big-tech-as-vestager-struck-centrist-note/. *See also*, discussion in M. R. Moiseyev, R. Williams and G. Hardesty, The Potential for Potential Competition after FTC v. Meta, *The Antitrust Source* (Aug. 2023), https://www.weil.com/-/media/files/pdfs/2023/september/the-potential-for-potential-competition-after-ftc-v-meta.pdf.

21 *See*, e.g., J. Queen, DOJ Antitrust Head: No 'Chickenshit Club' Despite Losses, *Law360* (Apr. 21, 2022), https://www.law360.com/articles/1486196/doj-antitrust-head-no-chickenshit-club-despite-losses. *See also*, C. Kang, F.T.C.'s Court Loss Raises Fresh Questions About Its Chair's Strategy, *NY Times* (July 11, 2023), https://www.nytimes.com/2023/07/11/technology/lina-khan-ftc-strategy.html.

22 *IQVIA/Propel Media* might be considered a fifth as the FTC litigated a vertical as well as a horizontal theory of harm. Ultimately, the district court abstracted from the vertical theory, deciding that as the FTC had proved its horizontal case, it was not necessary to assess the vertical one.

(*Nvidia*/*Arm* and *Lockheed*/*Aerojet*), settled once (*Amgen*/*Horizon*), and the final matter's (*Sealy*/*Mattress Firm*) outcome remains to be seen.[23] The DOJ has also brought a case against LiveNation with vertical elements.[24]

13. To be clear, concern that vertical and non-horizontal transactions could have anticompetitive effects is not novel. One of the authors can attest to having investigated—at length—non-horizontal theories while an enforcer, and the FTC's recent Commentary on Vertical Merger Enforcement documents its history of scrutinizing and challenging potentially problematic vertical mergers.[25] Moreover, some of the non-horizontal challenges that were litigated or issued during the Biden administration originated during the Trump administration (e.g., *Illumina*/*GRAIL*). Nevertheless, the agencies under the Biden administration do appear to have a greater focus on vertical theories than in the past.

14. While the economics literature is unambiguous that vertical and other forms of non-horizontal mergers can harm consumers and competition, it is also unambiguous that, unlike horizontal mergers, combining complements will typically change incentives in a pro-competitive way even if it may also alter them in a way that could harm consumers. Consequently, most economists agree that it is necessary to grapple with the combination of these effects.[26] In contrast to how DOJ litigated *AT&T*/*Time Warner*, explicitly weighing costs and benefits from the vertical integration, the challenges brought under the Biden administration have tended to avoid—or give comparatively short shrift to—this implication of standard economic theory. Instead, there has been an emphasis on establishing potential harm through allegedly high market shares, which are construed as establishing the incentive and ability to act in ways harmful to consumers and competition but without an underlying economic model.[27]

15. Altogether, the Biden administration's record as to success or failure in its non-horizontal merger challenges has been mixed at best, which is consistent with efforts to push the boundaries of recent practice. While the FTC ultimately secured the government's first victory in vertical merger litigation in decades in *Illumina*/*GRAIL*, the FTC first lost in its internal court in that matter.[28] And while the Biden administration may have ultimately helped induce both Nvidia and Lockheed to abandon their respective transactions, the government lost both *UHC*/*Change* and *Microsoft*/*Activision*.

V. Philosophy

16. The Biden administration's aggressive efforts in relation to nascent competition and non-horizontal transactions bring us to the final section. While any given administration may draw the line as to where to litigate somewhat differently, there historically has been an understanding that most mergers are benign and that some degree of efficiency can be expected from putting assets under the control of those who value them most. The Biden administration's approach seems qualitatively different in that there appears to be an underlying hostility to mergers and acquisitions (M&A) activity across the board that was absent in prior administrations.[29]

17. An early signal of the Biden administration's posture towards mergers writ large was its February 2021 abandonment of "early termination."[30] Under the Hart-Scott-Rodino (HSR) Act, merging parties must provide the antitrust agencies with 30 days to review proposed transactions prior to consummating them. Early termination is the practice of allowing parties to consummate their transactions before the 30-day period has concluded because agency review has indicated no reason to think competition would be adversely impacted. In other words, it was not a practice that reduced meaningful scrutiny of deals. Rather, it simply allowed for more expeditious resolution of deals that the reviewing agency had reached a decision on. Thus, early termination's abandonment has only imposed additional time and related monetary burdens on firms involved in transactions where standard assessment mechanisms produced no evidence for concern. Based on historical evidence, this decision has impacted an absolute majority

23 Furthermore, reporting suggests that a challenge to the *Amazon*/*iRobot* transaction, which would have combined a retail platform with a manufacturer of products commonly sold on that platform, would have been issued had the deal not been abandoned due to opposition from the European antitrust authorities. *See*, e.g., US FTC was poised to reject Amazon acquisition of iRobot – source, Reuters (Jan. 29, 2024), https://finance.yahoo.com/news/us-ftc-poised-reject-amazon-164931981.html.

24 Press Release, U.S. Dep't of Just., Justice Department Sues Live Nation-Ticketmaster for Monopolizing Markets Across the Live Concert Industry (May 23, 2024), https://www.justice.gov/opa/pr/justice-department-sues-live-nation-ticketmaster-monopolizing-markets-across-live-concert.

25 *See also* Fed. Trade Comm'n, Commentary on Vertical Merger Enforcement (Dec. 2020), https://www.ftc.gov/system/files/documents/reports/federal-trade-commissions-commentary-vertical-merger-enforcement/p180101verticalmergercommentary_1.pdf (Section 7 provides links to public-facing materials for 40 vertical mergers that the FTC investigated).

26 Sandford et al., *supra* note 8.

27 For explanation of why high market shares do not imply competitive harm in vertical integration, *see*, e.g., D. P. O'Brien, Tethering Vertical Merger Analysis, *CPI Antitrust Chronicle* (Apr. 2022), https://www.competitionpolicyinternational.com/wp-content/uploads/2022/04/6-TETHERING-VERTICAL-MERGER-ANALYSIS-Dan-O-Brien.pdf, and D. P. O'Brien, The Good, The Bad, and The Ugly of Current Policy Toward Vertical Mergers, Microfoundations (June 15, 2023), https://www.microfoundations.com/post/the-good-the-bad-and-the-ugly-of-current-policy-toward-vertical-mergers.

28 Moreover, in this nominal victory, the Fifth Circuit vacated the Commission's order and remanded it for further proceedings because the Commission applied the wrong legal standard in evaluating the parties' remedy. *See*, e.g., Fifth Circuit Accepts Vertical Harm Theory and Establishes Standard for Evaluating Merger Fixes, Paul, Weiss (Dec. 22, 2023), https://www.paulweiss.com/practices/litigation/antitrust/publications/fifth-circuit-accepts-vertical-harm-theory-and-establishes-standard-for-evaluating-merger-fixes?id=49610.

29 *See*, e.g., D. W. Carlton, The 2023 Merger Guidelines: A Critical Assessment, *Review of Industrial Organization*, Vol. 65, 2024, pp. 129–145.

30 F. Ashton, Early Termination's Termination: The First Full-Year Look from FTC and DOJ, American Action Forum (Jan. 17, 2024), https://www.americanactionforum.org/insight/early-terminations-termination-the-first-full-year-look-from-ftc-and-doj/. The article indicates that the number of terminations granted since the public decision to abandon the policy is vanishingly small.

of reportable mergers.[31] That is, it is difficult to interpret this change as other than raising the cost of all reviewable mergers. While the impact of delaying any one merger by a maximum of several weeks may be modest, at this point, historical statistics would suggest that the consummation of several thousand mergers has been delayed.

18. The new Merger Guidelines may also be seen as attempting to increase the scope for enforcement by placing greater weight on structural evidence relative to the Horizontal Merger Guidelines released in 2010.[32] For example, the thresholds for a presumption of harm were lowered from the 2010 Guidelines back to the levels in the 1992 Guidelines, and a new structural presumption was introduced for when a merger creates a firm with a share in excess of 30% and more than *de minimis* change in concentration. Also introduced is a market-share-based presumption for non-horizontal mergers, where a market share of 50% for one of the products may provide a basis for inferring a merger is anticompetitive.[33] The theoretical and empirical foundations for these changes are debated.[34] The new guidelines also appear to give even shorter shrift to the prospect for merger-specific efficiencies than prior versions.[35] Overall, the changes suggest a more skeptical—or even actively hostile—view of the role of mergers in the economy. Consistent with that, the new Merger Guidelines, and the draft Guidelines that preceded them, have been criticized by many prominent antitrust economists, and characterized as a significant shift by the administration relative to prior practice.[36]

19. Beyond trying to make it easier to bring challenges to proposed mergers, there is a widespread feeling among practitioners that the Biden administration has increased the costliness of merger reviews. In particular, the average length of the second requests that spell out the types of information that the merging parties must produce to the reviewing agencies is perceived to have expanded. It is difficult to know if this perception is correct, owing to the confidential nature of second requests, but the authors' anecdotal experience is consistent with that view. For example, the agencies commonly appear to be seeking data on parts of the parties' business that would historically not be seen as relevant to an antitrust assessment. The obligation to provide such incremental information effectively raises the costs of parties seeking to merge.

20. Consistent with the view that the Biden administration is generally skeptical of M&A, both antitrust agencies have been much less willing to accept remedies.[37] For example, there is some evidence that very few consent decrees are being negotiated, with almost all "significant investigations" leading to abandonment or complaints.[38] This is likely to disincentivize broadly efficient mergers that may nevertheless have discrete areas of concern. While remedies can never guarantee success, abandoning them also is not without harm. Not only may this lead to litigation for those mergers that are proposed, where the outcome is always uncertain, but if competitive concerns can be remedied, deterring fixable mergers deprives consumers of the benefits that would follow from the more efficient alignment of assets.

21. In line with the hypothesis that the Biden administration's skepticism about the role of mergers in the economy has led it to seek ways of raising the costs of pursuing them, the FTC and DOJ have also proposed revisions to the information that merging parties must submit as part of their HSR notification obligations.[39] If adopted, all merging firms would have to submit much of the detailed data and documents that historically would only be required of the very few firms that receive a second request because the agencies' initial investigation revealed some likelihood of a competition problem. In effect, the new rules would oblige the more than 95% of transactions that historically have not been found to raise concerns to delay merging by months while they spend millions of extra dollars in an effort to produce material that history suggests need not be evaluated (and likely would not be under prior administrations).[40] While it remains unclear how much the actual changes to the HSR notification process will resemble those that have been proposed, the fact that these changes were publicly proposed at all is indicative of the broad view of mergers of key Biden administration policymakers.

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31 *See*, e.g., statistics in Figure 1 of J. Orszag, M. Schmitt and N. Wilson, Understanding Recent Antitrust Bills: How They Risk Harming Rather than Helping Consumers, US Chamber of Commerce White Paper, 2021.

32 Whether or not the attempt to make challenges easier to bring will indeed result in greater enforcement has been called into question. *See*, e.g., discussion in L. Kaplow, The 2023 Merger Guidelines and Market Definition: Doubling Down or Folding?, *Review of Industrial Organization*, Vol. 65, No. 1, 2024, pp. 7–37. https://doi.org/10.1007/s11151-024-09958-w. *See also*, C. Shapiro, Evolution of the Merger Guidelines: Is This Fox Too Clever by Half?, *Review of Industrial Organization*, Vol. 65, No. 1, 2024, pp. 147–175, https://doi.org/10.1007/s11151-024-09956-y.

33 *See* § 2.5.A.2 & n.30 of the Merger Guidelines.

34 *See* discussion in Carlton, *supra* note 29, at 136. *See also*, D. S. Hosken, L. M. Olson and L. K. Smith, Do retail mergers affect competition? Evidence from grocery retailing, *Journal of Economics & Management Strategy*, Vol. 27, No. 1, 2018, pp. 3–22, which presents empirical evidence for one industry that does not clearly support a change to the structural presumption.

35 *See*, e.g., Sandford et al., *supra* note 8.

36 *See*, e.g., multiple contributions to the *Review of Industrial Organization*'s special issue (Vol. 65, No. 1) on the Merger Guidelines. *See also* J. B. Baker, A. I. Gavil, R. Gilbert, H. Hovenkamp, M. L. Katz, D. Melamed, F. M. Scott Morton, D. L. Rubinfeld, C. Shapiro and H. A. Shelanski, Comments of Economists and Lawyers on the Draft Merger Guidelines, *U. Pa. Inst. for Law & Econ. Research Paper* No. 23–45 (Sept. 18, 2023), https://ssrn.com/abstract=4574947.

37 *See*, e.g., discussion and statistics in R. Quillian, Biden Admin's M&A Rhetoric Outpaces Enforcement Numbers, *Law360* (Oct. 30, 2023), https://www.cov.com/-/media/files/corporate/publications/2023/10/biden-admins-ma-rhetoric-outpaces-enforcement-numbers.pdf.

38 *See*, e.g., DAMITT Q2 2024: Abandonments Dominate the Podium in Merger Enforcement, Dechert LLP (Aug. 6, 2024), https://www.dechert.com/knowledge/publication/2024/8/damitt-q2-2024--abandonments-dominate-the-podium-in-merger-enfor.html.

39 *See* Press Release, Fed. Trade Comm'n, FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review.

40 *See*, e.g., statistics in Figure 1 of Orszag et al., *supra* note 31.

VI. Conclusion

22. Overall, there is a broad perception that the Biden administration has ushered in a substantial change in antitrust policy as well as mindset relative to the past. Our review suggests that there is truth to this perception, but that there is still at least some degree of commonality with prior practice. On the one hand, agencies have continued to undertake the sort of commonplace "blocking and tackling" horizontal merger reviews and challenges that might be expected under any modern administration, and such efforts likely account for much of what most antitrust staff do on a day-to-day basis. However, on the other hand, the administration has taken policy steps that appear qualitatively more skeptical of M&A activity, if not openly hostile to it. Those steps are raising the costs of even traditional investigations that never proceed to challenge. The administration has also made a policy of pursuing litigation that pushes the boundaries of existing law and economics, reflecting a willingness to accept losses in the hope of substantially altering conventions. We lack the data to draw firm conclusions but have to wonder if the resources these more adventurous efforts require have not had to come at the cost of other, more traditional areas. ■

Biden antitrust policy skepticism toward private equity buyers in healthcare industry mergers

Richard Dagen*
rdagen@axinn.com
Partner
Axinn, Veltrop & Harkrider, Antitrust Practice Group, Washington, DC

Leslie Overton
loverton@axinn.com
Partner
Axinn, Veltrop & Harkrider, Antitrust Practice Group, Washington, DC

Lisl Dunlop
ldunlop@axinn.com
Partner
Axinn, Veltrop & Harkrider, Antitrust Practice Group, New York

I. Introduction

1. In January 2025, a new presidential administration will occupy the White House and bring with it the possibility of a change in direction for the antitrust agencies. Regardless of the election's victor, one enforcement priority new leadership is likely to reassess in 2025 is the antitrust implications of private equity investment. Private equity (PE) funds pool a number of investors in equity and equity-related securities of companies, often taking an active role in managing the business, and ultimately seeking an exit by sale or taking private companies public. The PE financing model has been active across the U.S. economy in such diverse fields as technology, healthcare, energy, and a variety of manufacturing, retailing, and other sectors.

2. PE acquisitions can raise traditional antitrust concerns when they combine competing or vertically related businesses: if a PE company already owns a portfolio company in the same industry as the company it is considering acquiring, the competition issues are the same as if there were no PE investment. Nonetheless, PE ownership has been associated with industry roll-up strategies, the contribution of deeper pockets and more attention to growth by way of a merger and acquisition (M&A) pipeline than non-PE-backed companies may have managed on their own. Roll-ups that comprise many small transactions over time can aggregate to levels of concentration that arguably raise antitrust concerns. When these individual transactions fall below Hart-Scott-Rodino (HSR) Act reporting thresholds and do not otherwise come to the agencies' attention, the agencies do not have the opportunity to assess and, if they are concerned, intervene at an early stage.

3. The current focus on PE involvement in transactions goes further than an analysis of horizontal and vertical relationships, however. While PE acquisitions without clear competitive interaction among the parties' respective portfolio companies have historically been considered benign from an antitrust perspective, the last several years have seen increasing concerns being raised about other allegedly adverse impacts of PE ownership. PE firms have suffered from a perception by some that they have a short-term, profit-focused outlook and allegedly underinvest in innovation and other activities that could be more beneficial in the long run.[1] The Biden White House has gone so far as to describe PE investment in the healthcare industry as "*corporate greed*."[2] There is, however, a body of economic literature contradicting these concerns: for example, studies finding that, after

* The views expressed herein are the author's own and do not reflect the views of their firm or any client. The authors would like to thank associate John Bogert for his assistance with his article.

1 *See* A. Gupta, S. T. Howell, C. Yannelis and A. Gupta, Owner Incentives and Performance in Healthcare: Private Equity Investment in Nursing Homes (*National Bureau of Economic Research, Working Paper* 28474, 2021) (revised 2023) at 18, https://www.nber.org/system/files/working_papers/w28474/w28474.pdf; S. Kannan, J. D. Bruch and Z. Song, Changes in Hospital Adverse Events and Patient Outcomes Associated with Private Equity Acquisition, *JAMA* (Dec. 26, 2023), https://jamanetwork.com/journals/jama/article-abstract/2813379; S. Gondi and Z. Song, Potential Implications of Private Equity Investments in Health Care Delivery, *JAMA* (Feb. 28, 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6682417/.

2 Press Release, White House, Fact Sheet: Biden-Harris Administration Announces New Actions to Lower Health Care and Prescription Drug Costs by Promoting Competition (Dec. 7, 2023) (hereinafter White House Fact Sheet), https://www.whitehouse.gov/briefing-room/statements-releases/2023/12/07/fact-sheet-biden-harris-administration-announces-new-actions-to-lower-health-care-and-prescription-drug-costs-by-promoting-competition/.

an acquisition by a PE firm, there was no reduction in patenting and in fact ongoing expansion and new product launches.[3]

4. This article provides an overview of the evolving views about PE acquisitions over the last three presidential administrations and considers the potential direction of agency policy going forward.

II. Obama years (2009–2016): Minimal attention

5. The Obama administration took a relatively low-key approach to PE firms—for the most part, viewing them as non-problematic acquirers, including as a safe pair of hands in a divestiture context. There was, however, greater acknowledgment of the potential for anticompetitive effects where a PE firm was already active in a market through portfolio companies held through other investment structures, leading the agencies to introduce changes to the HSR Rules to require greater disclosure of holdings of related entities to permit them to identify such overlaps.

6. The Department of Justice's (DOJ) updated Merger Remedies Guide issued in June 2011 did not specifically address PE, but it arguably implicated several facets of the PE business model. Section IV.B.4 of the guidance outlined a three-part test the DOJ would apply in assessing prospective divestiture buyers: a divestiture buyer should (i) not itself cause competitive harm, (ii) have "*the incentive to use the divestiture assets to compete in the relevant market*," and (iii) have "*sufficient acumen, experience, and financial capability to compete effectively in the market over the long term*." In the divestiture context, where the PE is a financial buyer without existing competitive assets, it would meet the first test. PE firms could, however, fail the second aspect of the DOJ's test if they are viewed as short-term competitors seeking a quick profit and exit. And with respect to the third test, a financial buyer is potentially disadvantaged in comparison with industry participants in terms of their operational expertise in the relevant industry sector, and so the bar might be higher for demonstrating their fitness to manage the divested business.[4]

7. On January 19, 2017, the last day of the Obama presidency, the Federal Trade Commission (FTC) published a study of merger remedies from 2006 to 2012 that commented favorably on the success of divestiture remedies involving PE buyers. Analyzing 50 remedies from that period, the study notes that, in assessing potential divestiture buyers, the FTC "*examines any outside sources of funds, including private equity and investment firms, and the extent of their involvement and financial commitment*." The study "*revealed that there were cases where the* [PE] *buyer's flexibility in investment strategy, commitment to the divestiture, and willingness to invest more when necessary were important to the success of the remedy*."[5]

8. As noted, the Obama-era agencies also revised the HSR filing requirements to address ownership structures common in PE, which can make use of a number of differently constituted funds to hold competitive assets.[6] Because HSR reporting relies on bright-line tests of beneficial ownership, rather than operational control, acquisitions made through different funds can obscure the fact that competing entities come under common management. The HSR filing changes require the acquiring person to identify overlaps between such commonly managed "associates" and the target.[7]

III. Trump years (2017–2020): Anti-PE undercurrents

9. The Trump administration's DOJ was even more open-minded towards PE M&A activity, but a vocal Democratic minority at the FTC foreshadowed the anti-PE sentiment of the Biden administration.

10. In October 2018, the FTC filed a complaint, objecting to the merger of Praxair and Linde, two major players in the market for industrial gasses, and a simultaneous settlement requiring the divestiture of assets in multiple product lines.[8] In dissent, then-Commissioner Chopra (D) noted that he "*would have preferred to include additional protections* (. . .)

3 K. Schwartz, M. Singer and I. Tecu, Private Equity and Competition—Comparing U.S. Agency Views to Recent Policy and Empirical Evidence, *A.B.A. Antitrust Mag. Online* (Apr. 2023), https://media.crai.com/wp-content/uploads/2023/04/26091627/Tecu_AMO_April2023.pdf; J. Lerner, M. Sorensen and P. Stromberg, Private Equity and Long-Run Investment: The Case of Innovation, *J. Fin.*, Vol. 66, Issue 2, 2011, pp. 445–477; C. Fracassi, A. Previtero and A. Sheen, Barbarians at the Store? Private Equity, Products, and Consumers, *J. Fin.*, Vol. 77, Issue, 3, 2022, pp. 1439–1488, https://onlinelibrary.wiley.com/doi/abs/10.1111/jofi.13134.

4 Antitrust Div., Dep't of Just., Antitrust Division Policy Guide to Merger Remedies at 1 (June 2011), https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf.

5 *See* Fed. Trade Comm'n, The FTC's Merger Remedies 2006–2012, section IV.D.2 (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf. The FTC vote to issue the study was 3-0: Ramirez (D), McSweeny (D), Ohlhausen (R). At the time, the FTC was down to two commissioners.

6 Press Release, Fed. Trade Comm'n, FTC, DOJ Announce Changes to Streamline the Premerger Notification Form (July 7, 2011), https://www.ftc.gov/news-events/news/press-releases/2011/07/ftc-doj-announce-changes-streamline-premerger-notification-form. The FTC vote was 5-0: Ramirez (D), Brill (D), Leibowitz (D), Rosch (R), Kovacic (R).

7 An "associate" is defined as any person or entity: (i) that manages the affairs or investments of the acquiring person; (ii) whose affairs or investments are managed by the acquiring person; or (iii) whose affairs or investments are under common management with the acquiring person. *See* 14 CFR § 801.1(d)(2) (2011), https://www.govinfo.gov/content/pkg/FR-2011-07-19/pdf/2011-17822.pdf.

8 Press Release, Fed. Trade Comm'n, FTC Requires International Industrial Gas Suppliers Praxair, Inc. and Linde AG to Divest Assets in Nine Industrial Gas Markets as a Condition of Merger (Oct. 22, 2018), https://www.ftc.gov/news-events/news/press-releases/2018/10/ftc-requires-international-industrial-gas-suppliers-praxair-inc-linde-ag-divest-assets-nine. The vote was 4-1 (Simons (R), Phillips (R), Wilson (R), Slaughter (D)—Chopra (D) dissenting).

to safeguard against risks often posed by the private equity buyer interest in the divested assets," such as requiring prior notice to or approval by the Commission of any asset sales. This was, he believed, because PE "*is associated with higher levels of debt financing*," those "*heavy debt burdens can increase the likelihood of insolvency*," and PE is separately "*associated with other firm behavior that can reduce long-term competition, including opportunistic asset sales*."[9]

11. Commissioner Chopra made similar comments in his dissent to the January 2019 divestiture settlement in *Staples and Essendant*, complaining that the PE owner of Staples, Sycamore, "*will have a strong incentive to rapidly increase margins to make a clear case to a potential future acquirer*" because PE firms "*generally* (. . .) *hope* [to] *realiz*[e] *significant gains through sale to a buyer*."[10] The majority Republican commissioners noted that such concerns are not unique to a PE buyer.[11]

12. In July 2020, Commissioner Chopra made a public statement in response to the FTC and DOJ Annual HSR Report to Congress attacking non-HSR-reportable "roll-ups" and PE M&A strategies involving an initial acquisition and subsequent tuck-in acquisitions. He particularly expressed concerns about unreported roll-ups in the healthcare sector, citing PE acquisitions of physician practices, hospices, ambulances, and generally "*higher costs and reduction in quality of care*." He also advised the Commission to act on Commissioner Wilson's proposal to use FTC's authority under Section 6(b) of the FTC Act "*to order information on non-reportable mergers in the health care sector*."[12]

13. In contrast, in the September 2020 updated Merger Remedy Guidelines, the DOJ addressed for the first time the viability of a PE divestiture. The DOJ clarified that it would use the same criteria to evaluate both strategic purchasers and purchasers that are funded by private equity or other investment firms, noting that "[i]*ndeed, in some cases a private equity purchaser may be preferred*." In relation to the third factor in the DOJ's assessment of a divestiture buyer—acumen, experience, and financial capability to compete effectively in the market over the long term—the Guidelines note that PE purchasers "*often partner with individuals or entities with relevant experience, which may inform the Division's evaluation of whether the purchaser has sufficient experience to compete effectively in the market over the long term*."[13]

14. In October 2020, then-Assistant Attorney General (AAG) Makan Delrahim publicly expressed his openness to PE buyers. AAG Delrahim explained that because there had been concerns in recent years over whether private equity buyers were "*more likely to pursue higher margins in the short term, then quickly resell the divested business at a profit*," DOJ felt the need to clarify that it would continue to judge PE and non-PE buyers alike on a case-by-case basis under the same criteria and considerations.[14]

IV. Biden years (2021–2024): PE under scrutiny

15. With the Biden administration, the brewing anti-PE undercurrent came to the fore, with a wave of policy statements, workshops, agency investigations, and enforcement activity aimed at PE transactions, particularly in the healthcare industry. Antitrust enforcement generally became increasingly aggressive. In particular, the White House itself has played a vocal role in urging all government entities—the antitrust agencies and beyond—to expand competition enforcement. As previously noted, early in the administration, President Biden issued an Executive Order on Competition, which restated the administration's policy to enforce the antitrust laws against excessive concentration in, notably, the healthcare industry, and announced a "whole of government" approach to competition, involving agencies other than the FTC and DOJ in competition initiatives.[15] Later in the administration, the White House announced other competition policies and directives focused on prescription drugs and "*corporate greed in healthcare*."[16] With strong White House support, the new leaders of the FTC—Lina Khan—and DOJ—Jonathan Kanter—have increased enforcement activity and instituted major policy changes, including a number that implicate PE activities. Agency leaders have also engaged in anti-PE rhetoric, with the DOJ even appointing a Special Counsel for Private Equity.[17]

9 Statement of Commissioner Rohit Chopra (Oct. 22, 2018), https://www.ftc.gov/system/files/documents/public_statements/1416947/1710068_praxair_linde_rc_statement.pdf.

10 Statement of Commissioner Rohit Chopra (Jan. 28, 2019), https://www.ftc.gov/system/files/documents/public_statements/1448335/181_0180_staples_essendant_chopra_statement_1-28-19_0.pdf.

11 Statement of Chairman Simons, Commissioner Phillips, and Commissioner Wilson (Jan. 28, 2019), https://www.ftc.gov/system/files/documents/public_statements/1448328/181_0180_staples_essendant_majority_statement_1-28-19.pdf.

12 Statement of Commissioner Rohit Chopra Regarding Private Equity Roll-ups and the Hart-Scott-Rodino Annual Report to Congress (July 8, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577783/p110014hsrannualreportchoprastatement.pdf.

13 Antitrust Div., Dep't of Just., Merger Remedies Manual (Sept. 2020) (withdrawn Apr. 2022), https://www.justice.gov/atr/page/file/1312416/dl.

14 M. Delrahim, AAG, Antitrust Div., DOJ, Remarks at Georgetown Law's Global Antitrust Enforcement Symposium (Oct. 6, 2020), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-georgetown-laws-global.

15 Executive Order on Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy.

16 White House Fact Sheet, *supra* note 2.

17 Brendan Ballou, a federal prosecutor serving as special counsel for private equity at the DOJ, published a book focusing on the effects of PE investment in industries like healthcare services, prison services, real estate, and others. *See* B. Ballou, *Plunder: Private Equity's Plan to Pillage America*, PublicAffairs, New York, 2023.

1. Merger enforcement actions

16. In the early years of the Biden administration, the growing sentiment against PE deals can be seen in DOJ and FTC enforcement actions against transactions, starting with the DOJ's challenge to the suitability of a PE buyer for assets proposed to be divested to resolve concerns raised by UnitedHealth's acquisition of Change Healthcare, and continuing with the FTC's imposition of prior approval requirements in a settlement of a PE firm's acquisition of veterinary clinics.[18]

17. In February 2022, the DOJ filed suit to block UnitedHealth's ("UHC") acquisition of Change Healthcare, in which UHC had incorporated a proposed divestiture to a PE buyer to resolve horizontal overlap concerns.[19] The DOJ argued against the effectiveness of the divestiture, stating that PE firms' "*incentives or commitments to innovation are not always aligned with those of the strategic buyers*."[20] But the DOJ's argument was unsuccessful: the court cited the DOJ's own Merger Remedies Guide (which the incoming leadership had withdrawn in April 2021) to reject the argument that the buyer's PE-status doomed the remedy and denied the DOJ's request for a permanent injunction.[21]

18. In June 2022, the FTC voted 5-0 to accept a consent decree to resolve concerns with National Veterinary Associates' ("NVA") proposed acquisition of SAGE Veterinary Partners in the individual specialty and emergency veterinary services markets.[22] NVA was owned by JAB Consumer Partners, a private equity firm, and had been subject to an FTC consent decree ordering divestitures in a prior acquisition. The SAGE settlement included a "prior approval" provision, requiring the merging parties to obtain prior FTC approval for future deals "*for every relevant market where harm is alleged to occur, for a minimum of ten years*," enabling the FTC to review future strategic deals regardless of their size.[23] In a statement accompanying the SAGE settlement, Chair Khan (joined by Democratic Commissioners Slaughter and Bedoya) critiqued JAB's practice of "*rapidly acquiring veterinary clinics*" and lauded the proposed order's "*prior approval and nationwide prior notice provisions*" for their ability to "*address stealth roll-ups by private equity firms like JAB/NVA*."[24]

19. The Democratic commissioners went on to outline their beliefs about PE at large, particularly in the healthcare industry. These included a range of different (and in some ways mutually exclusive) approaches, such as (i) PE engaging in leveraged buyouts, which saddle businesses with debt and shift the burden of financial risk in ways that can undermine long-term health and competitive viability; (ii) PE firms that seek to "*strip and flip assets over a relatively short period of time*" with a focus on "*increasing margins over the short-term, which can incentivize unfair or deceptive practices and the hollowing out of productive capacity*"; and (iii) PE firms making serial acquisitions or engaging in "buy-and-buy" tactics, enabling them to accrue market power and reduce incentives to compete, potentially leading to increased prices and degraded quality. The commissioners had particular concerns about PE in the healthcare industry, noting that a focus on short-term profits "*can incentivize practices that may reduce quality of care, increase costs for patients and payors, and generate appalling patient outcomes*."[25]

20. The Republican commissioners, now in the minority, wrote a statement agreeing with the decision to accept the consent decree but objecting to the majority's "*rhetoric, (...) evident distaste for private equity as a business model*," and imposition of "*heightened legal obligations on disfavored groups – including private equity – because of who they* are *rather than what they have* done."[26]

2. Agency policy

21. Possibly the most significant antitrust policy development of the Biden administration has been the introduction of new Merger Guidelines.[27] Several of the Guidelines have particular implications for PE firms engaging in serial acquisitions or roll-ups. Guideline 8—When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series—sits alongside Guideline 6 (entrenchment or extension of a dominant position) and Guideline 7

18 Press Release, Fed. Trade Comm'n, FTC Acts to Protect Pet Owners from Private Equity Firm's Anticompetitive Acquisition of Veterinary Services Clinics (June 13, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-acts-protect-pet-owners-private-equity-firms-anticompetitive-acquisition-veterinary-services.

19 Press Release, Dep't of. Just., Justice Department Sues to Block UnitedHealth Group's Acquisition of Change Healthcare (Feb. 24, 2022), https://www.justice.gov/opa/pr/justice-department-sues-block-unitedhealth-group-s-acquisition-change-healthcare.

20 Memo. Op. at 24–26, *United States v. UnitedHealth Group Inc*., No. 1:22-cv-00481-CJN (D.D.C. Sept. 21, 2022), ECF No. 138.

21 Ibid. at 24, 58.

22 Press Release, Fed. Trade Comm'n, FTC Takes Second Action Against JAB Consumer Partners to Protect Pet Owners from Private Equity Firm's Rollup of Veterinary Services Clinics (June 29, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-takes-second-action-against-jab-consumer-partners-protect-pet-owners-private-equity-firms-rollup-of-veterinary-services-clinics.

23 Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf. The FTC voted 3-2 to reintroduce the policy after it had been repealed in 1995: Khan (D), Slaughter (D), Chopra (D)—Phillips (R), Wilson (R) dissenting.

24 Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding NVA-Sage (June 13, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2022.06.13%20-%20Statement%20of%20Chair%20Lina%20M.%20Khan%20Regarding%20NVA-Sage%20-%20new.pdf.

25 Ibid. at 2 (citing R. M. Scheffler, L. M. Alexander and J. R. Godwin, Soaring Private Equity Investment in the Healthcare Sector: Consolidation Accelerated, Competition Undermined, and Patients at Risk, Am. Antitrust Inst. & Petris Ctr. On Health Care Mkts. and Consumer Welfare (May 18, 2021), at 2, https://bph-storage.s3.us-west-1.amazonaws.com/wp-content/uploads/2021/05/Private-Equity-I-Healthcare-Report-FINAL.pdf).

26 Concurring Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson (June 13, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2110140C4766NVASAGEPhillipsWilsonConcurringStatement.pdf.

27 The Merger Guidelines were released in draft in June 2023 and the final version in December 2023. Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Release 2023 Merger Guidelines (Dec. 18, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/12/federal-trade-commission-justice-department-release-2023-merger-guidelines.

(considering industry trends towards consolidation) in laying the preparatory groundwork for the agencies to consider the cumulative effect of a PE firm's acquisition strategy. To identify where serial acquisitions below the HSR reporting thresholds have taken place across the economy and "*inform the agencies' enforcement priorities and future actions*," the FTC and DOJ have launched a public inquiry seeking information from the public on when such acquisitions may have occurred.[28]

22. Another potentially important development is the agencies' proposals to amend the HSR filing requirements. Described as a "comprehensive redesign," some of the proposed changes are directly aimed at acquisitions involving PE investments.[29] These expand the requirements to provide details of minority holders of the acquiring entity and its subsidiaries to minority investors of all related entities, as well as information on "*entities or individuals that may have material influence on the management or operations of the acquiring person beyond those with the minority interests*." The latter includes entities or individuals that may provide credit, hold non-voting securities, options or warrants, are (or have the right to nominate) board members or board observers, or have agreements to manage entities related to the transaction.[30] Other proposals, such as details relating to employees, or details of directors, officers, and board observers, are not specifically targeted at PE but may have a disproportionate impact on a PE firm's reporting burden where, for example, it has numerous portfolio companies in a wide range of industries.[31] In response, many stakeholders have submitted comments to express specific concern regarding the impact of the increased reporting burden.[32] At the time of writing, final amendments have not yet been published.

3. Healthcare-focused inquiries

23. From the start, as illustrated by the 2021 Executive Order on Competition, the Biden administration has been heavily focused on the healthcare industry. Many of the ensuing agency actions have coupled concerns about consolidation in healthcare with the involvement of PE in that industry. In December 2023, the White House issued a statement expressing concerns that PE ownership in the healthcare industry has "*ballooned, with approximately $750 billion in deals between 2010 and 2020—in sectors including, but not limited to, physician practices, nursing homes, hospices, home care, autism treatment, and travel nursing*." The White House announced that it had launched a "*cross-government public inquiry into corporate greed in health care*" by the FTC, DOJ and Department of Health and Human Services (HHS) "*to seek input about how private equity and other corporations' increasing power and control of our health care is affecting Americans*."[33]

24. In accordance with this directive, the DOJ and FTC teamed up with HHS to launch a public inquiry into "*private-equity and other corporations' increasing control over health care*."[34] The accompanying request for information seeks information about the impact of transactions involving healthcare providers, facilities, or ancillary products or services conducted by private equity funds or other alternative asset managers. It also calls out direct acquisitions, "*transactions structured to facilitate private equity investment* [by] *circumventing applicable corporate practice of medicine restrictions*," and "*transactions involving other alternative asset classes, which are investments in assets other than stock and bonds, such as private credit funds and real estate investment trusts (REITs)*."[35]

25. The FTC followed this announcement by hosting a Workshop on Private Equity in Health Care.[36] The workshop heard from healthcare professionals, policymakers and researchers, all expressing concerns about the impact that PE ownership practices have had on the healthcare system. Introducing the Workshop, Chair Khan noted that while private investments can be an important source of capital, and some PE firms take a more long-term view and focus on creating real operational improvements, this is not universal. She then went on to describe "*concerning extractive practices*," such as "*the short-term, high-risk, and low-consequence*

28 Press Release, Fed. Trade Comm'n, FTC and DOJ Seek Info on Serial Acquisitions, Roll-Up Strategies Across U.S. Economy (May 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/05/ftc-doj-seek-info-serial-acquisitions-roll-strategies-across-us-economy.

29 Press Release, Fed. Trade Comm'n, FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review. All FTC commissioners at this point were Democrats because by February 2023, both Republican commissioners had resigned and were not replaced until March and April 2024.

30 Fed. Trade Comm'n, Notice of Proposed Rulemaking, 88 Fed. Reg. 42, 178 (June 29, 2023) at 42188–42190, https://www.federalregister.gov/documents/2023/06/29/2023-13511/premerger-notification-reporting-and-waiting-period-requirements.

31 The proposed changes would require data classifying employees into Standard Occupational Classification (SOC) codes and providing geolocational data on certain employees by Economic Research Group commuting zones, neither of which are commonly undertaken in the ordinary course of business. The proposed changes would also require submission of names of directors, officers and board observers, both current and for the prior two years, for every entity within the reporting person, as well as information on all other entities for which those individuals currently or previously served as director, officer or board observer. *See* ibid.

32 AIC Comment Letter to the FTC's Proposed New Premerger Notification Requirements (Sept. 27, 2023), https://www.investmentcouncil.org/aic-response-to-ftc-doj-proposed-new-merger-guidelines-continued/ (noting concerns about reporting burdens increasing transaction costs and thereby discouraging dealmaking).

33 White House Fact Sheet, *supra* note 2.

34 Press Release, Fed. Trade Comm'n, Federal Trade Commission, the Department of Justice, and the Department of Health and Human Services Launch Cross-Government Inquiry on Impact of Corporate Greed in Health Care (Mar. 5, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/03/federal-trade-commission-department-justice-department-health-human-services-launch-cross-government.

35 DOJ, FTC & HHS, Request for Information on Consolidation in Health Care Markets, Docket No. ATR 102 (Feb. 29, 2024), https://www.regulations.gov/document/FTC-2024-0022-0001 (requesting information on negative impacts from private equity transactions from stakeholders in the healthcare industry).

36 Private Capital, Public Impact: An FTC Workshop on Private Equity in Health Care, FTC (Mar. 5, 2024), https://www.ftc.gov/news-events/events/2024/03/private-capital-public-impact-ftc-workshop-private-equity-health-care.

ownership that can encourage a flip-and-strip approach" and use of debt to acquire healthcare companies, resulting in worse patient care. Chair Khan also noted concerns that PE firms deploy roll-up practices to consolidate power and sidestep antitrust review, and that PE firms buy up significant stakes in rival firms that compete in the same industry, reducing competition by softening incentives to compete due to common ownership interests.[37] Both Chair Khan's and AAG Kanter's introductory remarks cited research purporting to link PE ownership to adverse patient outcomes and health code violations, and both cited a study that estimated PE acquisitions of nursing homes preceded increased mortality rates, specifically over 20,000 excess deaths over 12 years.[38]

4. USAP roll-up litigation

26. The FTC put into practice several of the concepts in the Merger Guidelines and other policy initiatives in its suit against anesthesia provider U.S. Anesthesia Partners (USAP) and its PE sponsor, Welsh Carson. In announcing the complaint, Chair Khan stated that Welsh Carson "*spearheaded a roll-up strategy and created USAP to buy out nearly every large anesthesiology practice in Texas*."[39] The suit, filed in the U.S. District Court in the Southern District of Texas, alleged that Welsh Carson created USAP to execute a plan to roll up anesthesia practices and raise prices, acquiring monopoly power in hospital-based anesthesia services in three cities in Texas through acquisitions of providers with high market shares and subsequent tuck-ins as part of a "*multi-year anticompetitive scheme*." The complaint further alleged that Welsh Carson formulated, directed and actively participated in USAP's acquisition activities, including through at least one Welsh Carson director on USAP's board, who signed deal documents, led negotiations, and directed other Welsh Carson employees to assist in identifying attracting acquisitions and securing funding.[40] In an interview given shortly after filing the complaint, FTC Chair Lina Khan confirmed that her agency wants to send a message with this suit: "*This action puts the market on notice that we will scrutinize roll-up schemes*."[41]

27. By the time the FTC filed suit, however, Welsh Carson held only 23% of USAP with a right to appoint only two of fourteen directors. In granting Welsh Carson's motion to dismiss the FTC's complaint, the court found that applying the Clayton Act's prohibition against anticompetitive mergers to a minority non-controlling investor "*would expand the FTC's reach further than any court has yet seen fit*," and refused to impose liability on "*minority investors whose subsidiaries reduce competition*." The court found that the FTC did not adequately allege that Welsh Carson was violating the antitrust laws, and that there is no authority supporting the FTC's proposition that receiving profits from or continuing to hold stock in an entity that may be violating antitrust law is itself a violation of antitrust law. The court refused to dismiss the case against USAP itself.[42]

28. While the FTC has been unsuccessful in its enforcement efforts against the PE firm in the *USAP* case, the court dismissed the case primarily on the basis that Welsh Carson did not have a controlling interest in USAP. The FTC is continuing to investigate healthcare roll-ups with PE sponsors, and may bring future cases.

V. The next administration and beyond (2025–)

29. The Biden years have been a period of intensity for antitrust enforcement generally, and PE and healthcare specifically. If it is succeeded by a Harris administration, we will likely see the current enforcement trajectory continue. If Trump wins the election, it is unclear whether there would be a dramatic shift in the approach to antitrust enforcement, but there is some suggestion that his running-mate Senator Vance and other Republicans in Congress would support a continuation of at least some of Biden's current antitrust enforcement policies.[43]

1. A Harris first term

30. In general, a Harris administration would likely continue the status quo, maintaining current agency guidance such as the Merger Guidelines and ongoing antitrust enforcement activities. To date, she appears to be ideologically aligned with the Biden antitrust agenda, at least regarding an emphasis on large corporations and competition in healthcare markets. As California's attorney general, Harris joined the antitrust lawsuit to block the *Anthem/Cigna* merger alongside eleven other states, the DOJ, and the FTC.[44] And as governor of

37 Transcript at 2, 3 OPP/BE Private Equity Healthcare Workshop (Mar. 5, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/final-trancsript-ftc-opp-be-private-equity-healthcare-workshop-3-5-24.pdf.

38 Ibid. at 2, 4 (apparently referring to Gupta, *supra* note 1, at 18 ("*This calculation implies that about 22,500 additional deaths occurred due to PE ownership over the twelve-year sample period*")).

39 Press Release, Fed. Trade Comm'n, FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas (Sept. 21, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across.

40 Compl. at 1, 31–51, *FTC v. U.S. Anesthesia Partners*, No. 4:23-CV-03560 (S.D. Tex. May 13, 2024), ECF No. 1.

41 H. Meyer and KFF Health News, Lina Khan Speaks out About FTC's Private Equity Lawsuit: 'We're Putting the Market on Notice', *Fortune* (Nov. 17, 2023), https://fortune.com/2023/11/17/lina-khan-ftc-private-equity-lawsuit-were-putting-the-market-on-notice/.

42 Memo. Op. & Order at 11–13, *FTC v. U.S. Anesthesia Partners*, No. 4:23-CV-03560 (S.D. Tex. May 13, 2024), ECF No. 146.

43 For a deep dive into the argument for a continuation of the status quo—or at least the stalling of new change—*see* R. Dagen, Chair Khan Expiration Date, *Law360* (forthcoming Sept. 2024).

44 Press Release, State of California DOJ, Attorney General Kamala D. Harris Joins U.S. and 12 Other State Attorneys General in Filing Antitrust Lawsuit to Block Merger of Insurance Companies Anthem and Cigna (July 21, 2016), https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-joins-us-and-12-other-state-attorneys-general.

Minnesota, vice-presidential candidate Waltz helped block the merger of healthcare entities, cap insulin prices and ban noncompete agreements. The Harris campaign statement says that "*she will direct her Administration to crack down on anti-competitive practices that let big corporations jack up prices and undermine the competition that allows all businesses to thrive while keeping prices low for consumers*."[45]

31. Harris' position on PE is harder to read. She has made some comments related to PE buyouts, and was co-signatory to the White House statement announcing the inter-agency investigation into "*corporate greed in healthcare*," but has not made clear her future policy related to antitrust generally and private equity in particular. Some question whether, given her ties to Silicon Valley, she may be less aggressive on antitrust policy, particularly as it relates to big tech and corporations.[46]

2. A Trump second term

32. With some exceptions, antitrust enforcement during the first Trump term was less aggressive than Biden's, and it is possible his administration would scale back current enforcement, potentially repealing the new Merger Guidelines in favor of earlier guidelines (including the DOJ's 2020 Vertical Merger Guidelines, which were repealed when the administration changed in 2021). While notable voices in the Republican Party have expressed support for the FTC's aggressive enforcement—with vice-presidential candidate Vance recently stating that he viewed "*Lina Khan as one of the few people in the Biden administration that* [he] *think*[s] *is doing a pretty good job*," due to her "*broader understanding of* (. . .) *competition in the marketplace*" and not being "*so obsessed on pricing power within the market that* [she] *ignores all the other things that really matter*"[47]—they have largely been silent on PE. Vance, a former venture capitalist, was more moderate, saying that "[s]*ometimes in the* (. . .) *private equity space, you need to let some companies buy other companies. That's how investors get capital returns; that's how you promote capital formation*."[48]

33. Other conservative lawmakers are targeting the healthcare sector and consolidations. Senator Marshall (R) and Senator Bernie Sanders (I) co-sponsored the Bipartisan Primary Care and Health Workforce Act of 2023, which targeted facility fees, higher rates charged at hospital-owned clinics, and potentially anticompetitive contracting practices.[49] And in the wake of the Steward Health Care collapse, allegedly caused in part by crippling lease payments imposed by a former PE owner, Senators Grassley (R) and Whitehouse (D) launched a bipartisan congressional investigation into PE buyouts of hospitals. Senator Grassley (R) even avowed that "*a business model that prioritizes profits over patient care and safety is unacceptable*."[50] Despite the bipartisan suspicion towards healthcare consolidations and the role of PE, however, it remains probable that the treatment of PE by the current FTC under the 2023 Merger Guidelines may be pulled back in a new Trump administration. ■

45 Build an Opportunity Economy and Lower Costs for All Families, KamalaHarris.com, https://kamalaharris.com/issues/.

46 M. Stoller, It's Unclear What Kamala Harris Thinks About Corporate Power. But the Signs Are Worrisome, *NY Times* (Aug. 7, 2024), https://www.nytimes.com/2024/08/07/opinion/kamala-harris-google-antitrust.html; *see also* C. Cumming, Pro Take: Harris's Views on Private Equity Remain a Mystery, *WSJ Pro Priv. Equity* (July 23, 2024), https://www.wsj.com/articles/pro-take-harriss-views-on-private-equity-remain-a-mystery-515af0d6.

47 R. Klar, Vance: Biden FTC Chief Is 'Doing a Pretty Good Job,' *The Hill* (Feb. 27, 2024), https://thehill.com/policy/technology/4491363-vance-biden-ftc-chief-is-doing-a-pretty-good-job/.

48 H. Lowenkron, Vance Backs Khan's Approach on Big-Tech Mergers, Acquisitions, Yahoo Finance (Sept. 12, 2024), https://finance.yahoo.com/news/vance-backs-khan-approach-big-143536801.html.

49 M. Mcauliff, Why Some Conservatives Are Targeting Healthcare Consolidation, Mod. Healthcare (Apr. 24, 2024), https://www.modernhealthcare.com/politics-policy/vertical-integration-republicans-roger-marshall; Bipartisan Primary Care and Health Workforce Act, S. 2840, 118th Cong. (2023) (targeting facility fees, higher rates charged at hospital-owned clinics, and potentially anticompetitive contracting practices).

50 D. Knauth, Bankrupt Steward Health Care Sells Physician Network as Massachusetts Hospital Seized (Aug. 16, 2024), https://www.reuters.com/business/healthcare-pharmaceuticals/bankrupt-steward-health-care-sells-physician-network-massachusetts-hospital-2024-08-16/#:~:text=The%20company's%20bankruptcy%20has%20drawn,and%20leaving%20it%20on%20shaky; G. Morgenson, Senators Launch Bipartisan Probe of Private Equity's Growing Role in U.S. Health Care, NBC (Dec. 6, 2023), https://www.nbcnews.com/politics/congress/senators-grassley-whitehouse-probe-private-equity-us-health-care-rcna128070.

2024 & the FTC at 110: Reflections and elections

Maureen K. Ohlhausen*
mohlhausen@wsgr.com
Former Acting Chairman and Commissioner
Federal Trade Commission, Washington, DC
Partner
Antitrust and Competition, Wilson Sonsini, Washington, DC

1. In an interesting confluence, the 2024 U.S. presidential election coincides with the 110th anniversary of the Federal Trade Commission (FTC). I am especially attuned to the significance of this anniversary, as I participated in the FTC at 90 events, led the extensive agency self-assessment of the FTC at 100 project as director of the Office of Policy Planning, and celebrated the FTC's 100th anniversary as an FTC commissioner. As the FTC enters its next decade under a new administration, a review of what has been successful and not so successful in this administration as it draws to close may help the Commission improve its efforts. As the FTC at 100 Report[1] counseled, "*the FTC will prosper if it embraces an ethic of continuous self-assessment and improvement*."[2] The Report identified several factors by which to measure the FTC's performance, including clearly articulating the FTC's mission (which it identified as the improvement of consumer welfare), measuring outcomes for the public, and internal and external support for the mission from key constituencies.

2. A comprehensive review of the past four years of agency activity is beyond the scope of this brief article. Instead I chose to examine a single, but important, aspect: the FTC's track record in competition enforcement through federal court litigation in the Biden administration under the leadership of Chairwoman Lina Khan.[3] I believe the record suggests that the Commission's wins and losses in key competition matters during the Biden administration hold important lessons for how the FTC under the next administration can assess and improve its strategy to ensure that it makes the most of its capabilities to advance the Commission's competition mission. In particular, a return to the agency's historically bipartisan approach to enforcement will help the future FTC to win more cases and thereby achieve better outcomes for consumers and more efficient use of public resources, which will in turn shore up support for the FTC in key constituencies, such as Congress, where the agency has faced unusually strong criticism during Chair Khan's tenure.

I. The track record

3. Over the past approximately forty years, the FTC has typically, though not exclusively, brought cases to stop anticompetitive mergers and conduct on a bipartisan basis.[4] The commissioners vote individually on actions and they may support, concur, dissent, or recuse themselves from a vote to bring a complaint in the FTC's administrative court or in federal court. Over this same time period, the agency established a winning record of enforcement across many industries including pharmaceuticals and healthcare, and won multiple victories at the Supreme Court, focusing on cases targeting antitrust violations consistent with the courts' existing interpretation of the antitrust laws.

4. Under Chair Khan, however, the FTC has experienced a number of high-profile losses or setbacks in federal court litigation,[5] detailed more fully below. Notably, these losses tended to come when the agency initiated a case without bipartisan support (or as in certain examples, as in the *Facebook* litigation, with bipartisan support but over dissent of other commissioners). The common threads in these losses or setbacks are (i) that the federal courts have declined to accept a novel legal theory or extension of the law beyond existing precedent, and (ii) rejected the FTC's allegations or rationales for decisions as speculative or lacking in sufficient factual foundation.

* The author's views are her own.

1 The Federal Trade Commission at 100: Into Our 2nd Century: The Continuing Pursuit of Better Practices (Jan. 2009), https://www.ftc.gov/sites/default/files/documents/public_statements/federal-trade-commission-100-our-second-century/ftc100rpt.pdf ("FTC at 100 Report" or "the Report").

2 Ibid. at ii.

3 I also examine a few cases initiated at the end of the Trump administration and continued during the Biden administration.

4 *See*, e.g., M. K. Ohlhausen, Reflections on Recent Competition Enforcement at the FTC (Sept. 7, 2018), https://www.ftc.gov/system/files/documents/public_statements/1408329/09072018_posting_version_mko_fordham.pdf.

5 For the purposes of this article, I describe losses or setbacks broadly as adverse outcomes, for example, failure to obtain a preliminary injunction, dismissal of a complaint in whole or in part, or a court decision enjoining enforcement of an FTC rule.

5. To be sure, Chair Khan has been clear that she views the current federal appellate court precedent as inconsistent with older Supreme Court cases and insufficient to support robust antitrust enforcement. Thus, under her leadership, the Commission majority has purposefully brought cases that test the boundaries of existing doctrine, often focused on specific industries—particularly tech and private equity. During this period, the FTC on a partisan basis has also pushed to expand its own authority to define unfair methods of competition and to issue substantive rules to regulate new areas of policy focus, like noncompete agreements.

1. FTC losses and setbacks in matters without bipartisan support

6. ***Microsoft/Activision.*** In December 2022, the FTC challenged Microsoft's proposed acquisition of Activision, a company that creates and publishes blockbuster video games like *Call of Duty* and *World of Warcraft*. The agency alleged that the vertical merger would allow Microsoft to restrain competition with its Xbox gaming console and in subscription and cloud gaming.[6] At the time, the FTC had four commissioners. The three Democratic commissioners, Chair Khan and Commissioners Slaughter and Bedoya, voted in favor of the complaint and Commissioner Wilson, the sole Republican commissioner at the time, voted against it.[7] The district court denied the FTC's application for an injunction, ruling that the FTC had not shown that it was likely to prevail on its allegation that the merged firm would pull video games from rival gaming consoles, or that Microsoft owning Activision would substantially reduce competition in video game subscriptions and cloud gaming.[8] The court noted at multiple points that the FTC had failed to show that the anticompetitive effects it alleged would come about, or that the market would be more competitive but for the merger.[9] The FTC appealed and the Ninth Circuit Court of Appeals declined to issue an injunction to prevent the consummation of the acquisition pending appeal,[10] which cleared the way for the acquisition to close.

7. ***Meta/Within.*** In July 2022, the FTC voted 3-2 along party lines to permit agency staff to file a complaint to block Meta (formerly Facebook) from acquiring Within, the maker of a virtual reality fitness app.[11] The case was premised on the theory that Facebook's acquisition would reduce competition because Facebook was a potential competitor in the relevant market, or because it was perceived as a potential entrant in the relevant market such that the perception of possible entry constrained firms' behavior.[12] The district court denied the FTC's request for an injunction, ruling that the agency had failed to show that Meta was an actual potential entrant into the market, or that the acquisition would eliminate competitive pressure in the market because firms perceived Facebook as a potential entrant. The complaint also foundered on the speculative nature of its factual allegations, which the court found unsupported throughout its decision. The court ruled that it was not reasonably probable that Facebook would enter the market other than through the proposed acquisition of Within, and the evidence did not support a reasonable probability that firms in the relevant market perceived Meta as a potential entrant.[13]

8. Noncompete rule. In April 2024, the Commission issued a rule banning almost all noncompete agreements in the United States.[14] The decision to issue the rule was 3-2 along party lines, over the dissents of Republican Commissioners Holyoak and Ferguson.[15] The rule operationalized a November 2022 policy statement that took an expanded view of the scope of unfair methods of competition authority under Section 5 of the FTC Act,[16] which was also issued over the vigorous dissent by Commissioner Wilson, the sole Republican commissioner at the time.[17]

9. The noncompete rule claimed the authority to issue legislative-like rules implementing this broad view of Section 5 using a novel interpretation of a little-used

6 Fed. Trade Comm'n, *In the Matter of Microsoft / Activision Blizzard*, Complaint (Dec. 8, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/D09412MicrosoftActivisionAdministrativeComplaintPublicVersionFinal.pdf.

7 Ibid. at 23.

8 *FTC v. Microsoft Corp.*, 681 F. Supp. 3d 1069, 1097, 1100 (N.D. Cal. 2023).

9 *See*, e.g., ibid. at 1096, 1099–1100.

10 *FTC v. Microsoft Corp.*, 2023 U.S. App. LEXIS 17985 (9th Cir. 2023), at *1 (denying preliminary injunction).

11 Press Release, Fed. Trade Comm'n, FTC Seeks to Block Virtual Reality Giant Meta's Acquisition of Popular App Creator Within (July 27, 2022) https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-seeks-block-virtual-reality-giant-metas-acquisition-popular-app-creator-within.

12 *FTC v. Meta Platforms Inc.*, 654 F. Supp. 3d 892, 921 (N.D. Cal. 2023).

13 Ibid. at 938, 941.

14 Fed. Trade Comm'n, Non-Compete Clause Rule, https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete-rule.pdf; Press Release, Fed. Trade Comm'n, FTC Announces Rule Banning Noncompetes (Apr. 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes.

15 *See* Dissenting Statement of Commissioner Melissa Holyoak (June 28, 2024), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-melissa-holyoak-joined-commissioner-andrew-n-ferguson-matter-non; Dissenting Statement of Commissioner Andrew Ferguson (June 28, 2024), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-andrew-n-ferguson-joined-commissioner-melissa-holyoak-matter-non.

16 Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

17 Dissenting Statement of Commissioner Christine S. Wilson Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmt.pdf.

provision in Section 6 of the FTC Act.[18] Both of these aspects of the rule were also subject to a vigorous dissent by Commissioner Wilson when the rule was first proposed in 2023. In addition, when initially proposing the rule, the Commission announced several consent decrees, under which defendants committed not to use noncompete clauses, again over Commissioner Wilson's dissent.[19]

10. The rule was set to take effect on September 4, 2024. But in July, a federal court issued a preliminary injunction blocking the application of the rule to the parties in the case, and in August 2024, followed up with an order granting summary judgment for the plaintiffs, voiding the rule and enjoining its application nationwide.[20] The court found that the FTC exceeded its statutory authority under Section 6 of the FTC Act in issuing the rule and that the rule was arbitrary and capricious.

11. Echoing the objections of the dissenting FTC commissioners, the court found that "*Section 6(g) of the Act does not expressly grant the Commission authority to promulgate substantive rules regarding unfair methods of competition*."[21] The court further found that the rule was "*unreasonably overbroad without a reasonable explanation*" and that the FTC's "*lack of evidence as to why they chose to impose such a sweeping prohibition – that prohibits entering or enforcing virtually all non-competes – instead of targeting specific, harmful non-competes, renders the Rule arbitrary and capricious*."[22]

12. The court's decision in striking down the noncompete rule follows the pattern of the decisions in *Microsoft/Activision* and *Meta/Within*: the Commission was unsuccessful where it proceeded without bipartisan backing and pursued a novel legal position without adequate factual or evidentiary support.

13. *FTC v. U.S. Anesthesia Partners and Welsh Carson.* In September 2023, the FTC sued U.S. Anesthesia Partners and Welsh Carson, a private equity firm, alleging that the defendants monopolized the market for hospital anesthesia in Texas.[23] There were only three commissioners at the time after the resignation of Commissioner Wilson in March 2023, and all were Democrats who voted in favor of bringing the complaint.

14. While the court denied U.S. Anesthesia Partners' motion to dismiss, it granted Welsh Carson's motion. In doing so, the court noted that the FTC had not cited a case in which a minority, non-controlling investor like Welsh Carson could be held liable for anticompetitive acquisitions made by a company in which it invests.[24] The court also found that the FTC had not shown that Welsh Carson was "about to" violate antitrust law, as is required for a Section 13(b) claim, noting that the FTC offered nothing "*beyond speculation and conjecture*" that Welsh Carson was actually about to violate the law.[25] The claim against U.S. Anesthesia partners survived (it is worth noting that this outcome is consistent with the FTC's strong bipartisan enforcement record in healthcare mergers).

15. The *Welsh Carson* decision is another demonstration that courts are often likely to reject novel legal theory—here, antitrust liability for a minority private equity investor—where it is also based on speculative factual allegations.

16. *FTC v. Facebook*. Cases preceding Chair Khan's tenure reflect the same pattern when the agency proceeds with only partial support from the commissioners—the problem is not unique to the Biden administration or the approach of the current set of commissioners, although the FTC in the Biden administration has pursued cases without bipartisan support more frequently. In December 2020, the FTC voted 3-2 to sue Facebook in federal court, with Republican Commissioners Phillips and Wilson voting against.[26] Republican Chair Simons voted in favor of filing the complaint. The case alleged that Facebook's acquisitions of Instagram and WhatsApp violated Section 2 of the Sherman Act, on the novel theory that it bought the nascent companies to prevent them from competing and undermining its monopoly; it further alleged that Facebook had implemented policies limiting interoperability between Facebook and other platforms, restricting those apps' ability to become viable competitors to Facebook.[27]

17. In June 2021, the district court dismissed the FTC's complaint.[28] The court's ruling was primarily based on the finding that the "*FTC's inability to offer any indication of the metric(s) or method(s) it used to calculate Facebook's market share renders its vague* (. . .) *assertion* [regarding Facebook's market share] *too speculative and conclusory to go forward*."[29] The court also found that the FTC sued too late to pursue a Section 2 claim for injunctive relief regarding Facebook's lapsed policy of preventing

18 Federal Register, Notice of Proposed Rulemaking, Noncompete Clause Rule (Jan. 19, 2023), available at https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule.

19 *See*, e.g., Fed. Trade Comm'n, Decision and Order, *In the Matter of Anchor Glass et al.* (May 18, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/211_0182_c4793_anchor_glass_final_order_with_appendices.pdf; Federal Trade Commission, Decision and Order, *In the Matter of Prudential Security, Inc., et al.* (Feb. 23, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/c47872210026prudentialsecurityfinalconsent.pdf.

20 *Ryan LLC v. FTC*, No. 3:24-cv-00986, Memorandum Opinion and Order, Dkt. 211 (N.D. Tex., Aug. 20, 2024), at 2, 27.

21 Ibid. at 16.

22 Ibid. at 24.

23 Press Release, Fed. Trade Comm'n, FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas (Sep. 21, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across.

24 *FTC v. United States Anesthesia Partners, Inc.*, 2024 U.S. Dist. LEXIS 85714, at *16 (S.D. Tex., May 13, 2024).

25 Ibid. at 16–20.

26 Fed. Trade Comm'n, *FTC v. Facebook, Inc.*, https://www.ftc.gov/legal-library/browse/cases-proceedings/191-0134-facebook-inc-ftc-v.

27 *FTC v. Facebook*, No. 1:20-cv-03590-JEB, Complaint, Dkt. 1 (D.D.C., Jan. 13, 2021), at 2, 42–47.

28 *FTC v. Facebook, Inc.*, 560 F. Supp. 3d 1 (D.D.C. 2021).

29 Ibid. at 4.

interoperability with competing apps, noting that the agency was not permitted to seek injunctive relief for conduct that old, and that the last time Facebook revoked an app's permission in connection with the policy was in 2013, seven years before the lawsuit was filed.[30] The FTC amended its complaint under Chair Khan, and that complaint survived a motion to dismiss, although the court maintained that the allegations regarding Facebook's interoperability policies were legally infirm.[31]

18. The *Facebook* case is interesting both in that the original vote to file predates Chair Khan's tenure, and also saw one Republican vote in favor of filing the complaint. But, consistent with the pattern described above, significant dissent in the vote to bring the case accompanied a negative outcome for the agency and rejection of a novel legal theory where the FTC's factual allegations were too speculative.

19. To be clear, as discussed below, the Commission has had some successes in antitrust enforcement during the Biden administration, and even where it suffered some setbacks, those cases continue forward, as the Commission defeated a motion to dismiss from U.S. Anesthesia Partners and Facebook's motion to dismiss when it filed an amended complaint. It remains to be seen how these cases will ultimately turn out.

2. FTC victories during the Biden administration

20. The FTC's losses during the Biden administration are instructive about how the agency might adjust its strategy during the next administration, especially when the previous cases are contrasted to recent FTC victories in which the Commission voted with unanimous bipartisan support to prosecute a case.

21. ***Illumina/Grail.*** The FTC's challenge to the acquisition of cancer detection company Grail by DNA sequencing company Illumina was brought in by the Biden administration shortly before Chair Khan was confirmed.[32] It was the FTC's first litigated challenge to a vertical merger in decades. After the administrative law judge in the case declined to block the merger, the FTC complaint counsel appealed to the Commission, which, under Chair Khan, unanimously and on a bipartisan basis ordered Illumina to divest Grail.[33] Illumina appealed to the Fifth Circuit Court of Appeals, which effectively affirmed the Commission's decision to block the deal on the basis that it would substantially lessen competition, although it rejected both Illumina's and the FTC's approaches to the legal significance of steps Illumina had taken to remedy competition concerns about the deal in advance.[34] Illumina divested Grail following the Fifth Circuit's decision. While the agency pursued a novel theory, it did so with bipartisan support and, as reflected in the Fifth Circuit's decision, also with persuasive evidence regarding the competitive impact of the deal.

22. ***FTC v. Syngenta and Corteva.*** In September 2022, the Commission voted on a bipartisan basis (with one commissioner recused) to challenge the defendants' alleged anticompetitive loyalty discount programs, under which they paid distributors to limit purchases of competing crop protection products.[35] The FTC's case was brought along with a bipartisan group of state attorneys general under the FTC Act, federal antitrust law, and various state competition and consumer protection laws. The FTC and its co-plaintiffs defeated the defendants' motion to dismiss on all counts,[36] and the case is proceeding to trial.

23. ***IQVIA and Propel Media.*** This challenge was brought on a unanimous vote of the three Democratic commissioners at the time when the Commission had no Republican members. The Commission prevailed in securing a preliminary injunction barring a merger between the healthcare advertising firms IQVIA and Propel Media.[37] Although noting that "*market shares alone are not dispositive*," the court found that the FTC had established a strong prima facie case by applying the presumption from the Supreme Court's *Philadelphia National Bank* decision, ruling that mergers resulting in a combined firm with over 30% of the market threaten undue concentration; the court then rejected the defendants' rebuttal evidence in its entirety.[38]

II. Looking ahead to the 111th year

24. This review of the agency's losses or setbacks and wins in competition litigation suggests the clear lesson that the Commission is likely to improve its win/loss record if it pursues cases with bipartisan, unanimous support that target clear antitrust violations supported

30 Ibid. at 5.

31 *FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34, 61 (D.D.C. 2022).

32 Press Release, Fed. Trade Comm'n, FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail (Mar. 30, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-challenges-illuminas-proposed-acquisition-cancer-detection-test-maker-grail.

33 Press Release, Fed. Trade Comm'n, FTC Orders Illumina to Divest Cancer Detection Test Maker GRAIL to Protect Competition in Life-Saving Technology Market (Apr. 3, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-orders-illumina-divest-cancer-detection-test-maker-grail-protect-competition-life-saving.

34 *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1048, 1055–59, 1061 (5th Cir. 2023).

35 Press Release, Fed. Trade Comm'n, FTC and State Partners Sue Pesticide Giants Syngenta and Corteva for Using Illegal Pay-to-Block Scheme to Inflate Prices for Farmers (Sept. 29, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-state-partners-sue-pesticide-giants-syngenta-corteva-using-illegal-pay-block-scheme-inflate.

36 *FTC v. Syngenta Crop Prot. AG*, 2024 U.S. Dist. LEXIS 7083, at **1–3 (M.D.N.C., Jan. 12, 2024).

37 *FTC v. IQVIA Holdings Inc.*, 2023 U.S. Dist. LEXIS 232185, at **1–4 (S.D.N.Y., Dec. 29, 2023).

38 Ibid., n.24, at *114, 132–162.

by existing case law. But why does bipartisanship matter? Certainly, Congress created the agency to be bipartisan, which is an important aspect in itself. Further, in my experience, the previous bipartisan approach at the FTC resulted in the stress testing of theories and facts that culled out weak claims and shaky facts and encouraged the agency to focus on clear harms to consumers. It also helped insulate the Commission from partisan criticism because each side had some stake in the outcome.

25. Without that winnowing process of seeking bipartisan consensus, it is possible to create an echo chamber where the FTC majority only listens to those who agree with its views. However, judges are obligated to apply the law as it is, not as some FTC commissioners would like it to be. In practice, this means that swinging for the fences on novel theories is less likely to work without bipartisan buy-in. This is especially true without well-developed facts. Developing a strong, non-speculative factual record of the existence of competitive harm is essential, particularly where the agency seeks to prosecute novel legal theories. This helps to demonstrate to judges that there is a real-world problem of the type antitrust laws are meant to address, rather than acting on speculation and conjecture.

26. Some may also ask why losses matter. Why should the agency change course in the next presidential administration to try to win more often? First, the FTC has limited resources and can only bring so many cases. Each loss for the agency in pursuit of a case that it is unlikely to win on the law and the facts is a missed opportunity to devote those resources to challenging conduct or mergers that reduce competition. Second, it also risks undermining the agency's competition mission long term by creating bad law that will setback future enforcement efforts, even when the FTC is prosecuting well-supported cases. Repeated losses may also damage the agency's credibility before judges, making future enforcement even more challenging. Finally, the agency needs support from other constituencies, particularly Congress, not just for appropriations but also for its basic authorities. Partisan actions that persistently fail may undermine congressional and industry support to give the agency additional authorities, such as the ability to obtain consumer monetary redress.[39]

27. The leadership of the FTC after the 2024 presidential election would be well served to reflect on this record if it seeks to improve the FTC's ability to carry out its competition mission in its 111th year and beyond. ■

39 *See*, e.g., Fed. Trade Comm'n, Working Together to Protect Consumers: A Study and Recommendations on FTC Collaboration with the State Attorneys General: A Report to Congress (Apr. 10, 2024) (seeking restoration of the FTC's Section 13(b) authority to seek equitable monetary relief), https://www.ftc.gov/system/files/ftc_gov/pdf/p238400_ftc_collaboration_act_report.pdf.

Pharmaceutical antitrust enforcement in the Biden administration

Michael A. Carrier*
mcarrier@camlaw.rutgers.edu
Board of Governors Professor
Rutgers Law School, Camden

1. Pharmaceutical antitrust enforcement in the Biden administration has pushed the boundaries. Previously focused on conduct such as "reverse payment" settlements, "product hopping," and "citizen petitions,"[1] the Federal Trade Commission (FTC) has put on the top of its list three targets: improper patent listings in the "Orange Book" maintained by the U.S. Food and Drug Administration (FDA), more aggressive merger enforcement, and pharmacy benefit managers (PBMs).

I. Orange Book listings

2. In 2023, the FTC began a series of unprecedented actions addressing Orange Book listings. By way of background, a brand firm that seeks FDA approval must list the drug and any patents covering it in the Orange Book. A generic company then files one of four certifications before it can enter the market.[2] By listing its patent in the Orange Book, the brand firm is able to obtain an automatic 30-month stay of FDA approval.[3]

3. Only certain patents can be listed: those covering the "drug substance" (active ingredient), "drug product" (formulation or composition), or method of use.[4] Other patents, like those covering packaging, cannot be listed. The FDA plays only a "ministerial" role, which means that it will not correct improper listings.[5]

4. In September 2023, the FTC issued a policy statement designed "*to put market participants on notice that* [it] *intends to scrutinize improper Orange Book listings to determine whether these constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act*."[6] The FTC stated that "[i]*mproper Orange Book listings may have played a role in distorting pharmaceutical markets for decades*" and that they "*may disincentivize investments in developing a competing product and increase the risk of delayed generic and follow-on product entry*."[7]

5. In November 2023, the agency used the FDA's administrative process to "*challenge*[] *more than 100 patents held by manufacturers of brand-name asthma inhalers, epinephrine autoinjectors, and other drug products*" for being improperly listed in the Orange Book.[8] The FTC also "*sent notice letters to 10 drug companies informing them*" of its actions and its "*view that these patents were improperly listed in the Orange Book*."[9] In response, some drugmakers removed their patents, while others did not.[10]

6. In April 2024, the FTC expanded this "campaign"

1 M. A. Carrier, Pharmaceutical antitrust: What the Biden administration can do, in The new US antitrust administration, A. F. Abbott (eds.), *Concurrences* No. 1-2021, art. No. 98407, pp. 14–17, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3771055.

2 For a discussion of this regime, *see* M. A. Carrier, Unsettling Drug Patent Settlements: A Framework for Presumptive Illegality, *Mich. L. Rev.*, Vol. 108, Issue 1, 2009, pp. 37–80, at 45–47.

3 21 C.F.R. § 314.107(b)(3).

4 21 U.S.C. § 355(b)(1)(A)(viii)(I).

5 E.g., FDA, Small Business Assistance: 180-Day Generic Drug Exclusivity, https://www.fda.gov/drugs/cder-small-business-industry-assistance-sbia/small-business-assistance-180-day-generic-drug-exclusivity (last visited Aug. 2, 2024).

6 Federal Trade Commission Statement Concerning Brand Drug Manufacturers' Improper Listing of Patents in the Orange Book (Sept. 14, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p239900orangebookpolicystatement092023.pdf.

7 Ibid. at 3, 4.

8 Press Release, Fed. Trade Comm'n, FTC Challenges More Than 100 Patents as Improperly Listed in the FDA's Orange Book (Nov. 7, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-challenges-more-100-patents-improperly-listed-fdas-orange-book; *see* ibid. ("*The FTC sent notice letters to 10 companies, which include: AbbVie, AstraZeneca, Boehringer Ingelheim Pharmaceuticals, Impax Laboratories, Kaleo, Mylan Specialty, and subsidiaries of Glaxo-Smith Kline and Teva*").

9 Congressional Research Service (CRS), Patent Listing in FDA's Orange Book (May 1, 2024) at 2.

10 Ibid.

by "*notif*[ying] *the FDA that it disputes the accuracy or relevance*" of an additional 300 "*patent listings for diabetes, weight loss, asthma, and COPD drugs*," including Novo Nordisk's weight-loss drug, Ozempic.[11] The agency also sent warning letters to 10 companies covering 20 drugs.[12]

7. In addition to these actions, the FTC has filed amicus briefs. In these briefs, it has explained that improper Orange Book listings "*can cause significant harm to competition*" by "*delaying consumer access to a lower-priced competing drug that would save patients money while also potentially offering better access and higher quality medications*."[13] In particular: "*Given the high cost of many drugs, even a short delay in competition can have enormous consequences for consumers in accessing cost-effective medications*."[14]

II. Mergers

8. The second area of FTC activity involves mergers. At the beginning of the Biden administration, some had criticized the lack of government enforcement against pharmaceutical mergers. A comprehensive report by the American Antitrust Institute (AAI) found that between 1994 and 2020, the FTC "*challenged 67 pharmaceutical mergers worth over $900 billion* (. . .)*, moved to block only one, and settled virtually all of the remainder subject to divestitures*."[15]

9. In 2021, then-Acting Chairwoman Rebecca Kelly Slaughter formed the Multilateral Pharmaceutical Merger Task Force, which included "*staff from the FTC, DOJ* [U.S. Department of Justice]*, offices of multiple state Attorneys General, Competition Bureau Canada, the European Commission Directorate-General for Competition, and the U.K. Competition and Markets Authority* (. . .) *to rethink the approaches to pharmaceutical merger review*."[16] A workshop in June 2022 included discussions on "*market concentration in the pharmaceutical sector, merger remedies, innovation aspects of pharmaceutical mergers, and the intersection between conduct by pharmaceutical companies and merger analysis*."[17]

10. Considering merger enforcement more generally, the vast majority of challenges are filed against "horizontal" mergers because they involve direct competitors. Vertical mergers, between buyers and sellers, have been subject to closer scrutiny in recent years, as discussed below. Conglomerate mergers, which are neither horizontal nor vertical, are least likely to be challenged.[18]

1. *Amgen/Horizon*

11. In May 2023, the FTC filed the first merger challenge in years against Amgen's acquisition of Horizon. One reason the challenge received significant attention was that it was a conglomerate merger.

12. The FTC alleged that by acquiring Horizon, which possessed "*a monopoly on the medicines that treat thyroid eye disease ('TED') and chronic refractory gout ('CRG')*," Amgen would "*possess the ability and incentive to sustain and entrench its dominant positions* (. . .) *by leveraging its portfolio of blockbuster drugs*" (which included nine drugs generating more than USD 1 billion in annual net sales) "*to foreclose or disadvantage future rivals in these markets, raise their barriers to entry, and dissuade them from competing aggressively*."[19]

13. The FTC alleged that Amgen gave PBMs and payers "*substantial rebates in exchange for favorable formulary positions for its drugs*" and that it would extend these practices to Horizon's TED and CRG drugs.[20] The agency also claimed that Amgen's "*ability to implement multi-product contracts*" to harm rivals would be strengthened by consolidation, as the largest PBMs are "*vertically integrated with payers that manage patients' medical benefits*."[21]

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11 Press Release, Fed. Trade Comm'n, FTC Expands Patent Listing Challenges, Targeting More Than 300 Junk Listings for Diabetes, Weight Loss, Asthma and COPD Drugs (Apr. 30, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-expands-patent-listing-challenges-targeting-more-300-junk-listings-diabetes-weight-loss-asthma; *see* ibid. ("*The warning letters were sent to: AstraZeneca and Novo Nordisk for obesity and type-2 diabetes injectable drugs* [;] *Boehringer Ingelheim, Covis Pharma, Glaxo-Smith Kline, Novartis Pharmaceuticals Corp., Teva Pharmaceutical Industries Ltd. and some of their subsidiaries for asthma and COPD inhalers* [; and] *Amphastar Pharmaceuticals Inc. for a glucagon nasal spray to treat severe hypoglycemia in type-1 diabetics*").

12 Ibid.

13 Press Release, Fed. Trade Comm'n, FTC Files Amicus Brief Outlining Anticompetitive Harm Caused by Improper Orange Book Listings (Nov. 20, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-files-amicus-brief-outlining-anticompetitive-harm-caused-improper-orange-book-listings; *see also* Press Release, Fed. Trade Comm'n, FTC Files Amicus Brief in Asthma Inhaler Patent Dispute (Mar. 22, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/03/ftc-files-amicus-brief-asthma-inhaler-patent-dispute; Press Release, Fed. Trade Comm'n, FTC Amicus Brief Challenges Abuse of FDA "Orange Book" Listing Procedures to Block Drug Competition (Nov. 10, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-amicus-brief-challenges-abuse-fda-orange-book-listing-procedures-block-drug-competition.

14 Press Release, Fed. Trade Comm'n, FTC Files Amicus Brief Outlining Anticompetitive Harm Caused by Improper Orange Book Listings, *supra* note 13.

15 D. L. Moss, From Competition to Conspiracy: Assessing the Federal Trade Commission's Merger Policy in the Pharmaceutical Sector, American Antitrust Institute (Sept. 3, 2020), at 10, www.antitrustinstitute.org/wp-content/uploads/2020/09/AAI_PharmaReport2020_9-11-20.pdf.

16 Press Release, Fed. Trade Comm'n, FTC, DOJ Issue Summary on Joint Pharmaceutical Merger Analysis Workshop (June 1, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-issue-summary-joint-pharmaceutical-merger-analysis-workshop.

17 Ibid.

18 E.g., H. Hovenkamp, Antitrust and Platform Monopoly, *Yale L.J.*, Vol. 130, No. 8, 2021, pp. 1952–2273, at 2042.

19 Complaint for Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act ¶¶ 1, 59, 60, *FTC v. Amgen and Horizon*, No. 23-CV-3053 (N.D. Ill. May 16, 2023).

20 Ibid. ¶¶ 3, 6.

21 Ibid. ¶ 71.

14. In a surprise move, given the agency's criticism of behavioral remedies,[22] the FTC entered into a consent decree with the companies. Among other conditions, Amgen is prohibited for 15 years from bundling its products with Horizon's TED and CRG products, cannot condition rebates on the sale or positioning of Horizon's drugs, and cannot use rebates to disadvantage products that would compete with Horizon's drugs.[23]

2. *Illumina-Grail*

15. In the area of vertical acquisitions, the FTC filed a lawsuit challenging Illumina's proposed acquisition of Grail. Grail was "*one of several competitors*" developing multi-cancer early detection (MCED) tests.[24] Illumina was "*the dominant producer of next-generation sequencing (NGS) platforms, which are used to analyze genetic material from the blood samples drawn for MCED tests*."[25]

16. The Commission found that the acquisition would "*diminish innovation in the U.S. market for MCED tests while increasing prices and decreasing choice and quality of tests*."[26] In particular, Illumina "*is currently, and for the reasonably near future, will remain the only viable supplier of a critical input: NGS platforms necessary for MCED tests*."[27] As a result, it could "*easily foreclose Grail's competitors by raising their costs or withholding or degrading access to supply, service, or new technologies—inputs on which MCED test developers rely*."[28] In fact, Illumina "*has an enormous financial incentive to ensure that Grail wins the innovation race in the U.S. MCED market*" because it "*stands to earn substantially more profit on the sale of Grail tests than it does by supporting rival test developers*."[29]

17. On appeal, the Fifth Circuit largely upheld the FTC's ruling on the issue of liability. It found that "*the proposed merger is likely to substantially lessen competition*" on two grounds.[30] First, applying the "*Brown Shoe*"[31] factors, it found that "*at least four*"—"*likely foreclosure, the nature and purpose of the transaction, the degree of market power possessed by the merged firm, and entry barriers—supported a finding of a probable Section 7 violation*."[32]

18. The court also found that the FTC satisfied the "*ability-and-incentive*" standard, which "*asks whether the merged firm will have both the ability and the incentive to foreclose its rivals, either from sources of supply or from distribution outlets*."[33] On the first element, "*Illumina concedes that it would have the ability to foreclose Grail's rivals post-merger*."[34] And on the second, the Commission "*had substantial evidence to support its conclusion*" that "*post-merger, Illumina had a significantly increased incentive to crowd out Grail's competitors from the market*."[35] In particular, Illumina, the sole supplier of the "*critical input*" of NGS platforms, "*would likely foreclose against Grail's competitors—even at the expense of some short-term profits—to pursue its long-term goal of establishing itself (via Grail) as the market leader in clinical testing*."[36]

19. The Fifth Circuit nonetheless reversed because "[t]*he Commission held Illumina to a rebuttal standard that was incompatible with the plain language of Section 7 of the Clayton Act*."[37] In particular, while the statute "*only prohibits transactions that will 'substantially' lessen competition*," the FTC required Illumina's proposed supply agreement to rivals to "*restore the pre-*[merger] *level of competition*," in other words, "*eliminate Illumina's ability to favor Grail and harm Grail's rivals*."[38]

3. *Maze*

20. In the third transaction, the FTC filed a lawsuit to prevent Sanofi from licensing a drug from Maze Therapeutics. Sanofi sells an intravenous infusion for Pompe disease, a debilitating genetic disorder, and Maze was developing the first oral treatment.[39] The FTC alleged that "*the proposed acquisition would both extend Sanofi's monopoly power over Pompe disease treatments and reduce innovation competition to develop new Pompe drugs.*"[40]

21. One of the challenges with drugs not on the market is that it is not clear if they will reach the market. In earlier work, I synthesized studies that found that the mean percentage likelihood of reaching the market from each of the three stages of clinical studies was "*18% from Phase I, 30% from Phase II, and 57% from Phase III*."[41] As a

22 Testimony of Chair Lina M. Khan before the House Comm. on Appropriations, Subcomm. on Fin. Serv. & Gen'l Gov't, H. Rep. (May 15, 2024), at 28, https://www.ftc.gov/system/files/ftc_gov/pdf/testimony-chair-khan.pdf.

23 Press Release, Fed. Trade Comm'n, FTC Approves Final Order Settling Horizon Therapeutics Acquisition Challenge (Dec. 14, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/12/ftc-approves-final-order-settling-horizon-therapeutics-acquisition-challenge.

24 Press Release, Fed. Trade Comm'n, FTC Orders Illumina to Divest Cancer Detection Test Maker GRAIL to Protect Competition in Life-Saving Technology Market (Apr. 3, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-orders-illumina-divest-cancer-detection-test-maker-grail-protect-competition-life-saving.

25 Ibid.

26 Ibid.

27 Ibid.

28 Ibid.

29 Ibid.

30 *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1101 (5th Cir. 2023).

31 *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

32 *Illumina*, 88 F.4th at 1054.

33 Ibid. at 1051.

34 Ibid.

35 Ibid. at 1054.

36 Ibid. at 1053.

37 Ibid. at 1058.

38 Ibid. (emphasis omitted).

39 Press Release, Fed. Trade Comm'n, FTC Seeks to Block Sanofi's Acquisition of Rare Disease Drug that Threatens Sanofi's Monopoly (Dec. 11, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/12/ftc-seeks-block-sanofis-acquisition-rare-disease-drug-threatens-sanofis-monopoly.

40 Ibid.

41 M. A. Carrier, Two Puzzles Resolved: Of the Schumpeter–Arrow Stalemate and Pharmaceutical Innovation Markets, *Iowa L. Rev.*, Vol. 93, No. 2, 2008, pp. 393–450, at 419.

result, with all else equal, challenges are most justified the closer the product is to the market. The Sanofi challenge was ambitious because Maze had only completed Phase I testing.[42] An FTC official, however, explained that "[w]*here a drug product falls in its clinical life cycle is* (. . .) *not the only data point*," with another consideration being Sanofi's "*market dominance*."[43] Sanofi ultimately decided to terminate its acquisition of a license from Maze.[44]

III. PBMs

22. The FTC's third target has been PBMs. When they were created several decades ago, PBMs "*lowered prices by aggregating health plan customers to form large networks that allowed them to negotiate discounts*."[45] In the past several years, however, "*increases in consolidation* (. . .)*, power, and secrecy have swung the needle in the opposite direction*."[46]

23. In July 2023, the FTC withdrew earlier statements and reports that reflected a deferential view of PBMs.[47] The agency issued a statement "*caution*[ing] *against reliance on certain of its prior advocacy statements and reports relating to the pharmacy benefit manager ('PBM') market*."[48] In particular, the agency highlighted "*eleven advocacy letters and reports* (. . .) *published or issued between 2004 and 2014*" that "*took the position that certain state and federal proposals to increase PBM transparency could undermine competitive processes*."[49]

24. The FTC lamented that "*advocates continue to cite prior Commission work in opposition to efforts by lawmakers, enforcers, and regulators to mandate PBM transparency requirements*" even though the industry "*has changed significantly over the last two decades with increased vertical integration and horizontal concentration; the growth of PBM rebates, list prices and* (. . .) *fees; and the expiration of prior FTC Consent Orders*."[50]

25. In 2022, the FTC "*unanimously voted to launch an inquiry into PBMs using the Commission's* (. . .) *authority to conduct market studies*."[51] In July 2024, by a 4-1 vote, the agency issued an interim report.[52] The chair, joined by two commissioners, stated that "[g]*iven the stakes, there is enormous urgency in understanding PBMs' practices*," which led the three to "*strongly support the issuance of the interim staff report*."[53] In particular, "[e]*ven as FTC staff continue to collect and analyze information from the PBMs, the team has already examined thousands of documents and surfaced key facts*."[54]

26. While it was still gathering information, the agency offered several conclusions. First, "[t]*he market for pharmacy benefit management services has become highly concentrated, and the largest PBMs are now also vertically integrated with the nation's largest health insurers and specialty and retail pharmacies*."[55] Second, "[a]*s a result of this high degree of consolidation and vertical integration, the leading PBMs can now exercise significant power over Americans' access to drugs and the prices they pay*."[56] Third, "[v]*ertically integrated PBMs may have the ability and incentive to prefer their own affiliated businesses, which in turn can disadvantage unaffiliated pharmacies and increase prescription drug costs*."[57] Fourth, "[e]*vidence suggests that increased concentration may give the leading PBMs the leverage to enter into complex and opaque contractual relationships that may disadvantage smaller, unaffiliated pharmacies and the patients they serve*."[58] And fifth, "*PBMs and brand drug manufacturers sometimes negotiate prescription drug rebates that are expressly conditioned on limiting access to potentially lower cost generic alternatives*."[59]

27. Commissioner Holyoak dissented, stating that "*the Report fails to meet the standards of economic rigor expected of Commission reports*" and "*fail*[s] *to examine how PBM practices affect consumer prices*."[60] In addition, "[t]*hough the Report baldly asserts that PBMs 'have gained significant power over prescription drug access and prices,'*" it "*does not present empirical evidence that*

42 *In the Matter of Sanofi*, Dkt. No. 9422, ¶ 54, https://www.ftc.gov/system/files/ftc_gov/pdf/d9422_sanofi_maze_part_3_complaint_public_redacted.pdf.

43 E. Silverman, When it comes to policing pharma, the FTC says it's on 'an incredible winning streak,' *STAT* (Jan. 24, 2024).

44 Press Release, Fed. Trade Comm'n, Statement Regarding the Termination of Sanofi's Proposed Acquisition of Maze Therapeutics' Pompe Disease Drug (Dec. 13, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/12/statement-regarding-termination-sanofis-proposed-acquisition-maze-therapeutics-pompe-disease-drug.

45 M. Carrier, A Six-Step Solution to the PBM Problem, Health Affairs Blog (Aug. 30, 2018).

46 Ibid.

47 Federal Trade Commission Statement Concerning Reliance on Prior PBM-Related Advocacy Statements and Reports That No Longer Reflect Current Market Realities (July 20, 2023).

48 Ibid. at 1.

49 Ibid.

50 Ibid. at 1–2, 3–4.

51 Statement of Chair Lina M. Khan, Joined by Commissioners Alvaro M. Bedoya & Rebecca Kelly Slaughter Regarding the Pharmacy Benefit Managers Interim Staff Report, Commission File No. P221200 (July 9, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/Khan-Bedoya-Slaughter-Statement-Pharmacy-Benefit-Managers-Report.pdf.

52 Fed. Trade Comm'n, Office of Policy Planning, Pharmacy Benefit Managers: The Powerful Middlemen Inflating Drug Costs and Squeezing Main Street Pharmacies, Interim Staff Report (July 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/pharmacy-benefit-managers-staff-report.pdf.

53 Khan statement, *supra* note 51, at 2. A fourth commissioner voted to issue the report but did not join the statement.

54 Ibid.

55 FTC Report, *supra* note 52, at 2.

56 Ibid. at 3.

57 Ibid.

58 Ibid.

59 Ibid. at 4.

60 Dissenting Statement of Commissioner Melissa Holyoak, *In the Matter of the Pharmacy Benefit Managers Report*, Matter Number P221200 (July 9, 2024), at 4, https://www.ftc.gov/system/files/ftc_gov/pdf/Holyoak-Statement-Pharmacy-Benefit-Managers-Report.pdf.

demonstrates PBMs have market power—i.e., *'the ability to raise price profitably* by restricting output.'"[61] Finally, "*relying upon* (. . .) two *examples of potentially troubling results* (. . .) *without any evidence (empirical or otherwise) that demonstrates they are representative* (. . .) *is not a substitute for rigorous analysis*."[62]

IV. Conclusion

28. During the Biden administration, the FTC expanded the boundaries of its enforcement in the pharmaceutical industry. Its attention to issues relating to Orange Book listings, more aggressive merger enforcement, and PBMs reflects ever-evolving concerns with the industry. As we proceed to the next administration, it will be worth watching how these enforcement efforts develop. ■

61 Ibid. at 5.

62 Ibid.

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