BIDEN'S ANTITRUST: THE TRANSFORMATION IS HERE BUT WILL IT LAST?

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Like all new administrations, the Biden Administration entered office promising change in antitrust policy. Unlike previous administrations, however, the change this Administration promised was nothing less than the total transformation of antitrust enforcement. In its first year, the Administration has begun that transformation by overhauling enforcement personnel, starting to make policy changes, and promising much more. But will it last? The potential overthrow of the antitrust *status quo* faces opposition from entrenched interests and skepticism from a judiciary trained in it. It will take time to make the new ideas stick — will the new antitrust leaders have that luxury? In this article, we explore the subtle and not-so-subtle changes in antitrust policy made by the Biden Administration in its first year and consider the likelihood that these changes are just the beginning of a drastic and permanent alteration of the antitrust landscape.

I. INTRODUCTION

All new administrations and their antitrust leaders arrive promising change. But the Biden Administration leaders' promises are for much greater change, nothing less than a total transformation of the antitrust policy that has been in place for decades. Such a generational transformation cannot be accomplished in just a year; however, the contours of the intended change are clear and the process to effectuate it has begun. Below, we describe the biggest steps to date and discuss its likelihood for long-term survival.

II. TRANSFORMATION: FROM WHAT? TO WHAT?

While there is not complete consensus among those favoring the antitrust status quo or the highly transformed state, some general principles can be identified. Driven by a Chicago and Harvard School combination[2] and exemplified in Supreme Court opinions like *Sylvania*[3] and *Trinko*,[4] the *status quo* focuses on the economic efficiency goals of the consumer welfare standard; is wary of excessive agency or court intervention in the economy lest competitive behavior be over-deterred; and is most concerned about cartel agreements and large horizontal mergers.

The Biden Administration's new antitrust paradigm is the opposite. Instead of the consumer welfare's focus on consumers, the new version would seek to protect "workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals."[5] Under this new paradigm, enforcement officials would attempt to intervene in the marketplace much more frequently through aggressive litigation positions, structural remedies in more merger matters, and rulemaking. Finally, enforcement officials following the new paradigm would continue and even increase challenges to cartels and horizontal mergers but would also more actively challenge alleged monopolization, vertical mergers, and price discrimination.[6]

III. PERSONNEL IS POLICY[7]

To pursue the transformation to this new antitrust paradigm, the Biden Administration took several steps in its first year, beginning with the selection of its top officials. As with any incoming administration, the two most prominent and important picks were the heads of the Federal Trade Commission ("FTC") and the Department of Justice Antitrust Division ("DOJ"). Lina Khan was sworn in as Chair of the FTC in June. She had brief stints as a professor at Columbia, an assistant to FTC Commissioner Rohit Chopra, and counsel to the House Judiciary Committee's Antitrust Subcommittee. Her many writings, beginning even in law school, have been highly critical of the antitrust *status quo*, especially as applied to so-called "big tech" companies like Amazon.[8]

Jonathan Kanter was confirmed as Assistant Attorney General for DOJ in November. After a brief stint at the FTC's Bureau of Competition, he practiced antitrust law for about twenty years in three major Washington firms before forming his own antitrust boutique. Like Khan, Kanter has been critical of recent antitrust enforcement policy, especially as applied to "big tech" firms.[9]

Unlike other incoming administrations, the Biden Administration also named a Special Assistant to the President for Technology and Competition Policy. Tim Wu, formerly a Columbia professor and author of several books and articles on competition policy,[10] filled that position in March. Since then, he has called recent antitrust enforcement and policies a "failed 40-year experiment."[11]

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2 For an explanation of why the usual Chicago School myopia is misleading, see Kovacic, W. E. (2007). *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix. Columbia Business Law Review*, 2007(1).

3 *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

4 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

5 Majority Staff Report of Antitrust Subcommittee of House Judiciary Committee, *Investigation of Competition in Digital Markets* at 392 (2020).

6 For one description of the principles of the new paradigm and its recent rise, see Kovacic, W.E. *Root and Branch Transformation: The Modern Transformation of U.S. Antitrust Law and Policy?, Antitrust* Summer 2021, at 46.

7 Note the irony of using this phrase, first popularized during a Reagan Administration with a completely different take on antitrust enforcement. See, e.g. *Personnel is Policy* by Herbert Meyer, American Thinker, Feb. 3, 2007, available at https://www.americanthinker.com/blog/2007/02/personnel_is_policy.html.

8 See e.g. *Amazon's Antitrust Paradox*, 126 Yale L.J. 564 (Jan. 2017).

9 It Took Forever to Get Confirmed. Now All He Has to Do is Fix All of Antitrust Law, Politico, December 2021.

10 See e.g. *The Curse of Bigness: Antitrust in the New Gilded Age*, Columbia Global Reports, 2018.

11 See e.g. https://www.law360.com/articles/1426882/white-house-adviser-touts-revitalization-of-antitrust-.

Kanter & Khan have slowly filled agency leadership positions. Some recent picks have strengthened connections with groups that could support stronger antitrust enforcement if not transformation. Eric Posner (DOJ) and Spencer Weber Waller and John Kwoka (FTC) are academics who have consistently called for greater enforcement in numerous articles and speeches. Sarah Oxenham Allen (DOJ) headed up Virginia's antitrust enforcement and just stepped down as head of the antitrust group for the National Association of Attorneys General. These connections to like-minded academics and state enforcers could widen the base of support for the Administration's push to change the approach to antitrust enforcement.

Like all incoming administrations, the Biden Administration's FTC and DOJ have seen turnover in the career staff who will implement any new strategies of the agencies' leaders. Private anecdotal reports, however, have put this current staff turnover at a much higher level. Some commentators have suggested that the new leadership's ridicule of past antitrust enforcement, much of it conducted by current staff, has been a management mistake.[12] After all, how can you motivate staff, or even entice them to stay at the agency, if you tell them that their life's work was misguided, even evil?

We have come around to the opposite view. Yes, staff disgruntlement and departures might slow down the transformation process in the short run. But in the long run, "personnel is policy"[13] and only a whole new cadre of staff attorneys and economists who share the beliefs of the new leadership can hope to tear down the old antitrust edifice and build a new and lasting one. So expect the staff departures to continue and the replacements to be academics and others, like Posner, Kwoka, Allen & Waller mentioned above, not tainted by past enforcement "mistakes."[14]

IV. SOME SIGNIFICANT CHANGES ALREADY. FOR THE BEST? PROBABLY NOT

These new personnel have begun to make real changes, right now, in antitrust enforcement. We have already seen some controversial moves that, if they stand in the long term, might significantly change the antitrust landscape in the U.S.

A. Drastic Changes in the Merger Review Process

Changes to the merger review process have been at the heart of the new Administration, especially after Khan became the head of the FTC.

First, the agencies suspended the Hart-Scott-Rodino early-termination program early in 2021 by which the agencies affirmatively would clear the most routine mergers and similar transactions in less than 30 days, allowing them to close. Now, all parties, even those to transactions that raise no antitrust issues, must wait the entire 30 days before closing. That temporary suspension continues with no end in sight. Unfortunately, because most parties had requested early termination and received it, the change in policy means that hundreds of transactions that posed no competitive issues have been delayed for an unclear benefit.

Second, the FTC withdrew the Vertical Merger Guidelines, issued jointly — just last year — with the DOJ, together with the FTC's Vertical Merger Commentary.[15] The FTC stated that the guidance documents include unsound economic theories that are unsupported by the law or market realities. The statements by the various Commissioners showed the deep divisions within the FTC, about merger review and antitrust enforcement generally since Khan joined the Commission.

The statement by the FTC majority[16] asserts that the 2020 Vertical Merger Guidelines had improperly contravened the Clayton Act's language with its approach to efficiencies. The statement explains the majority's concerns with the Guidelines' treatment of the purported pro-competitive benefits of vertical mergers, especially its treatment of the elimination of double marginalization. The dissenting Statement of Commissioners Phillips & Wilson[17] starts with a bang: "Today the FTC leadership continues the disturbing trend of pulling the rug out under from honest businesses and the lawyers who advise them, with no explanation and no sound basis of which we are aware." The statement goes on to not only lament the confusion the withdrawal will generate, but contrast the process used when the Guidelines were issued — months of public

12 See e.g. Kovacic, *Root and Branch, supra* Note 5 at 52.

13 See *supra* Note 6.

14 https://www.competitionpolicyinternational.com/kanter-appoints-new-special-assistant-at-doj-antitrust-division/.

15 https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines?utm_source=govdelivery.

16 https://www.ftc.gov/public-statements/2021/09/statement-chair-lina-m-khan-commissioner-rohit-chopra-commissioner-rebecca.

17 https://www.ftc.gov/public-statements/2021/09/dissenting-statement-commissioners-noah-joshua-phillips-christine-s-0.

input and debate — with the process used for their withdrawal — no public input and, seemingly, no discussion even at the FTC outside the offices of three Commissioners.

Third, in early 2022, the FTC joined the DOJ in considering a complete rewrite of both the Horizontal and Vertical Merger Guidelines.[18] The agencies expect to have a draft of the new Guidelines by the end of 2022. The exact changes the agencies will propose are not yet known; however, based on their statements made and questions posed for public comment, below are some of the key questions that could lead to drastic changes in merger review:

- Should new Guidelines further de-emphasize market definition in favor of an approach that tries to directly predict competitive effects?
- Should presumptions based on market shares or similar measures be strengthened?
- Should effects on parties other than consumers, like labor and local communities, receive greater emphasis?
- Should effects on elements other than price, such as product quality and wages, receive greater emphasis?
- Should some efficiencies, such as lower input prices from suppliers, be seen as reasons to challenge the merger?
- Should distinctions between horizontal and vertical transactions reflected in the guidelines be revisited considering trends in the modern economy?

The agencies also seek input on possible updates to the guidelines' discussion of potential and nascent competitors, which may be key sources of innovation and competition, as well as how to account for key areas of the modern economy like digital markets, which often have characteristics like zero-price products, multi-sided markets, and data aggregation that the current guidelines do not address in detail.

Fourth, in August 2021, the FTC stated that some proposed mergers would receive form letters at the end of the 30-day initial review period saying that an antitrust investigation remains open, and that the FTC might challenge the transaction if the parties close it.[19] This means now that some parties will no longer receive the "no news is good news" treatment at the end of the initial 30-day waiting period; instead, if the FTC is the reviewing agency, it might, or might not, issue a letter informing the parties that it has not yet determined if the transaction is anti-competitive. If it issues such a letter, the FTC will continue to investigate under some indeterminate rules for some indeterminate amount of time. While the parties are free to close the transaction, the FTC letter warns them that the FTC might later challenge the transaction and try to unwind it. While seemingly small, the new process is another step by the FTC that reduces a major benefit of the HSR process — near certainty.

Last, but not least, in August 2021, the FTC also changed a long-standing informal interpretation about how potential HSR filers should view debt repayments when determining if the transaction is large enough to warrant a filing.[20] Until then, the FTC has interpreted HSR rules to exclude from the size of the transaction calculation the payoff of a target's debt by the acquiring person in transactions involving the acquisitions of voting securities and noncorporate interests (though not of assets). The rationale was that the purchaser of a majority of an issuer's stock automatically acquires the issuer's preexisting liabilities and so that fact presumably is reflected in the stock's acquisition price. But in September 2021, the FTC withdrew that informal interpretation. According to the FTC blog post, it appears that some merging parties have structured their deals to take advantage of this interpretation and avoid an HSR filing. Target companies may take on debt shortly before the merger and then have the acquiring person retire it as part of the transaction, thus reducing the size of the transaction, perhaps to a level whereby the parties can avoid a filing. In our view, at the margin, this change likely will result in more HSR filings. For instance, it will affect those transactions where the size of the transaction matters, such as transactions of private equity firms focused on the "middle market".

B. President Biden Executive Order on Promoting Competition in the American Economy

In August 2021 President Biden issued the Executive Order on Promoting Competition in the American Economy (the "Order").[21] The Order aimed to reduce the trend of corporate consolidation, drive down prices for consumers, increase wages for workers and facilitate innovation. It established a Whole-of-Government effort to promote competition in the American economy by including 72 initiatives across numerous agencies to enforce existing antitrust and other laws that may impact competition. The goal is to combat what the Administration sees as excessive concentration of industry and abuses of market power, as well as to address challenges posed by new industries and technologies. The Fact

18 https://www.ftc.gov/news-events/press-releases/2022/01/ftc-and-justice-department-seek-to-strengthen-enforcement-against-illegal-mergers.

19 https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings?utm_source=govdelivery.

20 https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/reforming-pre-filing-process-companies-considering?utm_source=govdelivery.

21 https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

Sheet[22] further explains how the Order encourages the leading antitrust agencies to focus enforcement efforts on problems in key markets and coordinates other agencies' ongoing response to corporate consolidation.

The Order specifically addresses merger review by encouraging antitrust agencies to revisit and update the Merger Guidelines (both horizonal and vertical) and challenge so-called bad mergers previously cleared by past Administrations. As explained above, the FTC and DOJ already have begun to implement this recommendation.

The Order also calls on both the FTC and DOJ to enforce the antitrust laws vigorously. In particular, the Order encourages the Chair of the FTC to exercise the FTC's statutory rulemaking authority in areas such as:

- Agriculture: Unfair anticompetitive restrictions on third-party repair or self-repair of items, such as the restrictions imposed by some manufacturers that prevent farmers from repairing their own equipment;
- Healthcare: Unfair anticompetitive agreements in the prescription drug industries, such as agreements to delay the market entry of generic drugs;
- Banking: Unfair exclusionary practices in the brokerage or listing of real estate;
- Transportation: Anticompetitive marketing, advertising, and pricing policies;
- Labor Markets: Non-compete agreements;
- Internet Service: Preventing Internet Service Providers — ISPs — from making deals with landlords that limit tenants' choices to revive the "Broadband Nutrition Label" and require providers to report prices and subscription rates to the FCC, to limit excessive early termination fees, and to restore Net Neutrality rules undone by the prior administration;
- Online platforms: Announcing an Administration policy of greater scrutiny of mergers, especially by dominant internet platforms, with particular attention to the acquisition of nascent competitors, serial mergers, the accumulation of data, competition by "free" products, and the effect on user privacy. It further encourages the FTC to establish (i) rules on surveillance and the accumulation of data, and (ii) rules barring unfair methods of competition on internet marketplaces.
- Beer, wine, and spirits. Requesting the Secretary of the Treasury, in consultation with the Attorney General and the Chair of the FTC, to submit a report assessing the current market structure and conditions of competition, including an assessment of any threats to competition and barriers to new entrants. On February 2022, the Department of Treasury issued its report and expressed serious concerns about increased consolidation in the $250 billion U.S. alcohol market, while at the same time, outlining several reforms that it believes would boost competition, including increased merger scrutiny and reducing regulatory burdens for new entrants.[23]

C. The FTC's New Agenda Moving Forward

In parallel, in 2021 the FTC also passed some new resolutions updating its rulemaking procedures to set the stage for stronger deterrence of corporate misconduct,[24] while authorizing investigations into key law enforcement priorities for the next decade.[25] As Khan stressed in her statement,[26] priority targets include repeat offenders; technology companies and digital platforms; and healthcare businesses such as pharmaceutical companies, pharmacy benefits managers, and hospitals.

V. BUT WILL IT LAST?

So, the Administration has already made some big changes in antitrust enforcement and is planning for more. But will all those changes last? The prior revolution in antitrust thinking that enshrined the consumer welfare standard and other elements of the *status quo* did not happen

22 https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.

23 https://home.treasury.gov/system/files/136/Competition-Report.pdf.

24 https://www.ftc.gov/news-events/press-releases/2021/07/ftc-votes-update-rulemaking-procedures-sets-stage-stronger.

25 https://www.ftc.gov/news-events/press-releases/2021/07/ftc-authorizes-investigations-key-enforcement-priorities.

26 https://www.ftc.gov/system/files/documents/public_statements/1591510/remarks_of_chair_khan_on_the_investigatory_resolutionsjuly_1_2021.pdf.

overnight. Writings by academics in the '50s[27] and '60s[28] led to Supreme Court opinions[29] and more writings[30] in the '70s and '80s. Policy was enshrined by twelve years of choices by the enforcers of the Reagan and Bush I Administrations. Those looking to overturn the antitrust *status quo* have the writings from the last few years.[31] Some of those same authors now lead antitrust enforcement and policymaking in the Biden Administration. While the revolutionaries' progress to date in overthrowing the current antitrust regime is impressive, some obstacles might block their ultimate success.

First, any novel enforcement moves by DOJ or the FTC will need to convince the judiciary. All DOJ enforcement and much of the FTC's must be enforced by courts in the first instance. The FTC's administrative hearings are subject to appellate review by the courts. The statutory and constitutional basis for the FTC to avoid the judiciary and rely solely on antitrust rulemaking under its "unfair methods of competition" power is unclear.[32] So all agency enforcement actions could face judicial review eventually. In such court arguments, the agencies will need to deal with decades of judicial precedent incorporating antitrust's *status quo* being interpreted by judges who were trained under it. One example of the attitudes the agencies are likely to face is the Supreme Court's opinion in Alston, an antitrust plaintiff's victory that generated a unanimous opinion chock full of praise for the *status quo*'s most cherished ideas and opinions.[33] Yes, courts have interpreted the antitrust statutes as malleable with changes in economic thinking; however, the agencies will face an uphill battle in convincing the judiciary that any radical changes are warranted now.

And the agencies and any others advocating for radical changes will face stiff opposition. Some entities — such as some companies[34] being sued or academics[35] and think tanks[36] historically supportive of the antitrust *status quo* — will oppose nearly all such changes and fight at every turn. Others who might support greater antitrust enforcement and be natural allies might be opposed to wholesale changes to the current framework.[37] They might also be put off by rhetoric that describes their past efforts in the antitrust arena as misguided at best, maybe even evil.

Finally, making durable any drastic changes to the antitrust *status quo* will take time. Today's *status quo* was developed over decades with years' worth of academic and popular articles and Supreme Court opinions and twelve years of Reagan and Bush I agency enforcement and judicial picks. Those advocating for change now certainly have the articles and popular books but one year of the Biden Administration probably is not enough to make all the desired changes, and make them durable. What if Democrats suffer setbacks in coming elections? Some Republicans today seem to favor some changes to antitrust enforcement, especially regarding "Big Tech," but will they reverse any Biden-era changes if given the chance? Will other Democrats who gain power have the same policies and the enthusiasm to push them or will there be a return to Clinton/Obama policies? In the era of Twitter and ever shorter news cycles, will the support to at least "do something" with antitrust wane, or even turn on agency enforcers who cannot quickly overcome the obstacles detailed above?

VI. CONCLUSION

In its first year, the Biden Administration has taken the first steps to a total transformation of antitrust law. Only time will tell how successful the effort will be.

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27 See e.g. Director & Levi, *Law and the Future: Trade Regulation*, 51 Northwestern University Law Review 281 (1956).

28 See e.g. Bork & Bowman, *The Crisis in Antitrust*, Fortune, December 1963, at 138.

29 See e.g. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) and *Monsanto Co. v. Spray-Rite Svc. Corp.*, 465 U.S. 752 (1984).

30 See e.g. Bork, *The Antitrust Paradox: A Policy at War with Itself* (1978) and Easterbrook, *The Limits of Antitrust*, 63 Texas. Law Review 1 (1984).

31 See e.g. *supra* Notes 7 and 8 and Stoller, *Goliath: The 100-Year War Between Monopoly Power and Democracy* (2019).

32 See e.g. Ohlhausen & Rill, *Pushing the Limits: A Primer on FTC Competition Rulemaking*, U.S. Chamber of Commerce, August 12, 2021.

33 *NCAA v. Alston*, 594 U.S. ___, (2021). For commentary on the opinion, see e.g. Cernak, *Alston v. NCAA: Helpful for Future Antitrust Defendants?*, The Antitrust Attorney Blog, June 23, 2021.

34 See e.g. *Axon Enterprise, Inc. v. Federal Trade Commission, et. al.*, (20-15662)(cert. granted Jan. 24, 2022).

35 See e.g. authors at Truth on the Market, avail at https://truthonthemarket.com/.

36 See e.g. U.S. Chamber of Commerce, esp. here: https://www.uschamber.com/regulations/u-s-chamber-of-commerce-stands-up-to-ftc-going-rogue.

37 Several authors have noted the presence of more than two sides debating antitrust's future. See e.g. Melamed, *Antitrust Law and Its Critics*, 83 Antitrust L.J. 269 (2020) and Ohlhausen, *Liberty, Equality, and Fraternity: Evolution or Revolution in Antitrust*, 35 Antitrust 3 (Summer 2021).

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