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Merger Proposals Reflect Agency Leaders' Antitrust Principles

By **Ryan Quillian, Jacqueline Fitch and Marie Hanewinckel**
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The current leadership at the Federal Trade Commission and U.S. Department of Justice Antitrust Division provided very little concrete guidance about how they planned to enforce the antitrust laws during their first two years in office.

In some circumstances, they withdrew guidance without replacing it,[1] and, other times, they affirmatively claimed that it is not their job to provide guidance.[2] This summer, the FTC and DOJ gave their clearest indication as to how they plan to enforce the antitrust laws in the context of mergers and acquisitions when they issued proposed revisions to the Hart-Scott-Rodino rules[3] and published draft merger guidelines.[4]

The policy framework described in these two documents is largely consistent with the concerns underlying the Biden administration's view of antitrust enforcement, as well as policy statements that the antitrust agencies have issued under their current leadership.

This article traces some of the agencies' most significant proposed changes to the HSR rules and the draft merger guidelines to certain foundational concerns of the current leadership of the FTC and the DOJ Antitrust Division. In particular, we address the following merger-related issues:

- Concentration associated with horizontal and vertical mergers;
- Serial acquisitions and acquisitions of nascent competitive threats;
- Potential harm in markets for labor; and
- Issues relating to interlocking directorates.

It bears noting that — even though these recently published documents may be consistent with the core beliefs of the Biden administration's approach to antitrust enforcement — many of the theories of harm articulated by agency leadership either have not been tested in court or have been rejected by trial courts.

Issues have already been raised regarding both the draft merger guidelines and the proposed HSR rule changes. For example, the draft merger guidelines identify potential merger-related concerns without

providing any clear principles for determining when a particular transaction actually violates Section 7, and they do not appear to take into account that mergers can create benefits for competition, consumers, and even employees.

And the proposed changes to the HSR rules, which would apply to every single filing, do not appear to balance the burdens they impose on all merging parties with any potential benefit that the agencies may obtain from imposing those additional burdens.

The Perceived Threat of Concentration

An early articulation of the Biden administration's approach to antitrust is contained in The Utah Statement,[5] which now-FTC Chair Lina Khan and Tim Wu, who previously served as a special assistant to President Joe Biden for technology and competition policy, drafted in October 2019 during an antitrust conference at the University of Utah.

The clear message from The Utah Statement is that concentration itself is bad, or at least highly suspect. And not just because of the potential for harm to competition. According to The Utah Statement, "Excessively concentrated industries ... have become a threat to the basic idea of representative democracy." Other passages from The Utah Statement help illustrate the reasons that the current leadership of the federal antitrust agencies view concentration as inherently problematic:

- "Excessive concentration of private economic power breeds antidemocratic political pressures and undermines liberties."
- "The simple premise of anti-monopoly revival is that concentrated private power has become a menace, a barrier to widespread prosperity, and an indefensible division of the spoils of progress and economic security that yields human flourishing."
- "The result [of the economic policies of the last 40 years] has been decades of economic consolidation across industries like agriculture, finance, pharmaceuticals, and telecommunications," as well as "the consolidation of tech into just a few platforms."
- "The broad structural concerns expressed by Congress in its enactment of the 1950 Anti-Merger Act, including due concern for the economic and political dangers of excessive industrial concentration, should drive enforcement of Section 7 of the Clayton Act."

The language Khan used in a September 2021 memorandum to FTC staff,[6] which described her high-level strategic approach and policy priorities as the leader of the commission, echoed The Utah Statement: "[W]e need to address rampant consolidation and the dominance that it has enabled across markets."

The draft merger guidelines put this apparent distrust of consolidation into more practical terms. For example, the agencies propose substantial reductions to the concentration thresholds they use to determine whether a horizontal transaction is presumptively illegal,[7] claim that the elimination of head-to-head competition by itself — which occurs in every horizontal merger — can be sufficient to deem a merger illegal, and take a skeptical view of mergers that "further a trend toward consolidation," among other things.

The proposed changes to the HSR rules also add new screens for horizontal consolidation. If enacted as

proposed, the rules would require every filer to describe the full range of business operations of all entities within it as part of the transaction description. This would increase the burden on all merging parties that have to make HSR filings, but may also provide the agencies with information that could make it easier for them to identify putative horizontal overlaps than under the current rules.

The proposed rules also would require every filer to submit a narrative description of the horizontal overlaps between the filing entities, along with the parties' strategic rationale for the transaction. This, too, would add to the burden imposed on merging parties, while potentially giving the agencies more, or at least more easily accessible, information than they currently receive.

It also would give the merging parties an early opportunity to explain to the agencies why the transaction is not competitively problematic. For example, the merging parties could argue that, although there is a horizontal overlap, there are a significant number of other strong competitors, and, therefore, the merger will not substantially lessen competition.

Vertical Supply Relationships

The federal antitrust agencies' apparent skepticism about consolidation extends to vertical transactions, particularly with respect to claims that such deals create efficiencies.

The Utah Statement rejected the widely held view that most vertical transactions are not problematic: "[V]ertical mergers should enjoy no presumption of benefit to the public." The Democrat-appointed majority of the FTC emphasized this point when they voted in September 2021 to withdraw the vertical merger guidelines:

The 2020 VMGs contravene the text [of Section 7] of the [Clayton Act], devoting a whole section to the discussion of procompetitive effects, or efficiencies, of vertical mergers. This approach is legally flawed because the statute does not provide for a balancing test where an 'efficient' merger is allowed even if it may lessen competition.[8]

The recently published draft merger guidelines go even farther than The Utah Statement and — for the first time — include a presumption of illegality for vertical transactions that result in a foreclosure share of above 50%.

The agencies define "foreclosure share" as "the share of the related market that is controlled by the merged firm, such that it could foreclose rival's [sic] access to the related product on competitive terms." Where the foreclosure share is below 50%, the draft merger guidelines say that agencies will consider "a range of plus factors" to determine if the transaction nevertheless raises competitive concerns.[9] There is no discussion of efficiencies in the draft merger guidelines section on vertical transactions.[10]

The proposed changes to the HSR form also implement a screen for potential vertical concerns. In particular, all filers would be required to describe the vertical supply relationships between the filing persons.

Leaving aside the burdens that would be imposed by this requirement, it would give the agencies information that they do not receive under the current system, but would give the merging parties another opportunity to submit advocacy to staff about why the transaction would not be problematic.

The proposed HSR-related changes also would require filers to submit all agreements between the filing parties or their subsidiaries — including those unrelated to the transaction — in effect within a year of filing, which the agencies presumably believe could give them insight into any vertical relationship between the parties, including supply and distribution agreements, that may affect the competitive landscape.

Serial Acquisitions and Acquisitions of Nascent Competitive Threats

Agency leadership is also concerned with concentration created by serial acquisitions — i.e., a pattern or strategy of multiple small acquisitions in the same or related business lines.

It is also concerned with acquisitions of nascent competitive threats — i.e., a dominant company's acquisition of a smaller firm that "could grow into a significant rival, facilitate other rivals' growth, or otherwise lead to a reduction in dominance."

The Utah Statement did not explicitly address these types of acquisitions, but subsequent statements by the leaders of the FTC and DOJ have made it clear that they will be an enforcement priority.

For example, the FTC's Section 5 enforcement policy statement explained that (1) acquisitions of nascent competitors can allow firms to protect their dominance by anticompetitive means, and (2) a series of acquisitions that ultimately gives a firm a dominant position can be illegal even if none of the individual transactions violated the antitrust laws.[11]

The draft merger guidelines — for the first time — explicitly address serial acquisitions and acquisitions of nascent competitive threats. In the context of serial acquisitions, the agencies say that they will focus on the "cumulative effect" of a filer's broader acquisition pattern or strategy, beyond any one particular transaction and even in markets unrelated to the transaction.

The agencies apparently will pay particular attention both to the firm's acquisition history and to its current or future strategic incentives. Additionally, any acquisition by a "dominant" firm — defined in the draft as a firm with at least a 30% market share, or with power to unilaterally raise prices, reduce quality, or impose favorable terms — is subject to challenge if the agencies find it eliminates a nascent competitor.

The agencies are also poised to use parties' HSR filings to screen for serial acquisitions and acquisitions of nascent competitive threats. For example, the proposed rules would require both merging parties to identify all prior acquisitions of any size for the previous ten years in any line of business where there is a potential overlap.

Notably, the rules would eliminate any minimum reporting threshold, thereby requiring every filer to identify prior transactions that the HSR form has never required to be disclosed. The stated rationale for removing the threshold is to identify

acquisitions of new entrants or other nascent competitors that, despite not yet having widespread commercial success, nonetheless are poised to affect competition among existing firms or disrupt market dynamics.

The proposed HSR rules also would require filers to report expected revenue from specific pipeline or pre-revenue products, which the agencies could try to use to identify whether the transaction involves

what they see as a nascent competitive threat or whether horizontal competition between the parties will likely exist in the future.

Labor Market Concerns

Competition in markets for labor is also a foundational concern for the Biden administration's antitrust enforcers. The Utah Statement was clear that "[t]he markets for labor — and in particular problems caused by labor market monopsony — should be subject to robust antitrust enforcement" at least in part because they believe that "[i]t is not true that Congress designed the Sherman Act as a consumer welfare prescription."

Similarly, the top strategic priority in Khan's September 2021 memo to FTC staff identified harm to workers as a key element to her "holistic approach to identifying harms," which also implicitly rejected consumer welfare as the lodestar of antitrust enforcement.

The FTC and the Antitrust Division further demonstrated their focus on protecting competition in labor markets in 2022 by entering into separate memoranda of understanding with the National Labor Relations Board.[12] In addition, two of the three current FTC commissioners have publicly endorsed challenging mergers on the basis of alleged harm in labor markets.[13]

The fixation on competition in labor markets is front and center in the draft merger guidelines and the proposed changes to the HSR rules. The draft merger guidelines emphasize that "[l]abor markets are important buyer markets" and the agencies plan to investigate whether "workers face a risk that the [proposed] merger may substantially lessen competition for their labor."

Given the agencies' claim that "labor markets are often relatively narrow,"[14] merging parties should expect the agencies to analyze labor-related issues in all investigations.

The expectation that the agencies will investigate labor issues routinely is reinforced by the proposed changes to the HSR rules, which would require every filer to provide certain types of information that the agencies say they will use to screen for potential harms in labor markets. For example, every filer will need to provide at least three categories of information related to labor:

- The filer's five largest categories of workers according to the Bureau of Labor Statistics' Standard Occupational Classification system,[15] along with the total number of employees that fall into each of those five categories.[16]

- The filer's top-five SOC codes in which both parties employ workers, along with a list of the geographic areas — using the Department of Agriculture's ERS Commuting Zones and Labor Market Areas[17] — in which the parties overlap for each of those five SOC codes. For each of those SOC codes, the filer would also have to list overlapping ERS commuting zones from which employees commute, as well as the total number of employees within that ERS commuting zone. Note that the SOC codes identified here may be different from the filer's top-five SOC codes described above.

- A list of any penalties or findings that were issued in the last five years against the filer by the Department of Labor's Wage and Hour Division, the NLRB or the Occupational Safety and Health Administration. The agencies' stated rationale is that a history of labor law violations may

suggest a highly concentrated labor market and that the party does not have to compete vigorously for workers.

As the foregoing shows, labor issues will continue to be a key component of merger investigations for the foreseeable future.

Interlocking Directorates

Another policy priority of the agencies, particularly for the Antitrust Division, is investigating interlocking directorates that may violate Section 8 of the Clayton Act. Assistant Attorney General Jonathan Kanter has said that Section 8 "is the law, and we are going to enforce it ... . And in many respects it's probably the most effective way of deconcentrating the United States economy today."[18] Pursuant to that belief, the DOJ has issued several press releases claiming that it has forced board members to resign based on Section 8 concerns,[19] and the FTC recently reached a consent decree that purportedly addressed interlocking directorate issues.[20]

Under the proposed changes to the HSR rules, every filer will be required to address interlocking directorate issues by identifying the officers, directors, or board observers of all entities within the filing entity — i.e., all subsidiaries, portfolio companies, etc.[21] Under this new requirement, the filer also must identify any other entities for which these individuals served as an officer, director, or board observer within the two years prior to the filing date.

The agencies' stated intent is to identify existing, prior, or potential interlocking directorates and to assess the competitive implications of such relationships. The draft merger guidelines emphasize this policy point, noting that the agencies will consider whether partial acquisitions lessen competition by giving the partial acquirer the ability to influence the competitive conduct of the target firm — e.g., through rights to appoint board members or to observe board meetings.

The draft merger guidelines and the proposed changes to the HSR rules provide the most guidance yet by the Biden administration as to how they plan to enforce the antitrust laws in the context of mergers and acquisitions. Nevertheless, it remains to be seen how much guidance they will provide and whether courts will rely on them given the issues that have already been identified.

The draft merger guidelines, for example, set forth concerns that the agencies may have with proposed transactions, but they do not provide clear principles for determining when a particular transaction does or does not violate Section 7 in the view of the reviewing agency. The draft merger guidelines also seek to establish presumptions of illegality and to downplay or dismiss any potential positive impact that mergers might have, which ignores the fact that mergers can create benefits for competition, consumers, and employees even if they do not do so in every case.

The agencies also do not seek to balance the burdens of the proposed changes to the HSR rules — or the potential loss to innovation and economic growth from the presumptions of illegality that they seek to establish in the draft merger guidelines — against the potential benefits of their proposed approach in either document.

Given that more than 7,500 transactions have been notified since January 2021 — and more have been completed without notification[22] — and the Biden administration has brought enforcement actions

against only 60, or 0.8%, of those transactions,[23] such balancing would seem to be important and worthwhile.

Finally, as noted at the beginning of this article, the draft merger guidelines are only a statement of enforcement policy and do not carry the force of law. The considerations mentioned above — as well as any changes the agencies make before adopting a final version — are relevant to how persuasive the courts are likely to find them.

Practical Takeaways

The federal antitrust agencies are likely to continue to investigate mergers and acquisitions in a manner consistent with their core beliefs, as articulated in The Utah Statement, their enforcement policy statements, the proposed changes to the HSR rules, and the draft merger guidelines.

Companies can prepare for the proposed changes in the HSR rules, such as by collecting and/or preparing certain materials in advance of entering into a merger agreement (e.g., prior acquisition lists, lists of board members, employee SOC categories, and workplace safety information, among other things).

If the agencies finalize the HSR rules in their current proposed form, merging parties can use the newly required narrative responses as their first opportunity to explain their pro-competitive view of the transaction to the agencies.

There is still time to submit comments on the draft merger guidelines through Sept. 18, and on the proposed HSR rule changes through Sept. 27.

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[1] See, e.g., Press Release, Justice Department Withdraws Outdated Enforcement Policy Statements (Feb. 3, 2023), https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements; Press Release, Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary (Sept. 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary.

[2] For example, during the 2022 ABA Antitrust Law Spring Meeting, Assistant Attorney General Jonathan Kanter indicated that DOJ would not provide guidance on the criminal prosecution of Section 2 of the Sherman Act, and instead stated, "my guidance is to read the cases.... [T]here is over a century of case law relating to criminal antitrust enforcement of Section 1 and Section 2." See Tiffany Rider, et al., Criminal Monopolization Prosecutions: DOJ's Recent Policy Change, Past Cases, and Potential Obstacles,

ABA Antitrust Law Section (May 22, 2022), https://www.americanbar.org/groups/antitrust_law/resources/newsletters/criminal-monopolization-prosecutions/. High-ranking officials subsequently doubled down on this position, with one stating that it is not "necessarily our job as prosecutors" to provide such guidance and asking the defense bar, "this is your job, right?" See Dan Papscun, DOJ Owes No Guidance in Criminal Monopoly Cases, Official Says, Bloomberg Law (June 7, 2023), https://news.bloomberglaw.com/antitrust/doj-owes-no-guidance-in-criminal-monopoly-cases-official-says.

[3] https://www.ftc.gov/system/files/ftc_gov/pdf/p239300_proposed_amendments_to_hsr_rules_form_instructions_2023.pdf

[4] https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf

[5] https://onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6be198012d7

[6] https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf

[7] The Utah Statement also called for the restoration of structural presumptions in merger review.

[8] Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines, FTC File No. P810034, at 3 (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

[9] Plus factors include whether there is a "trend toward further vertical integration" in the relevant and related markets, whether the relevant market is already concentrated, the nature and purpose of the merger, and whether the merger increases barriers to entry.

[10] The draft Merger Guidelines substantially increase the burden on the merging parties to demonstrate a transaction's procompetitive efficiencies across the board (not just in vertical transactions). For example, the agencies would require that "cognizable efficiencies must be of sufficient magnitude and likelihood that no substantial lessening of competition is threatened by the merger in any relevant market." The parties must demonstrate that the claimed benefits are merger-specific, based on a verifiable methodology, promote competition in the relevant market, and that the benefits are not a result of less favorable terms for the parties' trading partners.

[11] https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf

[12] https://www.ftc.gov/system/files/ftc_gov/pdf/ftcnlrb%20mou%2071922.pdf, https://www.justice.gov/opa/press-release/file/1522096/download

[13] Concurring Statement of Commissioner Rebecca Kelly Slaughter and Chair Lina M. Khan, Regarding FTC and State of Rhode Island v. Lifespan Cor. & Care New England Health System, FTC File No. 2110031, at 1 (Feb. 17, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/public_statement_of_commr_slaughter_chair_khan_re_lifespan-cne_redacted.pdf.

[14] The basis for the agencies' claim that "labor markets are often relatively narrow" is unclear. The draft Merger Guidelines say that the agencies will use standard market definition tools and principles when defining the scope of labor markets, and those tools/principles might or might not result in narrow labor markets as narrow as the agencies seem to envision.

[15] https://www.bls.gov/SOC/

[16] The agencies state that they do not endorse the SOC classification system as a basis for defining relevant labor markets, but they plan to use it as an objective classification standard for initial screening purposes. See FTC Notice of Proposed Rulemaking, 16CFR§§ 801, 803, FTC File No. P239300, at 68 (June 27,
2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p239300_proposed_amendments_to_hsr_rules_form_instructions_2023.pdf.

[17] https://www.ers.usda.gov/data-products/commuting-zones-and-labor-market-areas/

[18] Michael Acton, US DOJ crackdown on interlocking boards 'probably most effective way' of deconcentrating economy, Kanter says, mlex (Mar. 31,
2023), https://content.mlex.com/#/content/1460974.

[19] See, e.g., Press Release, Two Pinterest Directors Resign from Nextdoor Board of Directors in Response to Justice Department's Ongoing Enforcement Efforts Against Interlocking Directorates, U.S. Dep't of Justice (Aug. 16, 2023), https://www.justice.gov/opa/pr/two-pinterest-directors-resign-nextdoor-board-directors-response-justice-departments-ongoing ("The division's enforcement initiative has led to fifteen interlocking director resignations from eleven boards.... Enforcement involving interlocking directorates will continue to be one of the top priorities of the Antitrust Division.").

[20] See Press Release, FTC Acts to Prevent Interlocking Directorate Arrangement, Anticompetitive Information Exchange in EQT, Quantum Energy Deal, Fed. Trade Comm'n (Aug. 16,
2023), https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-acts-prevent-interlocking-directorate-arrangement-anticompetitive-information-exchange-eqt.

[21] The text of Section 8 of the Clayton Act does not actually cover board observers; it only references directors and officers, the latter of which the statute defines as "an officer elected or chosen by the Board of Directors." See 15 U.S.C. §19. As a result, the proposed changes to the HSR rules require filers to provide information that goes beyond what would constitute an interlocking directorate that violates Section 8. Similarly, the text of Section8 only refers to "corporations," but agency leadership has claimed that the scope of Section8 is broader. For example, according to Chair Khan's statement accompanying the issuance of a consent decree in Quantum/EQT, "The proposed [consent decree] puts industry actors on notice that they must follow Section 8 no matter what specific corporate form their business takes.... Today's action makes clear that Section 8 applies to businesses even if they are structured as limited partnerships or limited liability corporations." Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro Bedoya, In re EQT Corp., File No. 221-0212, at 5 (F.T.C. Aug. 16, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2210212qeteqtkhanstatement_0.pdf.

[22] Through July 2023, approximately 7,546 transactions had been reported to the federal antitrust agencies. See U.S. Fed. Trade Comm'n & U.S. Dep't of Justice Antitrust Division, Hart-Scott-Rodino Annual Report, Fiscal Year 2021, Appendix B (Feb. 10,
2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf (providing the

number of transactions reported by month for fiscal years 2012 to 2021); Fed. Trade Comm'n, Premerger Notification Program (last visited Aug. 29, 2023), https://www.ftc.gov/enforcement/premerger-notification-program (providing preliminary estimates for the number of transactions reported by month from October 2021 through July 2023).

[23] For the purposes of this article, "enforcement actions" include (1)complaints filed to block a merger, (2)consent agreements following merger investigations, and (3)mergers abandoned in the face of antitrust concerns raised by the FTC or DOJ with an accompanying press release or other public acknowledgement of the abandonment. This is largely consistent with how the FTC and DOJ count enforcement actions. See, e.g., Hart-Scott-Rodino Annual Report for Fiscal Year 2021, supra note 14, at 9-15 (counting "challenged" merger transactions as those in which the agencies issued a complaint—both to block mergers and for consent purposes—and when parties abandoned or restructured the transaction after the relevant agency raised antitrust concerns).