



Antitrust Agency Insights: Developments at the US Antitrust Enforcement Agencies—First Quarter 2022

Successfully navigating antitrust agency investigations requires a familiarity with Department of Justice and Federal Trade Commission processes, as well as insight into those agencies and their leaderships' current priorities for enforcement and competition policy. This newsletter will provide periodic updates on both, offering an analytical look at how the antitrust agencies are approaching important competition issues and what current investigations may mean for potential future enforcement. We hope our experience—both inside and outside these agencies—will provide insights that help you make more informed decisions for your business.

Letter from the Editors

FTC's 2-2 Split: Impact and Outlook

The Biden Administration has made clear its intentions to reinvigorate antitrust enforcement at the federal level (see [here](#), [here](#) and [here](#)). Nowhere is this more evident than at the Federal Trade Commission (FTC), where Chair Lina Khan has staked out an aggressive agenda to reorient the agency's enforcement efforts to shape the "distribution of power and opportunity across" the US economy (see [here](#) and [here](#)). However, since October 8, 2021, when former Commissioner Rohit Chopra left the agency to take over as Director of the Bureau of Consumer Financial Protection, the FTC has been split 2-2 between Republican and Democratic Commissioners. President Biden has nominated Alvaro Bedoya, a Georgetown law professor with expertise in privacy and technology, to fill the open seat but the nomination has since stalled in the Senate. Despite some recent procedural moves to advance his nomination out of committee, the timing of Professor Bedoya's confirmation remains uncertain.

Despite the lack of a majority of sitting commissioners, FTC leadership took the somewhat controversial step of relying on votes cast by the former commissioner on his last day at the FTC. On October 25, 2021, the [FTC approved a policy statement by a 3 to 2 vote](#) (including a vote from former Commissioner Chopra on October 8th) that articulated the FTC's "practice of routinely requiring 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." Although

the [FTC has defended the practice](#), which allows a former Commissioner's vote to remain valid for up to 60 days after departure, a group of Republican Senators has [introduced legislation](#) to prevent such “zombie” votes use in the future.

More recently, although the 2-2 split has not stopped the FTC from pursuing a number of enforcement actions (including its December 2021 challenge of Nvidia's proposed acquisition of Arm, its January 2022 challenge to Lockheed Martin's acquisition of Aerojet Rocketdyne, and its February 2022 challenge to the merger of Lifespan and Care New England Health Systems), it appears that the deadlock may be stymying more aggressive actions. For example, it was reported that [Chair Khan declined to call a vote](#) on whether to challenge Amazon's acquisition of MGM because she did not have the votes to challenge it. Similarly, after initial fanfare, the FTC's competition rulemaking efforts have been quiet since fall 2021.

In arguably the most public display of the challenges associated with a split Commission, the FTC failed to approve a study of Pharmacy Benefit Managers' (PBMs) relationships with affiliated and independent pharmacies under Section 6(b) of the FTC Act during a February 17th open meeting. Despite bipartisan support for an investigation into conduct by PBMs (including supporting statements from two Republican Congressmen during the open meeting), the motion to issue the 6(b) orders failed on a 2-2 vote. Both Democratic and Republican Commissioners [expressed concern](#) about PBMs' conduct, including ignoring “high list prices in favor of generous rebates, discounts, and fees or repackage drugs as a method to increase prices,” steering “patients to vertically integrated pharmacies and mandate the use of mail order pharmacy services against patient wishes,” and lessening “competition through mergers.” However, the Republican Commissioners voiced concerns with how last minute changes in the study proposal limited their ability to consult with FTC staff and stakeholders about its scope. As [Commissioner Christine Wilson stated](#), “the FTC must develop a 6(b) study with an objective design and credible guarantees that an expert-driven process will produce a data-driven report.”

The composition of the FTC thus bears watching. It is clear that [bipartisan support will continue](#) for challenges to transactions that may violate the antitrust laws—even in instances where the Democratic and Republican Commissioners disagree on the exact theory of harm. However, for the time being, the Chair may face continued resistance to her pursuit of a more aggressive agenda. It is possible the Commission could attempt to delay decisions on key matters until Professor Bedoya is confirmed, but parties in merger cases have the ability to close their transaction after they have complied with any second requests and abided by any timing agreement with the staff, and it appears companies are doing so. During this time, it will be especially important to pay attention to speeches and other comments by the Democratic Commissioners as they will likely provide an indication of the FTC's priorities and actions once the Democrats regain a majority on the Commission.

Additional Agency Updates

Cases and Proceedings

- ***Cargotec and Konecranes abandon merger in the face of DOJ and CMA opposition.*** On March 29, 2022, Cargotec and Konecranes announced that they had abandoned their merger following a rejection of a settlement proposal by the UK Competition & Markets Authority (CMA) and the US DOJ. Both agencies asserted that the merger would increase concentration in the market for container handling equipment.
 - Read [DOJ's press release](#)
 - Read [CMA's press release](#)
- ***Third Circuit affirms District Court injunction of Englewood Healthcare Foundation and Hackensack Meridian Health merger.*** On March 22, 2022, the Third Circuit affirmed the district court's injunction of the merger, holding that the district court "did not clearly err in finding the FTC demonstrated that Bergen County, including all hospitals that serve its residents, is a relevant geographic market." The Third Circuit further held that direct evidence and market concentration analysis established "a strong prima facie case of anticompetitive effects" that was not offset by procompetitive benefits. FTC alleged that the merger would eliminate competition between inpatient general acute care hospitals in Bergen County, New Jersey.
 - Read [FTC's press release](#)
 - Read [the court's decision](#)
- ***ALJ dismisses FTC complaint alleging that Altria and JUUL entered into a series of agreements that violated the antitrust laws.*** On February 24, 2022, an ALJ rejected the FTC's allegations that the Altria and JUUL entered into a series of agreements, including Altria's acquisition of a 35% stake in JUUL, that eliminated competition in violation of federal antitrust laws. The ALJ dismissed the FTC's complaint, and held that the market had in fact become more competitive since the parties entered into the agreements, and that the evidence failed to show that Altria's removal of its own product substantially harmed competition. FTC Complaint Counsel has filed a notice of appeal.
 - Read [FTC's press release](#)
 - Read [the ALJ's Decision](#)
 - Read [FTC's complaint](#)
- ***DOJ challenges UnitedHealth Group's acquisition of Change Healthcare.*** On February 24, 2022, DOJ and the Attorneys General in Minnesota and New York filed suit in the US District Court for the District of Columbia to enjoin UnitedHealth Group's acquisition of Change Healthcare. DOJ alleged that the acquisition would eliminate competition in the market for first-pass claims editing technology, a product that health insurers use to improve efficiency and reduce costs. DOJ also alleged two theories of vertical harm: first, that UnitedHealth

Group would gain access to competitively sensitive information of rival insurers, and second, that the acquisition would allow UnitedHealth Group to raise the cost of first-pass claims editing technology for rival insurers.

- Read [DOJ's press release](#)
- Read [DOJ's complaint](#)

- ***Lockheed Martin and Aerojet Rocketdyne Holdings (Aerojet) abandon merger after FTC challenge.*** On February 15, 2022, Lockheed Martin and Aerojet abandoned their merger after the FTC challenged the transaction on January 25, 2022. The FTC alleged that Lockheed's acquisition of Aerojet, the last independent supplier of missile propulsion systems, would allow Lockheed to cut off or increase the price of inputs to its competitors.
 - Read [FTC's press release on abandonment](#)
 - Read [FTC's press release announcing the suit](#)
 - Read [FTC's complaint](#)

- ***Nvidia and Arm abandon merger after FTC challenge.*** On February 7, 2022, Nvidia and Arm announced that they had abandoned their transaction following the FTC's challenge to the deal. The FTC alleged that Nvidia's proposed acquisition of Arm would give Nvidia the ability and incentive to limit competition from its rivals in datacenter and automotive applications.
 - Read [FTC's press release on abandonment](#)
 - Read [FTC's press release announcing the suit](#)
 - Read [FTC's complaint](#)

DOJ/FTC Amicus Activity & Other Third-Party Filings

- ***DOJ files amicus brief regarding the NLRB's definition of "employee."*** On February 10, 2022, DOJ filed an amicus brief arguing that the National Labor Relations Board should not adopt an overly narrow definition of employees in its *SuperShuttle DFW, Inc.* decision, because doing so would risk subjecting gig economy workers to antitrust liability if they engaged in collective bargaining against their employers. DOJ noted that, even if prosecutors exercised discretion not to prosecute workers whose status is unclear, gig workers could face private civil litigation. DOJ also briefly noted the possibility of antitrust liability for employers who set prices or terms for their gig economy workers if those workers are categorized as independent contractors.
 - Read [DOJ's brief](#)

- ***DOJ files amicus brief in support of state Attorneys General in Facebook litigation.*** On January 28, 2022, DOJ filed an amicus brief in an appeal by state Attorneys General of a district court's dismissal of their complaint alleging that Facebook had monopolized the personal social-networking services market by engaging in anticompetitive conduct to buy or eliminate threatening new entrants. DOJ argued that the district court improperly disaggregated Facebook's alleged

course of conduct, erroneously treated Facebook's conditional refusal to deal as a unilateral refusal to deal, did not properly analyze the plaintiffs' platform allegations, and erroneously excluded the possibility of injunctive relief.

- Read [DOJ's brief](#)
- **DOJ files amicus brief in support of neither party in Epic's action against Apple.** On January 27, 2022, DOJ filed an amicus brief in *Epic Games, Inc. v. Apple, Inc.* In that case, the district court largely rejected Epic's allegations that Apple's refusal to allow it to distribute Fortnite on Apple devices in a manner that would avoid payment of Apple Store fees violated the antitrust laws. In its brief, the DOJ argued that the district court erred in its Section 1 analysis, because the court failed to weigh the benefits against harms of the challenged restraints before deciding that they were reasonable. DOJ also argued that the court erred in its Section 2 analysis, because it underestimated the importance of supracompetitive pricing without accompanying evidence of reduced output, and held that conduct found reasonable under Section 1 cannot violate Section 2 as a matter of law.
 - Read [DOJ's brief](#)
- **DOJ files statement of interest in Nevada state court regarding non-compete clauses.** On February 25, 2022, DOJ filed a statement of interest in *Beck, et al. v. Pickert Medical Group, P.C., et al.* pending in the Second Judicial District Court for the State of Nevada in and for the County of Washoe related to a challenge to geographic non-compete clauses. DOJ analyzed the agreements under the Sherman Act, without commenting on the state law claims. DOJ explained its intercession by noting that state courts play an important role in the analysis of post-employment restraints, which are normally challenged under state law.
 - Read [DOJ's brief](#)

Policy

- **DOJ and FTC hold joint enforcer's summit.** On April 4, 2022, the DOJ and FTC held an in-person and virtual summit of antitrust enforcement officials from federal, state and international agencies to discuss modernizing merger guidelines, theories of harm in vertical mergers, and state and local enforcement.
 - Read [DOJ's press release](#)
 - Read [FTC's event description](#)
- **FTC and DOJ launch listening forums to hear comments from people affected by mergers.** On March 17, 2022, FTC and DOJ announced listening forums targeting those who might not otherwise participate in process of drafting merger guidelines, such as employees, small business owners, and farmers. There will be four forums, each focused on a single industry: food and agriculture, health care, media and entertainment, and technology. The first forum, on food and agriculture, took place on March 28, 2022.

- Read [FTC's press release](#)
 - Read [DOJ's press release](#)
 - Read [FTC's description of the food and agriculture forum](#)
- **FTC requests public comment on PBM practices.** On February 24, 2022, the FTC issued a “Solicitation for Public Comments on the Impact of Prescription Benefit Managers’ Business Practices” requesting information on “the ways that practices by large, vertically integrated Pharmacy Benefit Managers’ (PBMs) are affecting drug affordability and access.”
 - Read [FTC's press release](#)
 - **DOJ launches supply chain initiative.** On February 17, 2022, DOJ announced the launch of an initiative to “deter, detect and prosecute those who would exploit supply chain disruptions to engage in collusive conduct.” DOJ will be “prioritizing any existing investigations where competitors may be exploiting supply chain disruptions for illicit profit and is undertaking measures to proactively investigate collusion in industries particularly affected by supply disruptions.” The initiative also includes the formation of a working group with international competition agencies from the United Kingdom, Australia, New Zealand, and Canada.
 - Read [DOJ's press release](#)
 - **FTC announces annual increase in HSR thresholds.** On January 24, 2022, FTC announced new HSR filing and transaction fee thresholds, which became effective on February 23, 2022. The size-of-transaction filing threshold increased from \$92 million to \$101 million. Filing fee thresholds also increased, as detailed in the chart linked below. Commissioners Slaughter and Khan released a concurring statement arguing that the filing fees themselves should increase, the FTC should be given funding for more employees, and Congress should examine the 30-day waiting period and the 30-day substantial compliance period.
 - Read [FTC's press release](#)
 - Read [the chart of filing fee thresholds](#)
 - Read [Commissioner Khan and Slaughter's Statement](#)
 - **FTC and DOJ solicit comments on modernizing the federal merger guidelines.** On January 18, 2022, FTC and DOJ issued a joint request for comments seeking input on ways to modernize the agencies’ merger guidelines. FTC Chair Lina Kahn explained that the inquiry was “designed to ensure that our merger guidelines accurately reflect modern market realities and equip us to forcefully enforce the law against unlawful deals.” Assistant Attorney General (AAG) Jonathan Kanter cited the need for new guidelines in light of massive technological change.
 - Read [FTC's press release](#)
 - Read [DOJ's press release](#)
 - Read [the Request for Information](#)
 - Read [AAG Kanter's remarks](#)

DOJ Inter-Agency Initiatives

- **DOJ and USDA issue joint principles and commitments related to anticompetitive practices in agriculture.** On January 3, 2022, DOJ and the US Department of Agriculture (USDA) issued joint principles and commitments including that, within 30 days, DOJ and USDA would develop a process by which food producers and growers could report potential violations of the antitrust laws and the Packers and Stockyards Act. This tool, farmerfairness.gov, was launched on February 3, 2022.
 - Read [DOJ's press release on the joint principles](#)
 - Read [DOJ's press release on "farmerfairness.gov"](#)
- **DOJ and the Department of Labor sign a memorandum of understanding.** On March 10, 2022, DOJ and the Department of Labor (DOL) signed a Memorandum of Understanding (MOU) to strengthen DOJ and DOL's partnership in protecting workers from anticompetitive and unlawful conduct. The MOU provided for information sharing between the agencies, including a system for referring cases to one another.
 - Read [DOJ's press release](#)
- **DOJ and the Federal Maritime Commission announce plan to share resources for enforcement matters.** On February 28, 2022, the DOJ and Federal Maritime Commission (FMC) announced a plan for DOJ to provide attorneys and economists to assist the FMC in enforcing the Shipping Act and related laws, while the FMC would provide industry expertise to DOJ in antitrust matters.
 - Read [DOJ's press release](#)

FTC Speeches and Reports

- **Commissioner Wilson delivers remarks titled "Governing is Hard: Antitrust Enforcement in the First Year of the Biden Administration."** On January 26, 2022, Commissioner Christine Wilson delivered a speech at the Mercatus Antitrust Forum hosted by George Mason University. In her speech, she asserted that, despite strong rhetoric from the Democratic commissioners, enforcement practices had not substantially changed in the first year of the Biden Administration and in fact, there have been fewer merger enforcement challenges.
 - Read [Commissioner Wilson's speech](#)
- **Chair Khan speaks at the White House Roundtable on the State of Labor Market Competition in the U.S. Economy.** On March 7, 2022, Chair Khan gave remarks at the White House Roundtable on the State of Labor Market Competition in the US Economy addressing a Department of Treasury report on labor market competition issues. Khan explained that addressing practices that negatively impact workers is an FTC priority. She identified FTC actions in this

area, including investigations into whether mergers could result in harm to workers that would violate the antitrust laws.

- Read [Chair Khan's remarks](#)

DOJ Speeches

- ***AAG Kanter delivers remarks to the New York State Bar Association (NYSBA)***. On January 24, 2022, AAG Kanter delivered remarks to the NYSBA on the need for antitrust law to evolve to match market realities, and described the DOJ's efforts in this area to solicit comments on updates to the agencies' merger guidelines and the need to litigate more merger cases, rather than settling them, to ensure proper remedies and up-to-date case law.
 - Read [AAG Kanter's remarks](#)