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New York Law Journal

ANTITRUST TRADE & PRACTICE

The FTC Will See You in (Federal) Court: Implications of the FTC's New Direct-to-Litigation Approach for Merging Parties

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November 5, 2026

In a departure from decades of agency practice, the Federal Trade Commission (FTC) did not initiate a Part 3 administrative proceeding to challenge Henkel's acquisition of Liquid Nails, and instead pursued its challenge solely in federal court, where in August it obtained a permanent injunction blocking the deal. This result marks the agency's first success in implementing the new procedural approach advocated by FTC Chair Andrew N. Ferguson.

In this article, we explain the *Henkel* litigation in the context of developing constitutional jurisprudence and current agency practice, and we conclude with an analysis of possible implications for merging parties.

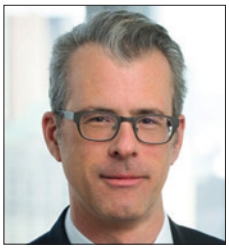
Although it remains to be seen whether the new policy will be a lasting change, companies considering mergers likely to be reviewed by the FTC should be aware of how the direct-to-federal court FTC policy could impact their proposed transactions.

The FTC Challenge to the Henkel-Liquid Nails Transaction

In April 2025, Henkel AG & Co. KGaA (Henkel), the manufacturer of Loctite brand construction adhesives, announced an agreement to acquire Liquid Nails, another construction adhesive brand. Following an initial review, the FTC issued a Second Request to the parties, ultimately deciding to seek to enjoin the transaction.



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The FTC challenged *Henkel's* proposed acquisition in December 2025, filing suit directly in federal court for a permanent injunction to block the merger. Following a seven-day bench trial in July 2026, the U.S. District Court for the Southern District of New York granted the FTC's request for a permanent injunction to block the proposed merger. *FTC v. Henkel AG & Co. KGaA*, No. 1:25-cv-10371, slip op. at 2 (S.D.N.Y. Aug. 14, 2026), ECF 197.

Although substantively, the FTC's theory of the case was based on familiar antitrust jurisprudence regarding mergers of horizontal competitors, the *Henkel* case is notable as a clear departure from the FTC's traditional procedural approach.

The Traditional Approach: FTC Administrative Proceedings

Historically, the FTC has challenged mergers by filing an in-house administrative case, under Part 3 of the FTC's Rules of Practice, and has concurrently sought a preliminary injunction in federal court while the Part 3 proceeding was pending. Federal Trade Commission Chair Andrew Ferguson on Competition and Mergers, C-SPAN (Feb. 20, 2026). [hereinafter *"Ferguson on Competition and Mergers"*]. In *Henkel,* by contrast, the FTC skipped the administrative case entirely, seeking a permanent injunction from a federal judge rather than a preliminary one.

In 1973, Congress amended the FTC Act to add section 13(b), which gave the FTC the authority to seek preliminary injunctions, and in "proper cases" permanent injunctions, to support internal administrative proceedings. 15 U.S.C. §53. Since then, the FTC has predominantly used section 13(b) authority to prevent the consummation of allegedly anticompetitive mergers.

As a result, the FTC came to challenge mergers on two fronts: It sought a preliminary injunction in federal court under section 13(b) to prevent the companies from merging, while simultaneously pursuing its own internal administrative proceedings on the merits.

In practice, however, the federal court preliminary injunction ruling usually decided the matter. When a federal court granted the FTC's request for a preliminary injunction during the pendency of an administrative proceeding, the merging parties almost always abandoned the deal. Likewise, when the FTC's requests for preliminary injunctions were denied, the agency typically dropped the Part 3 case.

Chair Ferguson's Direct-to-Litigation Strategy

In a press release announcing its recent success in blocking *Henkel's* proposed acquisition of Liquid Nails, the FTC stated that *Henkel* "marks the Commission's new approach to seeking permanent injunctions to block anticompetitive mergers without the need to continue cases in administrative proceedings." Statement on FTC Win Blocking Loctite, Liquid Nails Construction Adhesive Merger, FTC (Aug. 17, 2026).

Chair Ferguson first addressed this "new approach" to merger review in February 2026. *Ferguson on Competition and Mergers, supra*. He explained that the shift away from parallel proceedings is meant to avoid constitutional challenges to every merger case. Chair Ferguson cited recent cases like *SEC v. Jarkesy, Intuit, Inc. v. FTC* and *Axon Enterprises, Inc. v. FTC* as having cast doubt on the constitutionality of administrative proceedings.

In *Jarkesy*, after the Securities and Exchange Commission (SEC) imposed civil penalties for securities fraud through an in-house proceeding, the Supreme Court held that the Seventh Amendment's right to a jury trial applied to a defendant in a securities fraud action brought by the SEC, requiring the SEC to bring the action in federal court rather than in its own in-house administrative proceedings. *SEC v. Jarkesy*, 603 U.S. 109, 110 (2024).

Chair Ferguson has interpreted the language in *Jarkesy* to suggest that cases involving private rights must be litigated in Article III courts. *Ferguson on Competition and Mergers, supra;* see also *Jarkesy,* 603 U.S. at 127 ("On that basis, we have repeatedly explained that matters concerning private rights may not be removed from Article III courts.").

Chair Ferguson also pointed to the relevance of the Fifth Circuit's ruling in *Intuit, Inc. v. FTC,* where the court held that the FTC could not use its in-house process to adjudicate deceptive advertising claims. *Ferguson on Competition and Mergers, supra;* see also *Intuit, Inc. v. FTC,* 170 F.4th 411, 426 (5th Cir. 2026). In vacating an FTC cease-and-desist order against Intuit, the court instead held that an Article III court must adjudicate these claims. *Intuit*, 170 F.4th at 426.

As further support for the constitutional concerns behind this procedural shift, Chair Ferguson acknowledged the fallout from *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175, 195–96 (2023), where Axon sued in federal court to halt an FTC enforcement action it argued was unconstitutional. See Ferguson on Competition and Mergers, supra.

The Supreme Court held that companies can bring constitutional challenges to the FTC's administrative process directly in federal court, without first raising those challenges with the agency. *Axon,* 598 U.S. at 195–96. As a result, companies facing administrative proceedings have increasingly attacked the constitutionality of the FTC's structure.

In the wake of these cases, the FTC has opted to skip the administrative process—thereby avoiding the constitutional uncertainty. As Chair Ferguson explained, the FTC "eliminate[s] *Axon* challenges entirely by not bringing the [cases] within the internal agency adjudicative process." *Ferguson on Competition and Mergers, supra*.

Since Chair Ferguson announced this policy, the Supreme Court has given more reason to doubt the constitutionality of the historical practice of the FTC. In *Trump v. Slaughter,* decided June 29, 2026, the court held that the limits on the President's power to remove FTC Commissioners violate the separation of powers. *Trump v. Slaughter,* 609 U.S. 422, slip op. 2–3 (2026). The court reasoned that the FTC "unquestionably exercises executive power."

In doing so, the court rejected the view, first set out in *Humphrey's Executor v. United States* (1935), that the FTC is a neutral body exercising only quasi-judicial, quasi-legislative functions. As Justice Gorsuch observed, agency adjudication raises serious questions under "Article III's assurances of an independent judge" and the "Due Process Clause's guarantee of a fair trial before a fair tribunal." (Gorsuch, J., concurring).

Will This Approach Stick?

Does the FTC's recent success in *Henkel* mean that this new merger policy is here to stay? The answer for now is likely yes, especially given the current constitutional climate and Ferguson's leadership as FTC Chair.

For one, the court in *Henkel* acknowledged and legitimized the FTC's departure from its typical path. *Henkel,* slip op. at 4. Although the court recognized that the FTC historically used administrative proceedings to challenge mergers, the court made clear that "nothing in the FTC's organic statute prevents [the FTC] from seeking permanent injunctive relief and pursuing the entire merger review process in federal court." Section 13(b) allows for the FTC to "obtain injunctive relief while administrative proceedings are foreseen or in progress, or when it seeks only injunctive relief." *AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 78 (2021).

Chair Ferguson has also made clear that he has no intention to return to dual-track administrative proceedings unless merging parties refuse to cooperate with a strea*mlined f*ederal court litigation process. After the FTC's *Henkel* win, Chair Ferguson said that he is "well and fully done" using Part 3 proceedings to challenge anticompetitive conduct. *Andrew N. Ferguson, Chair, Federal Trade Commission, Remarks at the 20th Annual Global Antitrust Enforcement Symposium*, Georgetown University Law Center (Sept. 15, 2026).

Chair Ferguson warned companies that fighting the FTC's shift to challenging mergers exclusively in federal court risks "making your life more difficult." *Andrew N. Ferguson, Chair, Federal Trade Commission, Remarks at a Discussion Hosted by Rule Garza Howley LLP* (Sept. 22, 2026). Specifically, Chair Ferguson suggested that if parties will not work with the agency to smooth out the "procedural roughness" that may arise in federal court, the FTC could still bring a Part 3 proceeding even after the federal case has concluded. Chair Ferguson said that if companies push back against the FTC's new policy, he will "do the two-step dance still... [and that he is] also not going to be nice about it."

Implications for Merging Parties

The new FTC approach to merger litigation has several important and largely favorable implications for companies, especially in industries traditionally reviewed by the FTC like healthcare, technology, energy and retail.

These implications include a potential shift from the preliminary to the permanent injunction standard, greater consistency with the merger challenges of the Department of Justice (DOJ), trial before an independent decision-maker and the potential for more direct involvement of FTC Commissioners in merger challenges. Notably, merging parties will no longer face the prospect of a separate, time-consuming and expensive Part 3 administrative proceeding.

Proceeding Under Permanent Injunction Instead of Preliminary Injunction Standards

Under the traditional dual-track approach, the FTC only had to meet the preliminary injunction standard, which asks whether, "weighing the equities and considering the commission's likelihood of ultimate success, such action would be in the public interest." 15 U.S.C. §53. By proceeding directly to litigation on the merits in federal court, the FTC must meet the higher permanent

injunction standard by proving that the "effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." 15 U.S.C. §18.

That said, as Chair Ferguson has noted, although the two standards differ, with the permanent injunction standard requiring a more complete factual record for the agency to prove its case, in practice the cases tend to come out the same under either one. *Ferguson on Competition and Mergers, supra*.

More Consistency with DOJ Review Process

Another key effect of the FTC's new approach is that FTC challenges will be much more similar to DOJ enforcement proceedings. The DOJ's merger review process has no in-house administrative proceeding equivalent to the FTC and has always proceeded only in federal court. The FTC's procedural shift thus responds to criticisms that merging parties have faced different procedures and standards depending on which agency reviewed their deal.

Another potential implication of this procedural convergence could be to add additional fuel to arguments for consolidating antitrust enforcement in a single agency. For example, the One Agency Act, a bill that would merge all antitrust enforcement authority into the DOJ, was introduced in early 2025 but has not been passed by the House or the Senate. See, e.g., House Bill H.R. 384, United States Congress.

Chair Ferguson, however, has suggested that consolidation is not a good idea, saying that proponents of the One Agency Act "are being pretty unrealistic about the costs that would come with dissolving a 100-plus year-old agency that has developed 100-plus years of expertise." *Andrew N. Ferguson, Chair, Federal Trade Commission, Remarks at the 53rd Annual Fordham Competition Law Institute Conference on International Antitrust Law & Policy*, Fordham University School of Law (Sep. 18, 2026). Instead of fixing a system that Chair

Ferguson notes is not "broke," he suggests the better course is to "soften the rough areas of friction between the agencies" rather than combine them.

Merits Trial Before an Independent Decisionmaker

Another reason Chair Ferguson has given for the new approach is his view that the FTC should not act as a judge in its own cases. *Ferguson on Competition and Mergers, supra*. This principle aligns with the Trump Administration's broader move away from administrative proceedings. Ferguson has expressed his opinion that suing directly in federal court is the "healthiest" way to proceed to avoid challenges to agency action.

Direct Involvement of FTC Commissioners in Challenges

The shift to federal court litigation without a parallel administrative action also has implications for FTC Commissioners, leaving them free to play a much more active role in the litigation. Under the Part 3 administrative process, Commissioners are walled off from the agency staff trying the case and are not able to discuss potential settlements with merging parties.

Removing that barrier allows Commissioners—the ultimate decision-makers at the FTC—to engage directly in settlement discussions and more actively direct the litigation, which may create earlier and more productive paths to resolution for merging parties.

Conclusion

Although it remains an open question as to whether this shift will survive future administrations, the FTC's new approach has the potential to substantially alter the litigation approach of companies with transactions that may be challenged by the FTC. By eliminating the prospect of a lengthy parallel administrative proceeding, the new approach offers merging parties a more streamlined and neutral path to resolving FTC challenges.

The opinions expressed in this article are those of the authors and do not necessarily reflect the views of Skadden or its clients.

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