

Axinn Antitrust Insight: Changes Afoot at the FTC

September 27, 2021

PRACTICE AREAS

Antitrust

Axinn Update

The last two weeks have seen some significant developments at the Federal Trade Commission. Chair Khan issued a broad statement of agency priorities. The Commission voted 3-2 along party lines to withdraw the 2020 Vertical Merger Guidelines and accompanying commentary. FTC staff presented the results of their investigation of non-HSR reportable acquisitions over the last 10 years by major technology companies. And the Biden administration announced the nomination of a third Democratic Commissioner – Alvaro Bedoya – to replace Commissioner Chopra.

Chair Khan Outlines Agency Priorities

On September 22, Chair Khan sent a letter to FTC staff and commissioners outlining her broad vision and priorities for the Commission. The letter calls for a strategic approach that, among other things:

- focuses enforcement efforts on certain “root causes” of harm such as conflicts of interest, business models, and structural dominance; and
- anticipates problems with forward-looking action by “being especially attentive to next-generation technologies, innovations, and nascent industries.”

In addition, the letter outlines certain policy priorities including with respect to “dominant intermediaries and extractive business models.” It indicates that:

- business models that outsource risk, liability, and costs warrant particular scrutiny; and
- the growing role of private equity invites examination of how such vehicles may “strip productive capacity” and facilitate illegal unfair methods of competition.

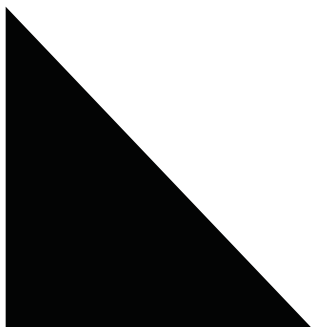
This broad statement of priorities continues the Biden administration's shift toward a more interventionist approach to antitrust.

Repeal of the Vertical Merger Guidelines

The FTC's withdrawal of the 2020 Vertical Merger Guidelines was not a surprise in light of the strong objections to their adoption made by then-minority Commissioners Chopra and Slaughter when the Guidelines were adopted last year. But, with no replacement guidelines on the table, the withdrawal leaves a policy lacuna for FTC reviews of vertical mergers. While the Guidelines remain operative at the Antitrust Division of the Department of Justice, the Division issued a [statement](#) indicating that it is considering a range of questions about the Guidelines, and is collaborating with the FTC on ways they could be improved, as directed by the White House Executive Order.

The 2020 Vertical Merger Guidelines were a long time in the making, replacing outmoded and largely ignored guidance from 1984. The 2020 Guidelines were widely viewed as representing existing enforcement practice at both antitrust agencies. The Democratic commissioners' principal objections to the 2020 Guidelines were that they were too deferential in acknowledging the potential benefits of vertical mergers, in particular in their treatment of "elimination of double marginalization" (or EDM). The Democratic commissioners also criticized the limited scope of theories of competitive harm and the need to take a harder look at efficiency claims than suggested by the Guidelines. In prior statements, Slaughter has advocated for presumptions of illegality for vertical transactions in concentrated industries when the upstream supplier provides critical inputs to competitors of the downstream firms, and putting the onus on parties to prove that they could not have achieved the same lower prices absent the merger, such as by entering into contracts.

The FTC's withdrawal of the 2020 Vertical Merger Guidelines follows a July statement by FTC Chair Lina Khan and the acting Assistant Attorney General for the Antitrust Division of the Department of Justice that both the vertical and horizontal merger guidelines needed a "hard look to determine whether they are overly permissive" and that they planned to update them. In the FTC meeting on September 15, Commissioner Slaughter suggested that new merger guidelines would be introduced to replace both the Vertical Merger Guidelines and the 2010 Horizontal Merger Guidelines, but did not give any indication of the timeline for new guidelines.



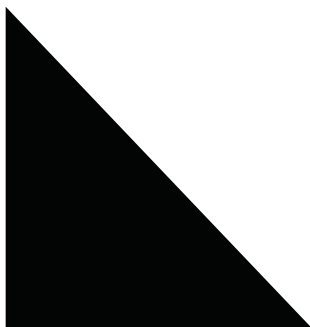
In the interim, there will be uncertainty regarding how the FTC staff will approach the analysis of vertical transactions. At the least, FTC reviews of vertical deals are likely to be longer and more complex. In the absence of the Guidelines, the Commission may be emboldened to bring enforcement actions beyond the scope of existing practice and court precedent.

Study on Non-Reportable Acquisitions by Digital Platforms

The FTC Staff reported on the results of their investigation of past acquisitions by certain large technology companies – Alphabet, Amazon, Apple, Facebook, and Microsoft – that did not require premerger notification to the FTC or DOJ. The inquiry focused on 616 transactions and made several findings, including:

- 65% of transactions were valued between \$1 million and \$50 million, with approximately two thirds of the targets being of domestic U.S. firms;
- Almost 40% of the transactions involved firms less than five years old, and more than half of the firms had 10 or fewer full-time non-sales employees;
- 75% of the transactions included non-compete clauses for founders and key employees;
- 94 transactions exceeded the size of transaction threshold, but fell below HSR reporting thresholds for other reasons;
- In over 30% of transactions, the acquirer assumed some debt and liabilities; and
- In almost 80% of transactions, founders and key employees received deferred or contingent compensation.

Interestingly, the report made no suggestion that any of these unreported acquisitions was anticompetitive. Chair Khan said that the study “captures the extent to which these firms have devoted tremendous resources to acquiring start-ups, patent portfolios, and entire teams of technologists—and how they were able to do so largely outside of our purview.” The Democratic commissioners claimed – without much supporting evidence – that transactions were not reported due to inadequacies and loopholes in the HSR filing rules themselves (sometimes perpetuated by informal interpretations by the FTC’s Premerger Notification Office), as well as firms actively structuring transactions to avoid filing requirements.



As a consequence, we expect to see further proposals to amend HSR reporting requirements, as well as new guidance on how the HSR thresholds are to be interpreted, with likely further action coming out of the FTC's currently-open Notice of Proposed Rulemaking and Advanced Notice of Proposed Rulemaking on HSR rules. Some informal changes in approach have already happened with a recent FTC blog post on treating the retirement of debt as consideration in any instance where the selling shareholders "benefit from the retirement of that debt," stepping back from longstanding FTC guidance to the contrary. In addition, we expect that the FTC will seek to conduct additional studies along these lines in other industries, such as health care.

Nomination of New Commissioner

The Biden administration nominated Alvaro Bedoya, a Georgetown University Law School professor specializing in privacy law, to be a Commissioner of the FTC. Bedoya's research has focused on the discriminatory impacts of technologies such as facial recognition and biometrics. Bedoya is viewed as knowledgeable about tech issues, particularly privacy lapses by online platforms.

If confirmed, Bedoya will replace Commissioner Chopra, who is currently seeking confirmation as head of the Consumer Financial Protection Bureau. If Commissioner Chopra is confirmed to head the CFPB before Bedoya is confirmed as a new FTC Commissioner, there will be a period – perhaps an extended one – where the FTC is deadlocked 2-2 between Republicans and Democrats. The FTC cannot take action to bring enforcement actions against mergers – or clear mergers through consent decrees – without a majority vote.

