

Biden's broad mandate has altered the antitrust landscape, making merger clearance process less predictable

By Tara L. Reinhart, Esq., and David P. Wales, Esq., Skadden, Arps, Slate, Meagher & Flom LLP*

FEBRUARY 7, 2022

Takeaways

- Under the Biden administration's "whole-of-government" approach to promoting competition, a range of agencies outside the DOJ and FTC have been asked to use their authority to reform markets.
- Wide-ranging procedural changes at the FTC have expanded its review powers and complicated merger clearances.
- The long-standing view that most vertical mergers pose no threat to competition is being abandoned.
- Bipartisan support in Congress for more controls on Big Tech could result in amendments to antitrust statutes in 2022.

The Biden administration has demonstrated a clear pro-enforcement approach to antitrust, implementing numerous directives and changes, driven in part by concerns about the power of Big Tech, and by progressives who want antitrust enforcement to further their social goals.

These efforts have brought more uncertainty in the short term as the antitrust agencies and the business community adjust. Whether 2022 brings more dramatic, rather than incremental, changes will depend on whether Congress revises the antitrust laws and if the agencies successfully challenge deals and conduct in court.

Key players

The main faces of antitrust enforcement in the Biden administration are vocal progressives, and in 2022 we expect to see them push for changes in policy, practice and the law:

- Timothy Wu, special assistant to the president for technology and competition policy, coined the term "net neutrality" and advocates reigning in dominant telecom firms and online platforms.
- Lina Khan, before her appointment as chair of the Federal Trade Commission, was best known for a 2017 law review article advocating a new antitrust framework to address market power in the digital age and using antitrust law to protect social interests, such as to prevent layoffs or stagnation of wages.

- Jonathan Kanter, assistant attorney general overseeing the Department of Justice (DOJ) Antitrust Division, comes from private practice, where he was a vocal critic of Big Tech and pursued, on behalf of clients, Google and other tech firms for antitrust violations.

The administration's 'whole-of-government' approach to antitrust

In a July 2021 executive order,¹ President Joe Biden articulated the administration's broad antitrust policy. That order instructed the antitrust agencies to increase enforcement to prevent a rise in consumer prices and competitive harm in labor markets and preserve nascent competition.

The Biden administration has demonstrated a clear pro-enforcement approach to antitrust, implementing numerous directives and changes.

Additionally, in what the order calls a "whole-of-government competition policy," it charged more than a dozen other agencies to protect competition using their authority under a range of statutes.

This approach allows the administration to challenge conduct it deems anticompetitive or unfair without having to resort to suits under the antitrust statutes. For example, in a town hall meeting in December 2021, Mr. Wu criticized distribution practices that allegedly favor large alcohol suppliers over small ones and called on the U.S. Department of the Treasury's Alcohol and Tobacco Tax and Trade Bureau to address them through rulemaking or regulation.

Former FTC Commissioner Rohit Chopra, now director of the Consumer Financial Protection Bureau, has advocated that his new agency's mandate be expanded to cover antitrust and "abuses of dominance," which traditionally would require a DOJ investigation and lawsuit alleging violations of the Sherman Act, such as monopolization or illegal agreements that foreclose competition.

The order instructs agencies to take additional steps, some directed toward specific outcomes, to promote competition and prevent “unfairness” by competitors in the marketplace. We expect agencies to use their separate statutory authorities under this whole-of-government approach to advance the administration’s antitrust goals in priority sectors such as financial services, health care, transportation, agriculture and telecommunications.

Changes in policy and process further the administration’s goals

Mr. Kanter’s time as assistant attorney general has been too brief to provide clear insights into the Antitrust Division’s new enforcement priorities. But Ms. Khan’s first six months as chair of the FTC make the commission’s new direction plain. A string of moves either on a 3-2 party line commission vote or through process changes by the FTC’s director of the Bureau of Competition, have undone decades-old policies and practices and replaced them with aggressive approaches that add uncertainty to the deal process and bring additional administrative burdens.

The main faces of antitrust enforcement in the Biden administration are vocal progressives, and in 2022 we expect to see them push for changes in policy, practice and the law.

Vertical mergers: The commission abandoned the Vertical Merger Guidelines, which for years had embraced the principle that most vertical tie-ups are pro-competitive and should not be challenged. The Khan commission advocates scrutiny of vertical mergers, considering, in particular, potential harms in the context of “modern firms,” as well as harms to labor markets. In December 2021, for example, the FTC sued to block Nvidia’s takeover of chipmaker Arm, asserting that the vertical merger would allow the combined entity to unfairly undermine competitors.

Prior approvals: The commission adopted a policy to include in merger consent orders a provision requiring firms to obtain approval before consummating future deals.

Individual commissioners can seek compulsory process: The commission adopted a resolution to authorize compulsory process — a demand for documents or testimony enforceable in federal court — at the request of a single commissioner.

Second requests: The Bureau of Competition director modified second-request requirements, making the process lengthier, and giving the FTC more time and leverage to challenge mergers.

Other process changes include the suspension of the Hart-Scott-Rodino Act early termination option, which allows deals to close before the end of the statutory waiting period with the

FTC’s consent, and the adoption of a practice of sending letters to merging parties warning them that the FTC will continue to investigate and reserves the right to challenge the deal after it closes.²

Antitrust legislation may pass in the upcoming congressional session

Many Republicans are critical of the Khan FTC’s aggressive approach, calling out the Democrats for unilaterally making significant substantive changes by amending procedures. Nevertheless, the potential for antitrust legislation to pass this session is real, because Democrats in Congress enjoy Republican support to rein in the power of Big Tech.

We expect agencies to use their separate statutory authorities under this whole-of-government approach to advance the administration’s antitrust goals in priority sectors such as financial services, health care, transportation, agriculture and telecommunications.

Numerous bills have been introduced in the House and the Senate, but the most likely to advance is the Platform Competition and Opportunity Act, with the House version introduced in June 2021 and the Senate version in November 2021. The measure would prevent technology platforms valued at more than \$600 million from acquiring existing or nascent competitors worth more than \$50 million. The prohibition would also apply to acquirers with more than 50,000 monthly users, or that are considered to be critical trading partners, defined as owning or controlling an online platform or having the ability to prevent a business user from accessing its own customers or tools it needs to serve its customers.

Conclusion

The FTC under Chair Khan is expected to implement further policy changes, and the Kanter Antitrust Division will begin similar efforts. We also expect both agencies to attempt to test the limits of antitrust enforcement through new cases. That will stretch already-thin agency resources and require the FTC and DOJ to prevail in court. Whether the administration will succeed in pushing its progressive antitrust agenda may depend primarily on the staffs’ capacity to handle the increased workloads, and on whether Congress amends the laws to make it easier for them to prevail.

Notes

¹ <https://bit.ly/34iLiPL>

² <https://bit.ly/3rqY1Jb>

About the authors



Tara L. Reinhart (L) is head of the antitrust/competition group in **Skadden, Arps, Slate, Meagher & Flom LLP**'s Washington, D.C., office. She focuses on civil litigation and government investigations, with an emphasis on complex antitrust litigation and international cartel probes. **David P. Wales** (R) is an antitrust/competition partner in the Washington, D.C., office. He provides antitrust advice to U.S. and international clients in a wide range of industries on all aspects of antitrust, including mergers and acquisitions, alliances, criminal grand jury investigations, dominant firm conduct, distribution arrangements, licensing and competitor collaborations. This article was originally published Jan. 19, 2022, on the firm's website. Republished with permission.

This article was published on Westlaw Today on February 7, 2022.

* © 2022 Tara L. Reinhart, Esq., and David P. Wales, Esq., Skadden, Arps, Slate, Meagher & Flom LLP

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit legalsolutions.thomsonreuters.com.