

A “REVITALIZATION OF ANTITRUST”: TOUGH TALK AND BROAD PROMISES IN THE FIRST YEAR OF THE BIDEN ADMINISTRATION



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President Biden made vigorous antitrust enforcement a key pillar of his agenda during his first year in office, setting the tone himself in July with a wide-ranging executive order that tasked more than a dozen federal agencies with policing alleged anticompetitive conduct across the economy. As expected, new leadership at the DOJ and FTC has been more than willing to heed the president’s call, and both Jonathan Kanter & Lina Khan have pledged to aggressively enforce the antitrust laws, including in areas that have not been a focus of antitrust enforcers for at least several decades. No one can doubt the administration’s ambition to reshape antitrust enforcement practices, and perhaps the antitrust laws themselves, but the DOJ and FTC face meaningful hurdles to doing so, including Khan’s & Kanter’s long and growing list of public promises that could really test the already taxed resources at both agencies.

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President Biden made antitrust enforcement a central focus of his first year in office to an extent and in ways that are unprecedented in modern U.S. history. While recent presidents typically have left antitrust enforcement policy to their appointees at the Antitrust Division of the U.S. Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”), Biden played a central role in setting forth his administration’s antitrust agenda. From his sweeping executive order in July to the promises made by his appointed leadership at the FTC and DOJ, the administration has been clear that it intends to fundamentally rethink — if not rewrite — 40 years of broadly accepted antitrust enforcement principles. This effort also comes at a time when there is some bipartisan support in Congress for new legislation to help expand and update existing laws that some view as unable to keep up with the competitive dynamics of the modern economy. If passed, these pending bills could dramatically alter the antitrust landscape and tighten the restrictions that apply to many companies doing business with U.S. customers.

While there is certainly disagreement regarding the merit of this more progressive approach to antitrust enforcement, the administration’s ambition to push the boundaries of antitrust enforcement is not in doubt. FTC Chair Lina Khan & Assistant Attorney General of the DOJ Jonathan Kanter have not shied away from setting forth a long and growing list of antitrust enforcement priorities, including some areas that have been outside the mainstream of antitrust enforcement for decades. Despite the administration’s frequent saber-rattling, questions remain as to exactly how far the agencies can go in achieving the administration’s lofty goals in light of meaningful procedural and legal impediments. To be sure, Khan & Kanter have already implemented procedural and policy changes likely to have some meaningful chilling effect on certain conduct (particularly mergers), but these incremental changes are hardly the tectonic shifts that have been promised. In fact, notwithstanding the aggressive rhetoric, the agencies’ enforcement actions in 2021 were generally based on antitrust theories well within the bounds of the past several decades of antitrust enforcement. Finally, it is worth wondering at this stage whether such a broad agenda may itself be a potential hurdle to achieving meaningful and lasting change in light of significant resource constraints at the agencies. This article takes stock of the promises made, the actions taken and the potential roadblocks ahead.

I. “A REVITALIZATION OF ANTITRUST”

Then-candidate Biden made few specific promises on the campaign trail with respect to antitrust. In fact, it was one of the few issues where there was some consensus between the candidates, as the Trump administration had largely broken with republican orthodoxy and itself pursued an aggressive enforcement agenda compared to recent administrations. After relative silence on antitrust issues during his first few months in office, Biden made clear his views in July when he issued his sweeping Executive Order on Promoting Competition in the American Economy, surprising many in terms of its boldness and specificity. While Biden endorsed the U.S. capitalist system as “the world’s greatest force for prosperity and growth” in prepared remarks, the Order paints a picture of an economy devoid of meaningful competition and in which “decades of industry consolidation” had led to a range of economic harm, including higher prices, lower wages and stifled innovation. And the only remedy to these ills, according to Biden, is a “whole-of-government” approach that requires more than a dozen federal agencies to “vigorously” enforce the antitrust laws to restore competition.

The Order is highly specific in this respect, tasking federal agencies (led by the DOJ and FTC) with carrying out 72 separate initiatives designed “to promptly tackle some of the most pressing competition problems across our economy,” ranging from the very broad (e.g. finding ways to lowering high prescription drug prices) to the more prescriptive (e.g. banning the use of non-compete clauses in employment agreements). The Order also targets a multitude of industries for particularly close scrutiny, including healthcare, transportation, agriculture, internet service, technology, and banking and consumer finance, while also generally placing heavy emphasis on promoting and protecting competition in labor markets.

The Order was hardly the President’s last word on the issue, as Biden has since publicly leveled allegations of anticompetitive conduct at several other industries, including “Big Meat” processors and “Big Oil” producers. More broadly, Biden has alleged that unspecified anticompetitive conduct is a root cause of two of his most persistent political bogeymen — supply chain disruptions and inflation — and he has directed the FTC and DOJ to investigate suspected wrongdoing, leading the FTC to launch a broad study into supply chain disruptions in November and the DOJ to announce in February that it was launching its own cooperative effort with foreign antitrust regulators to prosecute companies that “exploit supply chain disruptions.”

While the FTC and DOJ remain the fulcrum of Biden’s antitrust enforcement strategy, one tangible impact of the Order is the extent to which Biden dragged other agencies into the antitrust fray. For example, in September, the Federal Aviation Administration announced plans to award sixteen gates at Newark airport to low-cost-carriers in an effort to boost competition. In January, the Department of Agriculture joined with the DOJ in a public pledge to seek more aggressive antitrust enforcement to protect farmers, ranchers, and other agricultural producers and growers from unfair and anticompetitive practices. And in February, the Department of Treasury issued a report calling for greater antitrust enforcement in the alcoholic beverage industry just days before the Department of Defense issued a similar report calling for aggressive action

against pervasive consolidation between defense contractors and others in the private sector on which the DOD relies. While these actions can largely be painted as symbolic unless they result in meaningful enforcement changes, they nevertheless make clear that antitrust enforcement is an administration-wide priority and underscore the “revitalization of antitrust” that Biden’s chief antitrust advisor and architect of the Order, Tim Wu, has promised.

II. PUTTING POLICIES INTO ACTION: THE VANGUARD OF THE NEO-BRANDEISIANS

The statements coming out of the White House and other agencies make good headlines but lack teeth absent capable and willing enforcers at the DOJ and FTC to carry them out. For that reason, Biden’s most impactful moves in his first year were his decisions to nominate Lina Khan to Chair the FTC & Jonathan Kanter to lead the Antitrust Division of the DOJ. While they have markedly different backgrounds and experience — Khan is a “bonafide rockstar and visionary” of the progressive antitrust movement (to quote Kanter), an academic and the youngest FTC chair in history, while Kanter is a seasoned antitrust practitioner who has spent most of his career defending many of the large corporations he is now tasked with policing — they share a clear-eyed commitment to carry out Biden’s antitrust vision, as well as realize their own respective long-held policy goals of dramatically changing U.S. antitrust enforcement practices.

Only eight months on the job, Khan has not disappointed those who pushed for her nomination, as all of her actions to date are imbued with her uncompromising belief that the fundamental principles of antitrust enforcement for the past 40 years have been wrong. Consistent with the President’s own rhetoric, Khan has not been shy about setting a broad agenda for the FTC and making bold promises about the future of antitrust enforcement. As Chair, she has called for aggressive antitrust enforcement involving a wide array of industries and practices. In addition, she has taken steps to reset the baseline of the FTC’s enforcement principles by withdrawing a 2016 policy statement that committed the agency to applying the consumer welfare standard in its enforcement of Section 5 of the FTC Act, withdrawing the FTC from supporting the 2020 Vertical Merger Guidelines and announcing a joint initiative with the DOJ to revise the 2010 Horizontal Merger Guidelines. She also has responded to some of Biden’s more specific directives, including the previously mentioned supply chain study targeting major retailers, wholesalers and consumer goods manufacturers, and she has pledged to reinvestigate the FTC’s rulemaking authority.

But her most impactful contributions to date have been a series of policy and procedural changes to key aspects of the FTC’s enforcement approach. Among other things, in a series of 3-2 party-line votes at the Commission level, she has made it easier for Staff to open investigations, closed perceived loopholes in the Hart-Scott-Rodino Act reporting requirements that determine what mergers must be reported to the DOJ and FTC, brought back the use of prior approval requirements in merger consents, continued to suspend early termination of HSR waiting periods, and began issuing “warning letters” to companies whose merger activity has been placed on a watch list of sorts. Khan also is widely understood to have encouraged Staff to open more merger investigations, issue more Second Requests, and take a more expansive view on potential theories of anticompetitive harm, including with respect to labor, social justice, and environmental issues. Anecdotally, there also are signs that FTC Staff have been instructed to be less cooperative and transparent with parties that are subject to investigation. In addition, she has been clear that she believes the FTC should litigate more and settle less. This all amounts to shrewd maneuvering by Khan to make antitrust investigations, and particularly merger reviews, more onerous, costly, and time consuming, with the clear goal of creating a deterrent effect.

Only confirmed by the Senate in November, Kanter has not had long to make his impact on the DOJ in any formal way; but despite expectations by some that he would pursue a more moderate path than Khan, Kanter’s public statements thus far suggest close ideological alignment. In fact, since being confirmed, Kanter has heaped praise on his FTC counterpart and the two have pledged close cooperation and coordination between the agencies. On the policy front, Kanter has been a longtime advocate for more aggressive enforcement against single firm conduct and has pledged to make that a priority. He similarly has focused on the importance of protecting competition in labor markets, touting the DOJ’s recent spate of criminal indictments in that area. In addition, he has joined Khan in accepting Biden’s challenge to revisit the 2010 Horizontal Merger Guidelines and similarly has questioned some of the underpinnings of the past several decades of antitrust enforcement (although he has not gone as far as Khan in saying the consumer welfare standard should be abandoned). He also surprised many when he recently echoed Khan’s preference for litigation over settlement in merger cases, actually going further than Khan in saying that settlements “fail to move the law forward” and would be “the exception, not the rule” in the future. Early returns also suggest the DOJ is taking other pages from the FTC’s playbook, including by opening more merger investigations, considering more expansive theories of harm and overall seeking to use process and timing to stymie merger activity.

Khan & Kanter moved quickly in 2021 to implement changes at their agencies that signal more aggressive enforcement coming. And while the practical impact of these procedural maneuverings at the FTC and DOJ cannot be dismissed, these are incremental and potentially ephemeral changes that fall far short of the expansive promises that have been made. Indeed, as Republican FTC Commissioner Wilson has pointed out, the fact is that antitrust enforcement was measurably down in 2021 compared to prior years. Moreover, the cases that were brought

have been on tried and true theories of antitrust harm that fall well within the antitrust jurisprudence that Khan & Kanter have vowed to change, and the arguably bolder cases, such as the FTC's suit against Facebook, were inherited from the previous administration. We expect the agencies to take bolder steps in 2022 but where and how far they go are very much in question.

III. WHAT'S ON THE MENU FOR 2022?

Taking the administration at its word, the agencies have a shockingly long "To Do" list.

First, the agencies start the year with a reasonably full plate of matters that carried over from 2021, including a number of significant merger investigations and pending litigations (including FTC administrative trials), several high-profile ongoing conduct investigations and litigations in the big tech space, parallel FTC and DOJ investigations into supply chain issues, and public commitments to rewrite the Horizontal Merger Guidelines by the end of the year.

Second, antitrust leadership (including the President) have collectively pledged to "focus" on alleged anticompetitive practices in a long list of targeted industries, including healthcare (hospitals, pharmaceuticals, PBMs, and medical devices), transportation, agriculture, internet service, technology, banking and consumer finance, grocery stores, oil, meat processing, beer, and defense. After taking such a public stance, the White House likely will be expecting near-term results across the board.

Third, rather than prioritize any specific category of harm or alleged conduct, Khan & Kanter have repeatedly promised to expand the boundaries of antitrust enforcement beyond (but not to the exclusion of) traditional focus areas of mergers and illegal coordinated conduct. Both also have pledged to devote greater resources to investigate a wide variety of topics, including self-preferencing by online platforms, monopolization, monopsony issues, vertical agreements (mergers and otherwise) and anticompetitive practices in labor markets. This is on top of President Biden's broad mandate that they investigate the role of anticompetitive conduct in ongoing inflation and supply chain issues across the entire U.S. economy.

Tackling all of these issues in any meaningful way during the course of an administration would require a Herculean effort. Tackling them in a year would be impossible, particularly when both Khan & Kanter have acknowledged that their agencies are already underwater trying to deal with a "tidal wave" of merger filings. What's more, Khan's & Kanter's own policies are just as likely to exacerbate these resource constraints as they are to achieve meaningful enforcement victories. Policies that push Staff to open more investigations with broader theories of harm and less willingness to cooperate with parties' counsel necessarily will result in a greater number of broad investigations that require substantial staffing. In addition, a blanket refusal to settle merger cases deprives both the parties and Staff of one of the most expeditious (and long-accepted) means to resolve legitimate anticompetitive concerns. Moreover, while the agencies' clear intent is to deter merger activity by making the HSR review process more painful, merging parties and their counsel already are responding in kind to the agencies' tough tactics, including by refusing to accommodate Staff's requests for more time to investigate and utilizing their own litigation strategies to put the agencies to the test.

Rather than enable Staff to conduct broader reviews, the agencies could find themselves limited to the relatively bare bones review timelines afforded by the HSR Act, which would make it challenging to reach informed decisions, let alone be prepared to litigate against defendants that could be prepared to pursue more aggressive litigation strategies. And even were that not the case, Khan's & Kanter's strong preference for litigation could prove very challenging for agencies that historically have struggled to staff more than 2-3 litigations at any one time. Finally, these resource constraints have been exacerbated by substantial Staff departures from the agencies over the past year (particularly the FTC), including of experienced attorneys in leadership positions and with litigation experience. The procedural changes at the agencies may be designed to stem the tide of merger filings, but they are at least as likely to instead flood the agencies with litigation that they are not equipped to handle.

In the near-term, staffing constraints are among the most significant roadblocks to the administration's sweeping agenda, but they are not the only factors. Along with requiring substantial human capital, litigation is also expensive. Both Khan & Kanter have cited the need for more funding; the prospects for that seem murky, particularly for the FTC, which has drawn the ire of some prominent Republicans in Congress who have gone so far as to introduce legislation to strip the FTC of its antitrust enforcement authority. In addition, Khan will at least for the immediate future have to contend with a 2-2 partisan split at the Commissioner level that will limit her ability to take bold action. For example, in February, a Khan-supported proposed study into PBMs was scuttled when the Republican Commissioners voted against the measure. Unlike Kanter, who benefits from more unilateral authority, Khan likely will need to wait for a new Commissioner to be confirmed before she can continue her agency overhaul.

And hovering over it all is 40 years of case law that Khan & Kanter have admitted is generally unfavorable to their expansive interpretation of the antitrust laws, including by being rooted in the consumer welfare standard that Khan in particular eschews. This is not to suggest that

the FTC and DOJ will be afraid to push the envelope, but they will have to be strategic in what novel theories they pursue and how they pursue them. They may claim not to be concerned with losing in court, but even Khan & Kanter must harbor some doubts about pursuing litigation that could prove fatal to their policy goals.

IV. CONCLUSION

The tough talk will no doubt continue in Biden's second year, and the business community and antitrust practitioners should not doubt Khan's & Kanter's willingness to take bold action at their own peril. That said, absent new legislation and/or substantial additional funding for the agencies, we are unlikely to see the type of sweeping systematic changes that have been promised due to several significant impediments. Instead, we can expect the DOJ and FTC to continue to find ways to use the tools at their disposal to chill merger activity and other alleged anticompetitive conduct, without much clarity as to how effective that will prove to be in the long term. In addition, notwithstanding public promises to focus on essentially everything, we also expect the agencies will continue to prioritize their antitrust enforcement efforts in certain industries (e.g. big tech), particularly where they may see an opportunity to score a significant victory in an ongoing litigation.

We also fully expect that the FTC and DOJ will seek to expand the scope of their enforcement lens, including by testing less-established theories of harm. This is particularly true with respect to labor competition, as we expect the DOJ to bring more criminal indictments for anticompetitive labor practices and we have already seen Khan try to add a labor theory of harm to a recent FTC challenge to a hospital merger. Other more novel theories may appear as add-ons to merger challenges or other cases rooted in more widely accepted theories of harm (e.g. the DOJ's recent challenge to a publishing merger on quasi-monopsony and labor grounds), but we do not expect a fundamental realignment of the antitrust case law in the coming year.

Teddy Roosevelt, widely touted as the country's first trustbusting president, famously said "speak softly and carry a big stick; you will go far." President Biden and his antitrust lieutenants have taken a decidedly different tack, but we'll have to wait and see just how far it will take them.



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