



**United States of America
Federal Trade Commission**

An Update on FTC Merger Enforcement

Christine S. Wilson*
Commissioner, U.S. Federal Trade Commission

Remarks at International Bar Association's 19th Annual International
Mergers and Acquisitions Conference

New York
June 15, 2022

* The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. Many thanks to my Attorney Advisor Thomas J. Klotz for his assistance in the preparation of these remarks.

Let me begin by thanking the IBA and Ilene Gotts for inviting me to participate at this event. Before I launch into the substance of my remarks, allow me to give the standard disclaimer. The views I express are my own, and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

There is a popular narrative in the American media that Republican administrations reduce antitrust enforcement while Democrat administrations increase it. Historical evidence demonstrates that this narrative is false; instead, antitrust enforcement is relatively consistent across administrations, no matter which party is leading the agencies.¹ Nonetheless, for the past 18 months, the narrative of more aggressive enforcement under Democrat leadership has again gained traction. At this point, though, it is unclear whether the historical record of consistent enforcement or the media's pendulum narrative will prove more accurate with respect to the current administration at the FTC.

When the Biden administration began, sitting Commissioner Rebecca Slaughter was named Acting Chair for the Commission. She led the agency for five months, was committed to aggressive enforcement, and pursued the traditional bipartisan functioning of the agency. In mid-June 2021, the Senate confirmed Lina Khan as a commissioner; the White House promptly designated her Chair of the agency. Before becoming Chair, Khan's academic writings derided the past 40 years of antitrust enforcement as lax and feckless, leaving observers (and agency staff) to wonder what the future would bring.

During my time with you today, I will discuss merger policy and merger enforcement during the first year of Chair Khan's tenure. First, I will discuss the cases the Commission has brought under the new Democrat administration. Second, I will identify procedural changes to the merger review process worth considering as deals are considered and merger agreements are negotiated. Finally, I will look ahead to identify potential changes we may see in the merger arena.

The Cases the Commission Has Brought

To consider the current state of merger enforcement at the FTC, let's look at the first 18 months of antitrust enforcement under President Biden. As a baseline, consider the last full calendar year under President Trump, when merger enforcement at the FTC was at a two-decade high. In 2020, the FTC sought to block or undo nine mergers in a broad variety of markets.² In addition, the FTC settled 12 merger enforcement actions to resolve competitive concerns;

¹ See Ian Conner, 2020: Remote work with real results, Fed. Trade Comm's, Competition Matters Blog (Jan. 5, 2020 9:42AM), <https://www.ftc.gov/enforcement/competition-matters/2021/01/2020-remote-work-real-results> (describing historic enforcement numbers during last year of Trump administration); Thomas B. Leary, *The Essential Stability of Merger Policy*, 70 Antitrust L.J. 105 (2002).

² Conner, *supra* note 1, <https://www.ftc.gov/news-events/blogs/competition-matters/2021/01/2020-remote-work-real-results> ("From our first merger challenge on January 3 to our most recent one on December 8, the Commission authorized the Bureau to seek to block or undo an unprecedented nine mergers.").

another ten mergers were abandoned after the FTC opened investigations.³ In total, there were 31 actions against mergers in 2020.

Let's compare the 2020 numbers to the 2021 numbers. Under President Biden, only three suits were brought to challenge mergers, compared to nine in 2020.⁴ The FTC entered into five consents to remedy anticompetitive transactions and settle Commission investigations, down from 12 in 2020.⁵ And four transactions were abandoned in 2021 after the FTC opened investigations, compared to 10 in 2020.⁶ Bottom line: the FTC had 12 merger actions in 2021, compared to 31 in 2020.

In calendar year 2022, the pace has increased. During the first five and one-half months of this year, the Commission voted to challenge four transactions⁷ and accepted consents in

³ *Id.* (“On top of these nine litigation matters, we settled even more – twelve – and another ten mergers were abandoned after we started our investigation. All in all, a banner year for merger enforcement.”).

⁴ HeidelbergCement AG, et al., File No. 201-0006, <https://www.ftc.gov/enforcement/cases-proceedings/2010006/heidelbergcement-ag-et-al-matter> (abandoned after complaint); Illumina, Inc., and GRAIL, Inc., File No. 201-0144 <https://www.ftc.gov/enforcement/cases-proceedings/201-0144/illumina-inc-grail-inc-matter> (complaint filed); Nvidia/Arm, File No. 211-0015, <https://www.ftc.gov/enforcement/cases-proceedings/2110015/nvidiaarm-matter> (complaint filed).

⁵ Casey's General Stores, File No. 221-0028, <https://www.ftc.gov/enforcement/cases-proceedings/221-0028/caseys-general-stores-matter>; Seven & i Holdings Co., Ltd., File No. 201-0108, <https://www.ftc.gov/enforcement/cases-proceedings/201-0108/seven-i-holdings-co-ltd-matter>; ANI/Novitium, File No. 211-0101, <https://www.ftc.gov/enforcement/cases-proceedings/211-0101/aninovitium-matter>; DaVita Inc. and Total Renal Care, Inc., File No. 211-0013, <https://www.ftc.gov/enforcement/cases-proceedings/2110013/davita-inc-total-renal-care-inc-matter>; Global Partners and Richard Wiehl, File No. 211-0050, <https://www.ftc.gov/enforcement/cases-proceedings/2110050/global-partners-richard-wiehl-matter>.

⁶ Press Release, Fed. Trade Comm'n, Statement Regarding Berkshire Hathaway Energy's Termination of Acquisition of Dominion Energy, Inc.'s Questar Pipeline in Central Utah (July 13, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/statement-regarding-berkshire-hathaway-energys-termination>; Press Release, Fed. Trade Comm'n, Expected Federal Trade Commission Opposition to Transaction Leads Great Outdoors Group, LLC and Rival Sportsman's Warehouse Holdings, Inc. to Abandon Plans for Proposed Merger (Dec. 3, 2021), <https://www.ftc.gov/news-events/press-releases/2021/12/expected-federal-trade-commission-opposition-transaction-leads>; Press Release, Fed. Trade Comm'n, Following Federal Trade Commission Staff Recommendation to Challenge Transaction, Two Health Care Systems in Central Georgia Abandon Proposed Merger (March 3, 2021), <https://www.ftc.gov/news-events/press-releases/2021/03/following-federal-trade-commission-staff-recommendation-challenge>; Press Release, Fed. Trade Comm'n, Following Federal Trade Commission Staff Recommendation to Challenge Transaction, Tronox Holding plc. Abandons Proposed Acquisition of TiZir Titanium and Iron (Jan. 29, 2021), <https://www.ftc.gov/news-events/press-releases/2021/01/following-federal-trade-commission-staff-recommendation-challenge>.

⁷ HCA Healthcare, Inc., Steward Health Care System, LLP, and de la Torre, File No. 221-0003, https://www.ftc.gov/system/files/ftc_gov/pdf/D9410HCAStewardPart3ComplaintPublic.pdf; RWJ Barnabas Health and St. Peter's Healthcare System, File No. 201-0145, https://www.ftc.gov/system/files/ftc_gov/pdf/D09409RWJP3ComplaintPublic.pdf; Lifespan Corp. and Care New England Health System, File No. 211-0031, https://www.ftc.gov/system/files/ftc_gov/pdf/d_9406_lifespan-cne_p3_complaint_public_redacted.pdf; Lockheed Martin Corp. and Aerojet Rocketdyne Holdings Inc., File No. 211-0052, <https://www.ftc.gov/system/files/documents/cases/d09405lockheedaerojetp3complaintpublic.pdf>.

seven matters.⁸ This pace seems to indicate a return to the enforcement rates we have seen in recent decades.

Beyond the numbers, the substantive analysis underlying the cases the Commission brought in 2021 similarly showed consistency with traditional enforcement. For each of the announced enforcement actions in 2021 and this year, the votes have been unanimous. I can assure you that I have not been supporting cases that depart from established law.

Some have asked whether there has been a change in the FTC's approach to vertical mergers. They point to the fact that the Commission has filed three complaints challenging vertical mergers since the start of the Biden administration.⁹ In fact, these cases are consistent with prior Commission actions. Each of the three complaints rests on a theory of anticompetitive effects that was reflected in the now-rescinded Vertical Merger Guidelines.¹⁰ This theory, called foreclosure, predicts that the vertically integrated merged firm will have the incentive and ability to deny or provide only on disadvantageous terms an important input to downstream competitors. The Commission has challenged many vertical mergers based on this theory of harm.¹¹

Because these three mergers were challenged, not settled, observers ask whether these cases demonstrate a diminished appetite for accepting behavioral remedies in vertical cases.

⁸ ARKO Corp., File No. 211-0087, https://www.ftc.gov/system/files/ftc_gov/pdf/2110087GPMComplaint.pdf; JAB Consumer Partners SCA SICAR, National Veterinary Assocs., Inc., and SAGE Veterinary Partners, LLC, File No. 211-0140, https://www.ftc.gov/system/files/ftc_gov/pdf/2110140C4766NVASAGEComplaintPublic.pdf; IFM Global Infrastructure Fund, Buckeye Partners L.P., and Magellan Midstream Partners, L.P., File No. 211-0144, https://www.ftc.gov/system/files/ftc_gov/pdf/2110144C4765BuckeyeComplaint.pdf; Medtronic plc and Intersect ENT, Inc., File No. 211-0184, https://www.ftc.gov/system/files/ftc_gov/pdf/2110184%20C4763MedtronicComplaint.pdf; American Securities Partners VII, L.P., Prince Int'l Corp., and Ferro Corp., File No. 211-0131, https://www.ftc.gov/system/files/ftc_gov/pdf/2110131ASPFerroComplaint.pdf; Hikma Pharmaceuticals PLC and Custopharm Inc., File No. 221-0001, https://www.ftc.gov/system/files/ftc_gov/pdf/2210002C4762HikmaCustopharmComplaint.pdf; Encap Investments L.P. and EP Energy Corp., File No. 211-0158, https://www.ftc.gov/system/files/ftc_gov/pdf/2110158C4760EnCapEPEComplaint.pdf.

⁹ Illumina, Inc., and GRAIL, Inc., File No. 201-0144 <https://www.ftc.gov/enforcement/cases-proceedings/201-0144/illumina-inc-grail-inc-matter> (complaint filed); Nvidia/Arm, File No. 211-0015, <https://www.ftc.gov/enforcement/cases-proceedings/2110015/nvidiaarm-matter> (complaint filed); Lockheed Martin Corp. and Aerojet Rocketdyne Holdings Inc., File No. 211-0052, <https://www.ftc.gov/system/files/documents/cases/d09405lockheedaerojetp3complaintpublic.pdf>.

¹⁰ U.S. Dep't of Just. & Fed. Trade Comm'n, Vertical Merger Guidelines (June 30, 2020), https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-mergerguidelines/vertical_merger_guidelines_6-30-20.pdf But see Lina M. Khan, Rohit Chopra, & Rebecca Kelly Slaughter, Chair & Comm'rs, Fed. Trade Comm'n, Statement on the Withdrawal of the Vertical Merger Guidelines (Sept. 15, 2021), <https://www.ftc.gov/public-statements/2021/09/statement-chair-lina-m-khan-commissioner-rohit-chopra-commissioner-rebecca>.

¹¹ See, e.g., UnitedHealth Group Incorporated, Collaborative Care Holdings, LLC, DaVita Inc., and DaVita Medical Holdings, LLC, File No. 181-0057 (2019), <https://www.ftc.gov/legal-library/browse/cases-proceedings/181-0057-unitedhealth-groupdavita-matter>; Northrop Grumman Corp. and Orbital ATK, Inc., File No. 181-0005 (2018), <https://www.ftc.gov/legal-library/browse/cases-proceedings/181-0005-c-4652-northrop-grumman-orbital-atk-matter>; General Electric Co., File No. 131-0069 (2013), <https://www.ftc.gov/legal-library/browse/cases-proceedings/131-0069-general-electric-company-matter>.

These cases do not support that proposition. The antitrust analysis of any merger is fact-specific, and highly dependent on a variety of factors. In many instances, behavioral remedies – i.e., obligations imposed on the merging parties regarding post-merger business activities – are sufficient to address potential anticompetitive effects. But in markets where technological cooperation is particularly important, the Commission has found that behavioral remedies may be inadequate to resolve foreclosure concerns in vertical transactions. A consent decree may be incapable of anticipating, and precluding, the myriad ways in which the merged firm can disadvantage competitors when providing the technologically unique input.

This approach is not new, as demonstrated by the Commission’s analysis in Cytyc/Digene¹² under the leadership of Chairman Tim Muris in the early 2000s. Cytyc/Digene involved the merger of two complementary cervical cancer screening tests. The challenge was premised on the concern that Digene had both the incentive and ability to provide inferior support to rival liquid pap test suppliers when seeking FDA approval for use of their products in conjunction with the Digene product. The Commission concluded that it would be difficult to monitor the various ways in which the merged firm could limit support in the FDA approval process. Rather than settling for inadequate post-merger behavioral remedies, the Commission challenged the merger.

Observers also may wonder whether there is a change in the way the new administration addresses transactions in the defense industry. After all, the Commission sought to block Lockheed Martin’s proposed acquisition of Aerojet Rocketdyne¹³ in January, whereas the Commission accepted behavioral remedies in earlier defense industry matters, such as the 2018 Northrop Grumman acquisition of Orbital ATK.¹⁴ Again, I do not interpret the recent challenge as a change in policy. In defense deals, then and now, the views of the primary customer – the Department of Defense – are critical. Moreover, earlier transactions in the industry left fewer competitors. As described in the complaint for the recent challenge, Aerojet Rocketdyne is the only remaining independent supplier of key missile inputs.¹⁵ Absent an alternative source of supply for inputs, Lockheed Martin would have both the incentive and ability to reduce the competitive significance of other prime contractors for particular missile systems.

Process Changes

While there has been substantial continuity in the Commission’s *substantive* analysis in the cases that have been brought, current leadership has implemented significant changes to the

¹² Cytyc Corp. and Digene Corp., File No. 021-0098, <https://www.ftc.gov/news-events/news/press-releases/2002/06/ftc-seeks-block-cytyc-corps-acquisition-digene-corp>.

¹³ Lockheed Martin Corp. and Aerojet Rocketdyne Holdings, Inc., File No. 211-0052, <https://www.ftc.gov/system/files/documents/cases/d09405lockheedaerojetp3complaintpublic.pdf>.

¹⁴ Northrop Grumman Corp. and Orbital ATK, Inc., File No. 181-0005, https://www.ftc.gov/system/files/documents/cases/1810005_northrop_grumman_orbital_analysis_6-5-18.pdf (Analysis to Aid Public Comment).

¹⁵ Lockheed Martin Corp. and Aerojet Rocketdyne Holdings, Inc., File No. 211-0052, Complaint ¶ 48, <https://www.ftc.gov/system/files/documents/cases/d09405lockheedaerojetp3complaintpublic.pdf>.

merger review *process*. These changes alter the risk profile of certain deals and inject uncertainty into the process for most. I will take a few moments to highlight some of these changes.

First, current leadership has expanded the scope of merger investigations. In a blog post last fall, the FTC announced that merger investigations would no longer follow an “unduly narrow approach” but instead would investigate a broader range of market realities.¹⁶ Second requests now include topics such as “how a proposed merger will affect labor markets, the cross-market effects of a transaction, and how the involvement of investment firms may affect market incentives to compete.”¹⁷ These broader inquiries now include non-competition considerations. At an open Commission meeting, one practitioner described inquiries regarding ESG issues during the merger review process.¹⁸ And if private equity is involved in a transaction, a particularly detailed investigation can be expected, even absent overlaps.¹⁹ The broader scope of inquiry will increase both the time and expense of complying with the HSR merger notification process. To date, though, merger challenges have not relied on new theories of harm; complaints have not incorporated any non-competition factors that may have been explored during the HSR process.²⁰

Second, the Commission majority seeks the expansive use of so-called prior notice and prior approval provisions in consent agreements. Prior notice and prior approval provisions require parties to notify the agency of future transactions, even when those transactions fall below HSR filing thresholds. Thus, these obligations expand the boundaries of the premerger notification process. Prior approval provisions shift the burden of proof to the parties to establish that future transactions are not anticompetitive, flipping the burden of proof that the agency otherwise would bear. Notably, the prior approval process operates outside the HSR notification scheme, meaning that there are no statutory time limits imposed on the investigation.²¹

¹⁶ Holly Vedova, Making the Second Request Process Both More Streamlined and More Rigorous During This Unprecedented Merger Wave, Competition Matters blog (Sept. 28, 2021), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/making-second-request-process-both-more-streamlined>.

¹⁷ *Id.* See also Bryan Koenig, ‘Nontraditional Questions’ Appearing in FTC Merger Probes, Law360 (Sept. 24, 2021, 9:44 PM EDT), <https://www.law360.com/articles/1425218>.

¹⁸ Darren Tucker, Statement at Open FTC Commission Meeting, at 26 (Sept. 15, 2021) (“In an increasing number of FTC merger investigations, agency staff have requested information regarding how the proposed transaction will affect unionization, ESG policies, or franchising.”), https://www.ftc.gov/system/files/documents/public_events/1596052/transcript_open_commission_meeting_9-15-21.pdf.

¹⁹ *Cf.* Concurring Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson regarding JAB Consumer Partners SCA SICAR/SAGE Veterinary Partners, LLC, File No. 211-0140, https://www.ftc.gov/system/files/ftc_gov/pdf/2110140C4766NVASAGEPhillipsWilsonConcurringStatement.pdf.

²⁰ Chair Khan and Commissioner Slaughter wished to include a monopsony count involving labor in a recent hospital merger challenge, however. See Concurring Statement of Commissioner Rebecca Kelly Slaughter and Chair Lina M. Khan Regarding FTC and State of Rhode Island v. Lifespan Corporation and Care New England Health System, File No. 2110031, https://www.ftc.gov/system/files/ftc_gov/pdf/public_statement_of_commr_slaughter_chair_khan_re_lifespan-cne_redacted.pdf. Even in this case, had the allegation been included in the complaint, it would have been consistent with analysis described in the 2010 Horizontal Merger Guidelines.

²¹ *Cf.* Majority Staff Report and Recommendations of the Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, Investigation on Competition in Digital Markets 387 (2020)

Last July, the Commission voted 3-2 to rescind a 1995 policy statement on prior notice and prior approval that limited the circumstances in which these provisions would be imposed.²² In October, the Commission majority adopted a new Policy Statement on Use of Prior Approval Provisions in Merger Orders.²³ Pursuant to this new Policy Statement, the FTC will “routinely require merging parties subject to a Commission order to obtain prior approval from the FTC before closing *any* future transaction affecting each relevant market for which a violation was alleged.”²⁴ These prior approval provisions will cover deal activity of the merging parties for a *minimum* of ten years. Under the Policy Statement, the Commission also reserves the right to employ “stronger relief” by imposing prior approval provisions that cover “product and geographic markets beyond just the relevant product and geographic markets affected by the merger.”²⁵ Whether this stronger relief will be employed depends on a set of broad and subjective factors. Finally, the Statement explains that the Commission will require *buyers* of divested assets “to agree to a prior approval for any future sale of the assets they acquire in divestiture orders,” again “for a minimum of ten years.”²⁶

What does this new policy look like in practice? In a case announced earlier this week, involving the proposed acquisition of specialty and emergency veterinary clinics, the Commission required prior approval for future transactions anywhere within California and Texas,²⁷ despite the complaint’s allegation that competition is local.²⁸ According to Chair Khan, the broader statewide prior approval mechanism is justified because the acquiring party engaged in a prior transaction that resulted in divestitures, albeit in other local markets.²⁹

(“Subcommittee staff recommends that Congress consider shifting presumptions for future acquisitions by the dominant platforms. Under this change, any acquisition by a dominant platform would be presumed anticompetitive unless the merging parties could show that the transaction was necessary for serving the public interest and that similar benefits could not be achieved through internal growth and expansion. This process would occur outside the current Hart-Scott-Rodino Act (HSR) process, such that the dominant platforms would be required to report *all* transactions and no HSR deadlines would be triggered.”).

²² Christine S. Wilson, Comm’r, Fed. Trade Comm’n, Oral Remarks at the Open Commission Meeting (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf.

²³ Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ JAB Consumer Partners SCA SICAR, National Veterinary Assocs., Inc., and SAGE Veterinary Partners, LLC, File No. 211-0140, https://www.ftc.gov/system/files/ftc_gov/pdf/2110140C4766NVASAGEComplaintPublic.pdf.

²⁸ See Concurring Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson in the Matter of JAB Consumer Partners SCA SICAR/SAGE Veterinary Partners, LLC, File No. 211-0140, https://www.ftc.gov/system/files/ftc_gov/pdf/2110140C4766NVASAGEPhillipsWilsonConcurringStatement.pdf.

²⁹ See Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya in the Matter of JAB Consumer Fund/SAGE Veterinary Partners, File No. 211-0140, https://www.ftc.gov/system/files/ftc_gov/pdf/2110140C4766KhanStatement.pdf.

Labeling an acquirer a recidivist and penalizing it with a broad and burdensome prior approval requirement for future transactions is a substantial change in the accepted process for merger review. The merging parties in this week’s case followed an approach to acquisitions that has long been encouraged by the Commission. Under that approach, merging parties with overlapping assets would notify the full transaction to the antitrust agencies with an expectation – by both the agencies and the parties – that competitive concerns would be remedied by a negotiated consent agreement. This approach enabled the FTC to ensure that overlapping assets were divested to an acceptable buyer committed to operating the assets effectively and that the buyer would have a sufficient package of assets to replace lost competition.³⁰

The Commission has long discouraged fix-it-first efforts by merging parties—in other words, the disposal of overlapping assets *prior* to agency review. Fix-it-first transactions remove Commission oversight and increase the likelihood that competition will not be preserved and that consumers will be harmed. While the traditional process allowed the Commission to supervise the divestiture process, the new one encourages parties to adopt a fix-it-first approach to transactions. This approach will avoid subjecting future mergers to scrutiny under a process that operates outside the structure and timelines established by Congress in the HSR Act.

Under new Democrat leadership, the agency also has adopted other procedural changes that warrant attention while negotiating mergers. For example, the agency suspended early termination,³¹ which means no HSR-reportable transaction will receive clearance at least until the full first waiting period has expired. Also, even when all applicable waiting periods have expired, the agency may issue a letter warning the parties that the FTC investigation continues, and they consummate the deal at their peril.³² Parties should consider how to allocate the risk that the agency will indeed pursue a post-consummation challenge in the future.

Expected Future Changes

The Merger Guidelines describe the analytical approach applied by the FTC and the Antitrust Division in evaluating the legality of mergers. Following President Biden’s Executive

³⁰ See e.g., *The FTC’s Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics* (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.

³¹ See Press Release, Fed. Trade Comm’n, FTC, DOJ Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), <https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early>; Noah J. Phillips & Christine S. Wilson, Comm’rs, Fed Trade Comm’n, Statement Regarding the Commission’s Indefinite Suspension of Early Terminations (Feb. 4, 2021), https://www.ftc.gov/system/files/documents/public_statements/1587047/phillipswilsonetstatement.pdf.

³² See Holly Vedova, Adjusting merger review to deal with the surge in merger filings, Competition Matters blog (Aug. 3, 2021), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings>; Statement of Commissioner Christine S. Wilson Regarding the Announcement of Pre-Consummation Warning Letters (Aug. 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf.

Order on Competition,³³ Chair Khan and Acting Assistant Attorney General Richard Powers announced their intention to take a “hard look” at the guidelines to determine whether they are “overly permissive.”³⁴ In January, the FTC and Antitrust Division issued a Request for Information seeking public comments about merger enforcement policy.³⁵ More than 1,900 unique comments were submitted to the agencies. Given the views of Chair Khan and Assistant Attorney General Kanter, it is likely that we will soon see a substantial change to the analytical approach of the agencies with respect to merger review, perhaps by the end of the year.³⁶

While I have not been given an inside view of what the revised merger guidelines will entail, past statements and articles from FTC and DOJ leadership provide clues. First, I anticipate a shift from focusing on competition to focusing on competitors. Chair Khan consistently has advanced policies that protect inefficient rivals – while harming consumers.³⁷ Similarly, AAG Kanter has explained that antitrust should not be committed to the consumer welfare standard, but instead should focus on protecting competition, which includes “focusing on rivalry.”³⁸

As a corollary, the traditional view that efficiencies and cost savings are beneficial may similarly be revamped. Current agency leadership takes a dim view of efficiencies. They argue that prior merger guidelines are inconsistent with the Clayton Act because they discuss procompetitive benefits and efficiencies from mergers.³⁹ From a practical perspective, new

³³ See Executive Order on Promoting Competition in the American Economy, §5 (c) (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

³⁴ Lina M. Khan & Richard A. Powers, Chair, Fed. Trade Comm’n & Acting Ass’t Atty. Gen’l, U.S. Dep’t of Justice Antitrust Div., Statement on Competition Executive Order’s Call to Consider Revisions to Merger Guidelines (July 9, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/statement-ftc-chair-lina-m-khan-antitrust-division-acting>.

³⁵ See Fed. Trade Comm’n & Dep’t of Justice, *Request for Information on Merger Enforcement* (Jan. 18, 2022), [file:///H:/Merger%20RFI%20comments/FTC-2022-0003-0001_content%20\(1\).pdf](file:///H:/Merger%20RFI%20comments/FTC-2022-0003-0001_content%20(1).pdf).

³⁶ See Alex Wilts, *Khan lists potential updates to merger guidance, draft expected in “coming months,”* Global Competition Rev. (May 9, 2022), <https://globalcompetitionreview.com/gcr-usa/article/khan-lists-potential-updates-merger-guidance-draft-expected-in-coming-months>.

³⁷ See Majority Staff Report and Recommendations of the Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Investigation on Competition in Digital Markets* (2020) (recommending legislation that would preclude innovations that make it more difficult for rivals to compete, remove the recoupment prong from the predatory pricing test, and resuscitate the essential facilities doctrine).

³⁸ Jonathan Kanter, *Antitrust Enforcement: The Road to Recovery*, Kenote Address at the University of Chicago Stigler Center (Apr. 21, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler>.

³⁹ See Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines 3-4 (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. Antitrust luminaries Carl Shapiro and Herbert Hovenkamp question Chair Khan’s dismissal of “procompetitive effects” in merger analysis. They ask, “[i]f a merger will generate procompetitive effects and thus will *promote* competition, on what basis can the Chair claim that the merger will substantially *lessen* competition, a requirement that is explicit in the text of the statute?” They further observe that “if mergers never produced procompetitive effects they could be condemned under a per se rule, but neither the statutory language nor a century of enforcement history permits that.” Carl Shapiro & Herbert

leadership believes that mergers rarely, if ever, produce synergies and cost savings. But if efficiencies do materialize, they make life more difficult for less efficient rivals, even though consumers benefit from the lower prices or new products. A focus on competitors rather than competition turns efficiencies into a harm rather than a benefit.

Second, I anticipate that the traditional touchstone of antitrust analysis – how a given merger or business activity will impact *consumers* – will be abandoned. Sen. Elizabeth Warren, a close ally of current agency leadership, recently introduced legislation that would require enforcers to evaluate the impact of mergers on the parties’ “business ecosystems,” including “workers, consumers, customer choice, sellers, small and minority-owned businesses (including farms and ranches), local, rural, and low-income communities, communities of color, privacy, quality, entrepreneurship, and innovation.”⁴⁰ This approach dovetails with the broadened scope of investigation to which mergers are now subjected.

While I expect many constituencies to receive consideration, labor will receive perhaps the most emphasis. After all, the RFI included many questions about the impact of mergers on labor. To be clear, consideration of competition for labor as an input is not new. Speaking from experience, the FTC’s merger review process under Chairman Joe Simons frequently analyzed the competitive effects of mergers in labor markets, where labor is an input to a product or service. In other words, the FTC routinely assessed whether mergers would create monopsony power that could lessen the intensity of competition for labor or other inputs.⁴¹ This analysis is consistent with the 2010 Horizontal Merger Guidelines, but the current Commission majority appears to envision a different and broader inquiry.

Beyond new merger guidelines, the coming months may also bring a change in the types of merger challenges brought by the Commission. Democrat Commissioner Alvaro Bedoya was sworn in just one month ago, giving Chair Khan a Democrat majority. After Commissioner Rohit Chopra left the agency last October, the Commission had only four sitting members, two Democrats and two Republicans. While the FTC’s merger cases under President Biden thus far have been consistent with traditional antitrust analysis and precedent, Commissioner Bedoya’s arrival paves the way for more progressive enforcement. The next year will certainly be an interesting one.

Thanks again to Ilene Gotts and the IBA for inviting me to share my perspective with you today.

Hovenkamp, How Will the FTC Evaluate Vertical Mergers?, PROMARKET (Sept. 23, 2021), <https://promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/>.

⁴⁰ See Prohibiting Anticompetitive Mergers Act (2022), H.R. 7101, 117th Cong., 2d sess., available at <https://www.congress.gov/117/bills/hr7101/BILLS-117hr7101ih.pdf>.

⁴¹ Press Release, Fed. Trade Comm’n, FTC Requires Grifols S.A. to Divest Assets as Condition of Acquiring Biotest US Corporation (August 1, 2018), <https://www.ftc.gov/news-events/press-releases/2018/08/ftc-requires-grifols-sa-divest-assets-condition-acquiring-biotest>