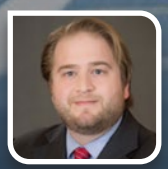
COMPETITION FOR THEE, BUT NOT FOR ANTITRUST!

BY MAX M. MILLER[1]



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Competition for Thee, but Not for Antitrust!

By Max M. Miller

Senator Mike Lee (R-UT) and other Republican senators have proposed consolidating federal antitrust enforcement under the Department of Justice. While the stated justification for the proposal is enforcement efficiency, the more likely goal is to foreclose competition to the consumer welfare standard in federal antitrust policymaking. The recent appointment of Lina Khan to the FTC Chair position and President Biden's July 9th Executive Order on Competition indicate that Neo-Brandeisian ("NB") antitrust ideas are emerging as a competitive threat to the consumer welfare perspective, and Senator Lee's proposals appear targeted at ending the threat before it gains a foothold in the antitrust marketplace of ideas. Because the current competition between consumer welfare and NB antitrust is beneficial to antitrust policy and American markets, Congress should reject these proposals.

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Antitrust policy is entering a renaissance of new (and old) ideas that encourage more aggressive enforcement and shifts in legal standards that would remove obstacles for successful enforcement actions. The field is benefitting from robust debates and diverse perspectives, which are gaining audiences with practitioners, government enforcers, Congress, the courts, and most recently, the President of the United States. But not everyone is supportive of the debate and the prospect of reform. Recently, Senator Mike Lee (R-UT), reintroduced his "One Agency Act" in the Senate, which would "transfer antitrust enforcement functions from the Federal Trade Commission to the Department of Justice[.]"[2] The Tougher Enforcement Against Monopolists Act" or "TEAM Act" introduced by Senators Lee and Grassley (R-Iowa) contains a similar proposal.[3] These proposals appear designed to eliminate competition among antitrust enforcement agencies' policy perspectives and instead present a single avenue for antitrust policymaking at the federal level. It follows efforts by the previous head of the Antitrust Division, Makan Delrahim, to intervene in actions by the FTC and State Attorneys General, indicating a goal by some in antitrust enforcement is to create a single arbiter of antitrust policy. This approach is misguided in both its purpose and proposed justifications and should be rejected by Congress. The antitrust status quo is rightfully coming under intense criticism for failing to protect competition, and now, more than ever, antitrust needs competition in the most important of markets: the marketplace of ideas.

Antitrust policy in the United States is experiencing its greatest disruption since the 1970s when the "consumer welfare" movement shifted the foundations of the field to a more monopolist-friendly ideological framework. Forty years of evidence, however, have mounted against the consumer welfare approach to antitrust, and vocal reformers such as Lina Khan have not only influenced the antitrust policy discussion, but are now taking seats in key positions of power. This could radically shift federal antitrust policy in the coming years. FTC Chair Khan, with others, has led a pro-enforcement movement, informally known as "neo-Brandeisianism," (hereafter abbreviated "NB") arguing for various reforms to the law and to agency enforcement approaches. The result has been a healthy and vigorous debate that has dominated antitrust circles for the past few years. With Chair Khan's appointment and confirmation, and with President Biden's July 9th Executive Order on Competition, the NB antitrust camp will now have a stronger voice in antitrust policy circles. This shift happened because different positions on antitrust policy competed for the hearts and minds of politicians and practitioners, not only within the United States, but also around the world. State Attorneys General have also entered the debate, taking different, more aggressive, positions from their federal counterparts in the *T-Mobile-Sprint* merger and leading the way on problematic markets such as generic pharmaceuticals.

This competition among enforcers is renewing interest in antitrust and leading to more people in power adopting the pro-enforcement approach. FTC Commissioner Rohit Chopra was among the first in the United States to start introducing these NB antitrust ideas at the highest levels of federal policymaking. Now, his former legal fellow, Lina Khan, is running the FTC. On July 9, President Biden issued a sweeping, 72-point executive order on competition encompassing many of the ideas put forward by NB antitrust advocates.[4] This rapid growth in prominence of the NB antitrust movement has many frightened about the coming age of corporate accountability, and not just the usual suspects in tech and other industries.

Senator Lee's "One Agency" proposal would remove the FTC from the federal antitrust policy discussion, silencing the NB ideas that have a bright future there. It would also end any prospect of the FTC's ideological competition with DOJ, which some perceive as having a more restrained approach to antitrust enforcement. Additionally, it has the potential to sideline the states as a co-equal enforcer of the nation's antitrust laws. In an op-ed promoting his act, Senator Lee chose to label this type of competition as "regulatory turf wars" but the weakness of his arguments about the problems of the current agency set up suggests that the real reason for pushing it at this time may be to insulate the consumer welfare standard from ideological competition in other parts of government. Senator Lee, after all, claimed Chair Khan's views on antitrust are "wildly out of step with a prudent approach" to antitrust law,[5] indicating Lee would simply prefer to foreclose the continuing discussion about the future of antitrust policy.

How does Senator Lee justify his radical proposal to eliminate a co-equal antitrust enforcer at the federal level? He outlined his arguments in a *Wall Street Journal* op-ed in November 2020.[6] Lee begins by asserting that a dual-agency approach to federal antitrust enforcement under-

2 One Agency Act, S. 633, 117th Cong. (2021-2022).

3 Tougher Enforcement Against Monopolists Act, S. 2039, 117th Cong. (2021-2022).

4 FACT SHEET: Executive Order on Promoting Competition in the American Economy, https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.

5 Press Release, Mike Lee, U.S. Senator for Utah, Sen. Lee Statement on Lina Khan Nomination (Mar. 9, 2021), https://www.lee.senate.gov/public/index.cfm/2021/3/sen-lee-statement-on-lina-khan-nomination.

6 Mike Lee, Opinion, *One Agency for Antitrust*, Wall St. J., Nov. 17, 2020, https://www.wsj.com/articles/one-agency-for-antitrust-11605653810.

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mines the objective of "effective and efficient antitrust enforcement," which he claims is "essential to maintaining free markets and protecting consumers." Setting aside the debate over what constitutes "effective" antitrust enforcement, it is interesting to claim that "efficient" enforcement is a goal of antitrust. This is especially true when this claim comes from such a staunch advocate for the consumer welfare standard. Previously, antitrust policy, as found in the case law and the DOJ's 1968 Merger Guidelines, was guided by black and white standards and bright-line rules that actually promoted efficient enforcement and adjudication of the law. These principles and policy approaches, however, were largely abandoned in favor of the much more nebulous and complicated standard of consumer welfare, requiring armies of economists to face off — hardly an efficient approach. This has caused the costs of antitrust enforcement to soar and resulted in much more highly concentrated markets than were found during the era preceding the consumer welfare standard. If efficiency of enforcement is really the goal, Senator Lee should be advocating for a return to less-complicated and less-manipulatable standards for antitrust law.

Senator Lee's reasoning for how the dual agency approach leads to inefficiency centers around the agency clearance process for merger reviews and conduct cases that Lee describes as "turf battles." He claims: "Every year government lawyers spend hundreds of hours managing these fights, wasting taxpayer money and delaying enforcement" of antitrust law. Senator Lee is grossly exaggerating the problems in the FTC/DOJ clearance process. Certainly, at times, the two agencies find themselves competing to handle a case, but the primary purpose for the clearance discussion is to determine which agency has "expertise in the product in question gained through a substantial investigation of the product within the last seven years."[7] In other words, the existence of the process and the discussion is motivated by a desire to increase the efficiency of enforcement.

While it would be desirable if every antitrust enforcer had working knowledge of every industry that might wind up in his or her case load, the truth is that antitrust markets are complicated, diverse, and numerous. As such, enforcers need time to study the way each market functions before being able to effectively perform an investigation. State enforcers often find themselves in this generalist, or "Jack/Jill of all trades" role, but federal enforcers have the ability to specialize in particular markets and bring their deep expertise not only to the agency investigation, but also to State AG offices that partner with them. If specialized expertise exists in one or the other federal agency, why would we avoid harnessing that diverse expertise through a clearance process? The hours spent engaging in the clearance process are more than offset by the hours it would take for enforcers to get up to speed on a particular industry with which they have no previous experience. If both agencies have a legitimate claim to efficient investigation because of expertise and resources, the rare "turf war" Senator Lee criticizes will hardly be a wasted endeavor as it will determine which of the two is *best* positioned to handle the matter.

Further into his argument, Senator Lee discusses what appears to be his primary concern with the existence of two antitrust agencies: the prospect of "different industries receiving different antitrust enforcement." In other words, Senator Lee is concerned about the clear differences of opinions on antitrust policy that are emerging. To justify his concern, he cites the Department's unprecedented intervention into the FTC's Qualcomm case. Senator Lee contends that this move by DOJ, which elicited head scratches and criticism from many antitrust commentators, evidences a "potential for conflicting enforcement policy." Based on his past support for the antitrust status quo in response to calls for reform, the criticism of Lina Khan's appointment to the FTC, and the decision to entrust the Department, rather than the FTC, with sole federal antitrust authority, one can conclude that Senator Lee fears the growing conflict between NB antitrust ideas and consumer welfare, and especially fears the prospect of those NB ideas winning that competition.

Senator Lee's proposed solution to curtail the debate over antitrust policy is to consolidate federal antitrust enforcement under the Department of Justice, which Lee describes as "more politically accountable to voters." This claim is suspect on its face as the control of the FTC also changes with the Presidential election, and in a time of closely divided presidential elections, the bipartisan nature of the FTC has better potential to represent the diversity of voters' views. It is plausible that Lee's real purposes for choosing the DOJ over the FTC is that the DOJ has a reputation of being less likely to pursue novel theories of antitrust liability. Some could also argue the Department has been less aggressive in its pursuit of merger control and conduct enforcement. Moreover, by eliminating the FTC as an antitrust enforcement agency, Senator Lee would effectively be eliminating what is arguably the federal government's greatest antitrust enforcement power: The FTC Act's "unfair methods of competition" and the FTC's rulemaking authority, an underutilized but potentially powerful tool under Chair Khan's leadership.

The consolidation of federal enforcement authority under DOJ could also jeopardize the beneficial synergies state enforcers have cultivated with their federal counterparts. If you were to poll state antitrust enforcers about which agency they prefer to work with, the FTC would likely come out on top. This is not to say that the states have ever had a "bad" or problematic working relationship with the DOJ, but the perception has been that the FTC is more inviting of state enforcer assistance and perspectives, and that the FTC tends to be much more candid and

7 Antitrust Division Manual, 5th ed. p. 338-339, https://www.justice.gov/atr/file/761166/download.

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open with the states about their thinking, their strategy, and their plans. Like the FTC, the states have also been on the receiving end of a DOJ intervention in an enforcement action. When a group of states, led by New York and California, challenged T-Mobile's acquisition of Sprint, the DOJ filed statements of interest to intervene, first to argue for a disqualification of the states' outside counsel,[8] and second, to argue, along with the FCC, that it was not in the public interest to block the merger.[9] In the latter statement, the Department argued, "[States] do not consider the rights and interests of the nation…They have neither the authority nor the responsibility to act on behalf of the nation, and while their concerns are not invalid, they are bound by state borders."[10] From a state enforcer perspective, therefore, the consolidation of federal antitrust authority under the DOJ could present an obstacle for continued state activism on antitrust issues. This would dampen reinvigorated antitrust enforcement, which in many ways has been led by the states over the past two decades. As Michael Kades noted in his recent *State of U.S. Federal Antitrust Enforcement*: "Arguably, since 2000, state attorneys general have been more aggressive than their federal counterparts."[11]

Perhaps this is why Senator Lee is so adamant about consolidating federal antitrust authority: diverse enforcement perspectives increase the likelihood of aggressive antitrust enforcement. This is a problem for Senator Lee's donors. Since 2015, Senator Lee's campaign committee and leadership PAC have received sizeable contributions from AT&T, Google, Amazon, Facebook Microsoft, 1-800-Contacts, Comcast, General Electric, Koch Industries, T-Mobile, Cigna, and Disney, as well as a number of corporate law firms engaged in antitrust defense work and investment banks.[12] All of these entities have an interest in keeping antitrust enforcement in the United States weak and ineffective. The One Agency Act's co-sponsor, Senator Thom Tillis (R-NC), has a donor list that includes the usual tech giant suspects, as well as pharmaceutical giants like Abbvie and Pfizer and a veritable Who's Who of investment banks and corporate defense firms.[13] It may be the case that these aspiring monopolists and their defenders are not donating to these campaigns simply to get Senators Lee and Tillis to pass the One Agency Act, but it is very likely these donors are supportive of the idea of centralizing federal antitrust authority.

Senator Lee has made a talking point of enforcement "efficiency" in support of his One Agency Act, but there is one efficiency of consolidating agency decision-making that he has failed to ever mention. One agency makes it more efficient for firms to capture and derail enforcement. With multiple agencies playing a role in competition policy and each having independent federal enforcement authority, the would-be monopolists find it much more difficult to influence the political process and insulate themselves from accountability. After all, it may take only one key appointment to head an agency to jumpstart antitrust enforcement and shift policy against the monopolists. If Congress is serious about giving federal agencies the tools and resources necessary to bring about more aggressive antitrust enforcement (and the recent series of proposed bills and the appointment and confirmation of Lina Khan suggest it is), then it needs to reject Senator Lee's One Agency Act and any other attempts to centralize and consolidate antitrust policy decision-making.

Senator Lee's drastic and radical measure should be cause for concern as it attempts to foreclose the nascent threat of NB antitrust. Consumer Welfare has enjoyed near-monopoly status in the antitrust marketplace of ideas for over four decades. But, just as we see in monopolistic product markets, when an incumbent is losing market share to a growing competitor, there is a tendency to engage in anticompetitive conduct to snuff out the threat. The one agency proposal is such conduct.

When I first transitioned to antitrust, I was struck by the misplaced arrogance of consumer welfare proponents. Statements such as "we all know" and "everyone agrees" were thrown around with regularity. I perceived this as the hallmark of an ideology on the cusp of decline. Just three years ago, then-AAG Delrahim spoke to the Federalist Society and stated: "We can safely say, 'We are all consumer welfare advocates now.'"[14] But these advocates regularly advanced an argument that, unbeknownst to them, undermined their case for consumer welfare: "Just look around! Look at how great things are! Consumer welfare gave us that!"

8 Jonathan Stempel & Diane Bartz, Judge rejects U.S. move to disqualify states' lawyer in T-Mobile/Sprint lawsuit, Reuters (Nov. 21, 2019), https://www.reuters.com/article/us-sprint-corp-m-a-t-mobile-idUSKBN1XV2K5.

9 Statement of Interest by DOJ and FCC, *New York, et al. v. DeutscheTelekom*, (December 20, 2019), https://www.justice.gov/atr/case-document/file/1347556/download.

10 *Id.* At 23.

11 Michael Kades, The State of U.S. Federal Antitrust Enforcement, Washington Center for Equitable Growth 1,16 (2019), https://equitablegrowth.org/wp-content/uploads/2019/09/091719-antitrust-enforcement-report-1.pdf.

12 OpenSecrets, https://www.opensecrets.org/members-of-congress/mike-lee/contributors?cid=N00031696&cycle=2020&recs=100&type=C.

13 OpenSecrets, https://www.opensecrets.org/members-of-congress/thom-tillis/contributors?cid=N00035492&cycle=2020&recs=100&type=C.

14 Makan Delrahim, Assistant Att'y Gen., Antitrust 40 Years After the Paradox: No Longer "A Policy At War With Itself," Remarks at The Federalist Society Conference Celebrating the 40th Anniversary of The Honorable Robert Bork's *The Antitrust Paradox* (June 22, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-federalist-society-conference.

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In contrast to the portrayal of consumer welfare as the only ideology in town, NB antitrust ideas, in the tradition of Louis Brandeis' perspectives on political economy, have been laughed off as "hipster" proposals underserving of serious consideration in any antitrust forum. Now, just a few short years later, the hipster-in-chief is chairing the FTC and President Biden just issued an executive order that would make Louis Brandeis proud.

This is not to say that NB ideas have definitively won the competition in the marketplace of ideas. Simply, we are settling into a "new normal" where there is actual ideological competition, not only at antitrust conferences, but also in the highest echelons of government. Because we now have real competition in the marketplace of ideas, the consumer welfare arrogance has subsided and been replaced with earnest appeals to the merits of the standard. That kind of honest and robust competition in the marketplace of ideas is good for antitrust policy and good for American markets, and we should be wary of any attempts to limit that competition.

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