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Dysfunction Junction: U.S. Merger Review Under the Biden Administration

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Introduction

Antitrust enforcers, practitioners, and scholars descended upon Washington, D.C. this month for the ABA's 70th Annual Section of Antitrust Law Spring Meeting to discuss antitrust law developments around the world. Two common themes emerged from merger review discourse: (1) companies, practitioners, and even the two sitting Republican FTC Commissioners are frustrated with procedural changes to the merger review process at the FTC and DOJ, and (2) the folks running those agencies don't have much sympathy. Less than a year into Lina Khan's tenure as FTC Chair and less than six months out from Jonathan Kanter's confirmation as Assistant Attorney General for the DOJ Antitrust Division, it is now clear that companies contemplating transactions subject to premerger notification under the HSR Act should be prepared for a procedural battle due to policy changes handed down by agency leadership in addition to substantive engagement on the merits with agency staff. But will this "new era" of tough merger enforcement promised by Chair Khan and AAG Kanter have the intended effect of halting acquisitions by large or "dominant" companies, or will the costs instead be borne by smaller companies attempting to gain scale through a transaction to better compete against larger, well-established competitors? All signs currently suggest the latter scenario is more likely.

I. EARLY SIGNS OF CHANGE

The first procedural change to the merger review process came only two weeks after President Biden's inauguration (and less than one week after Rebecca Kelly Slaughter became Acting Chair of the FTC) when the FTC and DOJ announced that the agencies were temporarily suspending the longstanding practice of granting early termination of the HSR waiting period for competitively benign transactions.[2] Then-Acting Chairwoman Slaughter said the temporary suspension of early termination grants was necessary because of "the confluence of an historically unprecedented volume of filings during a leadership transition amid a pandemic."[3]

But now, more than two years into the pandemic, the leadership transition completed, and a monthly volume of HSR filings below that of February 2021, early termination still has not been reinstated by the FTC or DOJ. According to Bureau of Competition Director Holly Vedova, one of the underlying drivers for the continued early termination suspension is changing the mindset that "merger review is a customer service"—enforcers' role is not to "provide white glove concierge service." Further, "the relentless pressure [enforcers] get from many parties to expedite our review so that they can close their transactions as quickly as possible can come at the expense of thoroughness."[4]

II. CHAIR KHAN'S OVERHAUL OF FTC MERGER REVIEW PROCESS

A. Omnibus Package of Investigatory Resolutions

Less than 3 weeks after Lina Khan was sworn in as Chair of the FTC, she convened the first Open Meeting in decades. The Commission passed several matters by vote, including omnibus resolutions intended to "streamline investigations by Commission staff into specific industries or specific conduct" and "allow the Commission to ramping up [sic] enforcement against illegal mergers, both proposed and

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[2] Press Release, Fed. Trade Comm'n, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination (hereinafter Early Termination Press Release).

[3] *Id.*

[4] Matthew Perlman, *DOJ and FTC Seek to Better Vet Deals Amid "Merger Boom,"* LAW360 (Apr. 8, 2022), https://www.law360.com/articles/1482402.

consummated."[5] The adopted resolutions authorized staff to use compulsory process for investigations in "key industries" such as technology platforms, health care, and pharmaceuticals. With respect to mergers, the omnibus package included a "general resolution authorizing the use of compulsory process when investigating mergers." Prior to the adoption of these resolutions, a majority Commission vote was required for staff to issue compulsory requests for documents, information, or testimony through civil investigative demands and subpoenas; now, the Chair or a Commissioner appointed by the Chair may authorize staff to use compulsory process. Chair Khan remarked that the omnibus package would provide the means to "relieve unnecessary burdens on staff and cut back delays and 'red tape' bureaucracy when it comes to advancing our Commission's law enforcement priorities, while still ensuring Commissioner involvement."[6]

B. Rescission of the 1995 Prior Approval Policy Statement

On July 21, 2021, the FTC held a second Open Meeting during which the Commission voted 3-2 along party lines to rescind the 1995 Policy Statement on Prior Approval and Prior Notice Provisions.[7] The FTC under Chair Robert Pitofsky issued the 1995 Policy Statement following a lengthy pursuit to impose a prior approval obligation on Coca-Cola Co. after it abandoned a proposed acquisition of the Dr. Pepper Company.[8] The 1995 Commission viewed the HSR process as the superior mechanism for learning about and reviewing proposed mergers by companies that had previously attempted transactions that were deemed illegal by the FTC because that process "adequately protect[s] the public interest in effective merger enforcement, without being unduly burdensome."[9] Chair Khan remarked during the Open Meeting that courts have deemed prior approval and prior notice provisions "entirely appropriate" for FTC use and that those provisions ensure the FTC is effectively allocating its scarce resources by relieving staff from reviewing mergers that were previously investigated and determined to be unlawful.[10] She stated that the FTC "will employ prior approval and prior notice provisions based on the facts and circumstances of the proposed transaction, including when the structure of the industry and the concentration of the market call for it."[11]

The FTC subsequently issued a new policy statement, which indicates that the FTC has returned "to its prior practice of including prior approval provisions in all merger divestiture orders for every relevant market where harm is alleged to occur, for a minimum of ten years."[12] The statement goes as far as to say the FTC will sometimes seek a prior approval provision against parties who abandon transactions based on a number of considerations, including whether a proposed transaction is "substantially similar" to a deal previously challenged by the FTC, whether the relevant market is already concentrated or the transaction will substantially increase concentration; whether one of the parties possessed market power pre-merger,

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[5] Open Commission Meeting—July 1, 2021, Fed. Trade Comm'n (July 1, 2021), https://www.ftc.gov/news-events/events/2021/07/open-commission-meeting-july-1-2021.

[6] Lina M. Khan, Remarks of Chair Lina M. Khan on the Investigatory Resolutions 2 (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591510/remarks_of_chair_khan_on_the_investigatory_resolutionsjuly_1_2021.pdf.

[7] Press Release, Fed. Trade Comm'n, FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers (July 21, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter-problematic-mergers.

[8] *See* Christine S. Wilson, Oral Remarks of Commissioner Christine S. Wilson, Open Commission Meeting on July 21, 2021 8 (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf.

[9] Notice and Request for Comment Regarding Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases, 60 Fed. Reg. 39,745, 39,746 (Aug. 3, 1995).

[10] Lina M. Khan, Remarks of Chair Lina M. Khan Regarding the Proposed Rescission of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions 1 (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592338/lk_remarks_for_1995_rescission_-_final_-_1230pm.pdf.

[11] *Id.*

[12] Fed. Trade Comm'n, Statement of the Commission on Use of Prior Approval Provisions in Merger Orders 2 (Oct. 25, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

the parties' "history of acquisitiveness", and whether market characteristics incentivize anticompetitive market dynamics post-merger.[13] Further, the statement makes clear the FTC will require all divestiture buyers to agree to a 10-year prior approval provision for any future sale of the assets they acquire.[14]

The FTC's new policy statement makes clear that the intended effect of reinstating prior approval requirements is to chill M&A activity. The policy imposes costs on parties that attempt mergers which, in the FTC's view, "should have died in the boardroom."[15] Indeed, the policy statement threatens harsher treatment for parties that choose to substantially comply with Second Requests to "signal to parties that it is more beneficial to them to abandon an anticompetitive transaction before the Commission staff has to expend significant resources investigating the matter."[16] The policy also specifically targets smaller, non-reportable deals for the stated purpose of "reduc[ing] the risk that the Commission will not learn of harmful mergers that do not trigger federal antitrust reporting requirements," effectively circumventing the statutory limits set forth by Congress in the HSR Act.[17]

C. Pre-Consummation Warning Letters

The next merger review process policy announcement came in early August, when the FTC announced it would begin sending "standard form letters alerting companies that the FTC's investigation remains open and reminding companies that the agency may subsequently determine that the deal was unlawful."[18] Bureau of Competition Director Holly Vedova's statement on this initiative attributed this extraordinary move to the "tidal wave of merger filings that is straining the agency's capacity to rigorously investigate deals ahead of the statutory deadlines."[19] These letters, which are now also being issued by DOJ, have created greater procedural uncertainty for parties that have made a good faith effort to comply with the statutory premerger notification requirements in the HSR Act.

D. Changes to Second Request Process

On September 28, 2021, the FTC announced additional merger review process reforms that were again attributed to an "unprecedented merger wave" and limited agency resources.[20] This round of reforms was aimed at making the Second Request process "more streamlined and more rigorous."[21] The FTC announced it would be expanding the scope of Second Requests in order to deeply examine a broader range of relevant market realities, including "how a proposed merger will affect labor markets, the cross-market effects of a transaction, and how the involvement of investment firms may affect market incentives to compete."[22] Further, companies must now provide information upfront on employees responsible for operating relevant lines of business or negotiating the transaction and providing information on how the company maintains data before FTC staff will consider requests for modifications to the Second Request.[23] The FTC also announced several changes related to the mechanics of Second Request compliance. First, parties must now inform FTC staff about the e-discovery tools they intend to use to identify responsive information prior to applying those tools.[24] Second, the FTC will no longer allow parties to

[13] *Id.*
[14] *Id.* at 2–3.
[15] *Id.* at 1.
[16] *Id.* at 2.
[17] *Id.* at 2–3.
[18] Holly Vedova, *Adjusting Merger Review to Deal With the Surge in Merger Filings,* FTC COMPETITION MATTERS (Aug. 3, 2021), https://www.ftc.gov/enforcement/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings.
[19] *Id.*
[20] Holly Vedova, Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave, FTC COMPETITION MATTERS (Sept. 28, 2021), https://www.ftc.gov/enforcement/competition-matters/2021/09/making-second-request-process-both-more-streamlined-more-rigorous-during-unprecedented-merger-wave.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*

submit a partial privilege log.[25] According to Director Vedova, these reforms are intended to "streamline [FTC] processes in ways that better enable [staff] to scrutinize, detect, and challenge illegal deals." The practical, combined effect of these reforms is to make it more burdensome and costly for companies to comply with the procedural aspects of merger investigations—a process that was already tremendously burdensome and costly.

III. PROMISES OF PROCEDURAL CHANGE FROM AAG KANTER

AAG Kanter has not been at the helm of the Antitrust Division for long, but he has indicated an intention to similarly disrupt the merger review process at the DOJ. In an interview earlier this month, Kanter stated: "We're not just bringing a few big cases, we're changing how it's done."[26] To that effect, Kanter has promised a commitment to litigate to block mergers as opposed to accepting remedies, including divestitures. We have certainly seen enforcers over the years express a preference for structural remedies due to concerns about the effectiveness of behavioral remedies in mergers that present competitive concerns, but Kanter's preferences go further than that—in a January 2022 speech, he stated that DOJ "must give full weight to the benefits of *preserving* competition that already exists in a market, rather than predicting whether a divestiture will actually serve to keep a market competitive."[27] It is Kanter's view that "merger remedies short of blocking a transaction too often miss the mark" and that the surest way to preserve competition is to "seek a simple injunction."[28]

At the 2022 ABA Spring Meeting, Principal DAAG Doha Mekki announced that the DOJ intends to seek "faster access to courts" to challenge mergers that have "problems you can see from outer space."[29] Mekki noted that the DOJ has adopted a policy that it may challenge mergers before the merging parties have substantially complied with Second Requests to prevent parties from engaging in "regulatory arbitrage" by prioritizing international agency reviews over DOJ.[30] In fact, according to Mekki, DOJ has already threatened to file a complaint before substantial compliance in one investigation, which resulted in the parties abandoning the transaction.[31]

IV. WHAT DOES THIS ALL MEAN IN PRACTICE?

Chair Khan and AAG Kanter have both identified tougher merger enforcement as a priority under their leadership and have at least publicly signaled that the FTC and DOJ will now present a united front. Indeed, some of the Second Request process changes implemented by the FTC were touted as aligning the FTC's practices more closely with the DOJ's. DOJ has also begun issuing pre-consummation warning letters.[32] Based on public reports from companies that have received these letters, the criteria for issuing the letters is unclear. And in many cases, parties that have received these letters have not had any further engagement from FTC or DOJ staff related to the supposed ongoing investigation into their transaction. One must wonder whether the letters are thus intended as a scare tactic for discouraging merger activity generally.

Though it appears DOJ temporarily reinstated grants of early termination for a few months in 2021,[33] suspension of early termination grants remains in effect at both agencies today. The

[25] *Id.*
[26] *Id.*
[27] Jonathan Kanter, Assistant Att'y Gen. for Antitrust, U.S. Dep't of Justice, Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york.
[28] *Id.*
[29] *See* Bryan Koenig, DOJ Willing To Challenge Mergers Before Investigations End, LAW360 (Apr. 6, 2022), https://www.law360.com/articles/1481559/doj-willing-to-challenge-mergers-before-investigations-end.
[30] *Id.*
[31] *Id.*
[32] Curtis Eichelberger, *US DOJ joins FTC in Sending Letters Warning Merging Companies They Close at Their Own Peril*, MLEX (Mar. 29, 2022), https://content.mlex.com/#/content/1368199.
[33] *See, e.g.*, Granting of Requests for Early Termination of the Waiting Period Under the Premerger Notification Rules, 86 Fed. Reg. 40,210 (July 27, 2021) (memorializing DOJ grant of early termination in July 2021).

FTC press release announcing discontinuance of the program stated that the FTC and DOJ would "be reviewing the processes and procedures used to grant early termination" and that the suspension was "anticipate[d]" to be brief.[34] But over a year later the "temporary" suspension remains in effect. What gives? Many, including Commissioner Noah Phillips,[35] have attributed the continued suspension to the populist viewpoint that mergers and acquisitions do not provide any benefits, are highly likely to be harmful, and should be reviewed with a fine-toothed comb. Others suggest the continued suspension is due to agency resource constraints in the midst of a "merger boom." Holly Vedova recently stated on a panel that people should not be surprised the agencies are no longer granting early termination and those advocating for resuming that process "should go tell Congress to triple the size of the Bureau of Competition."[36]

The merger review process changes implemented by the FTC, considered together, appear to many in the antitrust bar as a means to Chair Khan's (and other antitrust populists') desired end of halting consolidation in the U.S. economy as a whole. For example, Commissioner Phillips recently characterized procedural changes implemented by the FTC under Chair Khan as an attempt to "throw as much sand [as possible] in the gears of M&A activity" resulting directly from the "new mentality that is governing merger policy at the top of the [FTC] . . . that mergers have no real value, they don't produce any goods, and they have a lot of costs."[37] Commissioner Wilson has similarly expressed concern that "the carefully crafted HSR framework is suffering death by a thousand cuts" and that the at least some of the process changes implemented by Chair Khan may trap companies "perpetually beneath a Sword of Damocles" contrary to the purpose of the HSR Act.[38] And when the FTC issued the new policy statement on prior approval, the dissenting statement issued jointly by Commissioner Phillips and Commissioner Wilson remarked that the statement represents "yet another daft attempt by a partisan majority of commissioners to use bureaucratic red tape to weight down all transactions – not just potentially anticompetitive ones – and to chill M&A activity in the United States."[39]

Another data point consistent with the populist anti-merger viewpoint is the FTC's decision to begin issuing pre-consummation warning letters to parties who fulfilled their obligations under the HSR Act.[40] In practice, this policy did not change the FTC's merger review authority—the FTC has always possessed the ability to continue investigating and even challenge transactions after the allotted time for review under the HSR Act. But these "close at your own risk" letters of course inflict some additional level of uncertainty on merging companies that receive them. Companies maintain the statutory right to consummate their transaction once the FTC's allotted time to review their transaction expires, but query whether the intended effect of the letters is to discourage parties from entering into merger agreements in the first instance.

Process changes aimed at taxing merging parties may indeed have the effect of chilling merger activity across the economy, but it is unlikely to deter transactions involving the

https://www.federalregister.gov/documents/search?conditions%5Bagencies%5D%5B%5D=antitrust-division&conditions%5Bterm%5D=%22early+termination%22.

[34] Early Termination Press Release, *supra* note 2.

[35] Noah J. Phillips, Commissioner, Fed. Trade Comm'n, Remarks on "The Future of Mergers" panel at George Mason Law Review Antitrust Symposium (Feb. 25, 2022), https://www.youtube.com/watch?v=W5shvlzE4sY&list=PLFE64ft81IxxGWobjacPSmfh8Y_RPGDLE&index=6.

[36] Perlman, *supra* note 4.

[37] Curtis Eichelberger, *FTC Commissioner Phillips Says US Agencies Using Procedure to Slow Antitrust Merger Reviews*, MLEX (Apr. 6, 2022), https://content.mlex.com/#/content/1370256?referrer=email_dailycontentset&dailyId=76e3e33d7c8a498b8d408c3b9164a22a.

[38] Christine S. Wilson, Statement of Commissioner Christine S. Wilson Regarding the Announcement of Pre-Consummation Warning Letters 1, 3 (Aug. 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf.

[39] Christine S. Wilson & Noah Joshua Phillips, Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Statement of the Commission on Use of Prior Approval Provisions in Merger Orders 2 (Oct. 29, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598095/wilson_phillips_prior_approval_dissenting_statement_102921.pdf.

[40] *See* Vedova, *supra* note 184.

already-large companies Chair Khan and AAG Kanter seek to prevent from continuing to grow through acquisitions. That is because those companies possess the resources to take on these additional procedural burdens imposed by the agencies and to quickly comply with their obligations under the HSR Act. Amazon's acquisition of MGM, which closed last month after a 10-month investigation, is a prime example.[41] No company has been subject to as much criticism from Chair Khan as Amazon, and her fellow antitrust populists urged the FTC to challenge the transaction.[42] There could be many reasons for the FTC's lack of action on that matter. One possible explanation is that the FTC is busy, resource constrained, and did not believe there was a strong enough substantive case to challenge the transaction to justify continuing to allocate its scarce resources to blocking the deal.

Of course, Amazon is an enormous company with more than enough resources to withstand a lengthy investigation by the FTC and to satisfy the arduous requirements of complying with a Second Request in order to force the FTC to ultimately make a decision on whether or not to challenge the deal prior to consummation. But not all companies have that luxury. Complying with a Second Request requires companies to expend several million dollars on legal, e-discovery, and economist fees and, often, to shift a tremendous amount of manpower from the everyday operations of the business to assisting the legal team in preparing the companies' document, data, and narrative responses. Smaller companies realistically may not be able to sacrifice the necessary time and money to comply and are left at the mercy of the agencies, which can prolong investigations to the point where the costs of continuing to engage in furtherance of reaching resolution with the agency exceed the expected benefits from the proposed transaction. This calculus is especially important for a company that is struggling to keep up with the competition and has entered into a transaction that it believes critical to its continued existence and future success. The increased burden and uncertainty of successfully navigating the merger review process will no doubt deter such potentially beneficial transactions, to the detriment of those companies and the consumers they serve. Market leaders, on the other hand, will be able to capitalize on their ability to clear higher procedural hurdles and are likely to continue completing acquisitions largely unscathed.

[41] *See* Jennifer Maas, *Amazon Closes $8.5 Billion Acquisition of MGM*, VARIETY (Mar. 17, 2022), https://variety.com/2022/tv/news/amazon-mgm-merger-close-1235207852/.

[42] *See* Leah Nylen, *U.S. Antitrust Enforcers Won't Challenge Amazon's MGM Deal, Dashing Hopes of Monopoly Critics*, POLITICO (Mar. 17, 2022), https://www.politico.com/news/2022/03/17/u-s-antitrust-enforcers-amazons-mgm-deal-00018252.