Fried Frank Antitrust & Competition Law Alert®

Managing Antitrust Risk in the Biden Administration

The shift in the volume and nature of antitrust enforcement over the last few years is just the beginning of more changes to come. During the last Administration, antitrust enforcers initiated investigations and lawsuits that likely would not have happened earlier in the decade. For example:

- The FTC and DOJ challenged transactions where the targets had no or trivial current presence in the relevant markets (e.g., Visa/Plaid, Sabre/Farelogix, and Illumina/Pacific Biosciences).
- The DOJ sued to block a vertical merger, the first such litigation in four decades, yet the Democratic FTC Commissioners recently said that "[they] look forward to turning the page on the era of lax oversight and to beginning to investigate, analyze, and enforce the antitrust laws against vertical mergers with vigor."[1]
- The FTC reversed course on its clearance of Facebook's acquisitions of Instagram and WhatsApp in 2012 and 2014, respectively, with an unprecedented 48 attorneys general also bringing lawsuits.
- Google and Facebook are facing monopolization challenges the likes of which have not been seen since Microsoft almost three decades ago.
- State attorneys general are increasingly challenging deals approved by the DOJ and the FTC (e.g., T-Mobile/Sprint and Valero/Martinez and Richmond Petroleum Terminals) and imposing merger remedies on top of those issued by federal agencies (e.g., New York in Intuit/Credit Karma and Colorado in UnitedHealth Group/DaVita).

These examples reflect the current thinking at the federal and state antitrust enforcement agencies, which has evolved toward more enforcement and a greater willingness to tolerate litigation risk. With increased antitrust enforcement one of the few issues receiving widespread public and bipartisan support, the next Administration will likely be encouraged to push the limits of the law. Companies and their advisers should take note and recalibrate how they assess antitrust risk.

Prepare for a Possible Paradigm Shift

With antitrust very much in the political and popular spotlight, political leaders have proposed changes that could lead to a paradigm shift in enforcement:

- The Biden-Sanders Unity Task Force recommended that the antitrust agencies re-review certain mergers that were approved under the Trump Administration to assess competitive and social effects.[2]
- The US House of Representatives Task Force Report on the Digital Economy recommended codifying bright-line rules for structural presumptions, such as an anticompetitive presumption for

mergers resulting in a 30% combined market share and a presumption of dominance for buyers and sellers with market shares of 25% and 30%, respectively, among other changes.[3]

- Other proposals in the House include shifting the burden of proof to companies with a greater than 50% market share,[4] imposing penalties of up to 15% of total U.S. revenues for anticompetitive conduct,[5] changing the standard for illegal mergers from "substantially" to "materially" harmful, to show that anything more than *de minimis* harm is sufficient to block a deal, and establishing an anticompetitive presumption for any transaction involving a party with a $100 billion market capitalization.[6]

Apart from proposed legislative changes, any change in enforcement will depend on President-Elect Biden's appointments to lead the FTC and the DOJ. What is clear, however, is that the sitting Democratic-appointed FTC Commissioners support major changes in the next Administration's approach to antitrust. For example, Commissioner Chopra has been critical of the FTC's long-standing practice of approving pharmaceutical mergers with divestitures limited to overlap products and has argued that the Commission should also consider the overall impact of the size of the companies on competition.[7] He has also been particularly critical of private equity, arguing that roll-up acquisitions by PE-backed firms allow them to quietly accumulate market share and harm competition. Commissioners Chopra and Slaughter recently dissented from the DOJ/FTC Vertical Merger Guidelines and Vertical Merger Commentary because they believe that vertical merger enforcement has been too lax, and strongly cautioned the market against relying on these guidelines as an indication of how the FTC will act going forward.[8]

While the agencies already are focused on acquisitions of nascent competitors in markets with significant entry barriers, such deals likely will get even more scrutiny as the agencies are careful not to repeat the controversial clearances of Facebook's acquisitions of Instagram and WhatsApp. This trend was apparent in Visa/Plaid and Sabre/Farelogix, where both deals were challenged despite the targets' extremely small market share.

Federal Courts and Budget Constraints Will Be Limiting Factors

Challenging transactions based on novel antitrust theories, without the benefit of precedent, means the agencies have the uphill battle of persuading a court that the transaction violates antitrust laws. The DOJ's unsuccessful challenges of the AT&T/Time Warner and Sabre/Farelogix mergers showed how difficult it can be to win a merger challenge that goes beyond the comfort of precedent and presumptions. Notably, in Sabre/Farelogix, the court found in favor of the parties based almost entirely on the precedent set in the Supreme Court's decision in *Ohio v. American Express*. Similarly, the FTC's Ninth Circuit loss in its lawsuit against Qualcomm will make it more difficult to bring an antitrust challenge to licensing practices for standard-essential patents. With the Trump Administration appointing almost a quarter of active federal judges and three Supreme Court justices, winning cases that push the boundaries of antitrust law will not be easy.

Further, despite a record number of litigated cases, the budget at the antitrust agencies is insufficient to match the rhetoric of more enforcement. The DOJ had 25% fewer full-time employees in 2019 than it had 10 years earlier[9] and the FTC recently imposed a hiring freeze. With limited resources, the agencies are forced to make important tradeoffs in deciding what matters to challenge, settle, or walk away from. Indeed, Commissioner Wilson reportedly voted against bringing a lawsuit to block CoStar's acquisition of RentPath, in part, because of limited FTC resources.[10] Although the agencies will receive a modest budget increase for the current fiscal year,[11] it is far short of what some think is needed.[12] As antitrust enforcement has become a bipartisan issue, a significant increase in the antitrust agencies' budgets in the future is likely.

Navigating a Changing Antitrust Environment

There are a number of steps that companies can take to manage antitrust risk in this evolving enforcement environment:

- **Consider Antitrust Implications Early:** Involving antitrust lawyers early in the process can help companies understand the risks and set expectations so that management is fully informed when making critical decisions. This is equally important in strategic deals that may not require an HSR filing, because while the likelihood of an investigation may be lower, the pain is significant if the transaction is challenged post-closing.

- **Undertake a 360-Degree Analysis:** While the law and precedent will limit the risk associated with a litigated outcome, the shifting perspectives at the agencies will affect timing and potential settlement outcomes. Beyond the competitive effects of overlaps, foreclosure, and information sharing, companies should consider theories of harm that go beyond the traditional analysis. For example, are network effects an issue, are competitors disadvantaged, what groups − no matter how narrow and small − might be harmed, is there a data advantage, among others?

- **Keep Deal Documents Clean:** Documents prepared by or for senior management or the board describing the strategic rationale for the transaction must be submitted with the initial HSR filings and can set the narrative for the entire span of an antitrust investigation. Discussions of anticompetitive motives for the transaction, such as increasing prices, creating competitive moats, or keeping the asset out of the hands of others, can prove difficult to rebut during an investigation, even if drafted by low-level employees. Avoiding language that can be misconstrued pays dividends. For example, in rejecting the FTC's challenge to the Evonik/PeroxyChem merger, the court specifically noted the absence of contemporaneous deal documents suggesting an anticompetitive rationale for the transaction.[13]

- **Develop a Compelling Procompetitive Transaction Rationale:** A compelling procompetitive reason for a transaction can establish a favorable narrative for agency staff. To be persuasive, the analysis should be done pre-signing (rather than in response to an investigation) and should focus not only on standard cost synergies, but also on how the transaction will enable the combined company to enter new markets, develop next-generation products, or resuscitate a declining business.

- **Get Stakeholders on Your Side:** During the course of an investigation, agency staff will speak with dozens of the companies' customers, competitors, and other industry participants, and those discussions will play a significant role in framing the staff's view. As a result, companies should contact key customers and other stakeholders soon after announcement to explain the benefits of the transaction and reinforce the relationship.

- **Have a Backup Plan:** Buyers should develop a plan for remedies early so they are prepared if an antitrust investigation goes sideways. This includes outlining the scope of divestitures and restrictions the buyer is willing to endure. Lining up potential purchasers early is also important if the purchase agreement has significant divestiture commitments and a short outside date. Keeping attorneys involved and maintaining legal privilege for these discussions is crucial.

This alert is not intended to provide legal advice, and no legal or business decision should be based on its content. If you have any questions about the contents of this alert, please call your regular Fried Frank contact or the attorneys listed below:

Authors:

Bernard (Barry) A. Nigro Jr.

Nathaniel L. Asker

Aleksandr B. Livshits

Contacts:

Washington, DC

Bernard (Barry) A. Nigro Jr.	+1.202.639.7373	barry.nigro@friedfrank.com

New York

Nathaniel L. Asker	+1.212.859.8566	nathaniel.asker@friedfrank.com
Aleksandr B. Livshits	+1.212.859.8524	aleksandr.livshits@friedfrank.com

London

Dr. Tobias Caspary	+44.20.7972.9618	tobias.caspary@friedfrank.com

---

1 Fed. Trade Comm'n, Joint Dissenting Statement of Commissioners Rohit Chopra and Rebecca Kelly Slaughter Regarding the Vertical Merger Commentary, Commission File No. P181201 (Dec. 22, 2020).

2 Biden-Sanders Unity Task Force, Economy Unity Task Force Recommendations (2020).

3 Staff of H. Subcomm. on Antitrust, Commercial and Administrative Law of the Comm. on the Judiciary, 116th Cong., Majority Staff Report and Recommendations on Investigation of Competition in Digital Markets (2020).

4 Anticompetitive Exclusionary Conduct Prevention Act of 2020, S. 3426, 116th Cong. (2d Sess. 2020).

5 Monopolization Deterrence Act of 2019, S. 2237, 116th Cong. (1st Sess. 2019).

6 Consolidation Prevention and Competition Promotion Act of 2019, S. 307, 116th Cong. (1st Sess. 2019).

7 Fed. Trade Comm'n, Dissenting Statement of Commissioner Rohit Chopra in the Matter of Bristol-Myers Squibb/Celgene, Commission File No. 1910061 (Nov. 15, 2019); Fed. Trade Comm'n, Statement of Commissioner Rohit Chopra Joined by Commissioner Rebecca Kelly Slaughter in the Matter of Pfizer Inc./Mylan N.V., Commission File No. 1910182 (Oct. 30, 2020).

8 *Surpa* note 1.

9 Wash. Ctr. for Equitable Growth, Restoring Competition in the United States: A Vision for Antitrust Enforcement for the Next Administration and Congress, at 14 (Nov. 19, 2020).

10 The Capital Forum, *Wilson CoStar/RentPath Dissent Brings FTC Resource Reform Into Focus*, Merger Monthly, Vol. 9, No. 1 (Jan. 4, 2021).

11 For FY2021, the FTC was allocated $351 million, a $20 million increase over what it received in FY2020. The DOJ's Antitrust Division was allocated $184.5 million, $18 million more than it received in FY2020.

12 *Supra* note 9, at 16.

13 *FTC v. RAG-Stiftung*, No. 19-2337 (TJK), Mem. Op., at 61 (D.D.C. Jan. 24, 2020).