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# The FTC and DOJ appear ready to alter long-standing merger review practices

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Amid an uptick in merger filings, the Federal Trade Commission (FTC), led by Chair Lina Khan, and the Antitrust Division of Department of Justice (DOJ), led by Assistant Attorney General (AAG) Jonathan Kanter, appear to be considering significant changes to how the government considers mergers, particularly by emphasizing labor market effects, discounting vertical efficiencies, and doubting the viability of remedies, including even structural remedies.

## Merger filings reach record levels in 2021 and result in calls for change to the Hart-Scott-Rodino Act

Without a doubt, 2021 was a historic year for M&A activity. According to FTC reported totals, in calendar year 2021, there were 3,644 filings under the Hart-Scott-Rodino (HSR) Act, and November 2021 reached a record 607 merger filings. This annual total is almost double the previous annual record under the current statutory thresholds. (Note that there were a larger number of filings in 1998, 1999, and 2000 prior to legislation that lifted the statutory thresholds and indexed them to GDP.) According to FTC Chair Lina Khan, the sheer volume of cases has caused "significant strain" in light of the FTC's current staffing levels and has purportedly caused the FTC to make "difficult choices" about which deals to investigate.

In reaction to this situation, FTC Commissioner Rebecca Slaughter advocated in a statement on January 24, 2022, which was joined by Chair Khan, that Congress should increase the review periods under the HSR Act:

> "The short 30-day window the agencies are given to determine whether a deal warrants close investigation and the 30-day timeline imposed on the agencies after parties certify they have 'substantially complied' with the inquiry have not kept pace with the increased volume and complexity of transactions and their related data and documents since passage of the HSR Act in 1976."

As a practical matter, it is unclear whether this call for revisions to the HSR Act will gain traction given that:

- The statutory periods are often the minimum amount of time for review: the DOJ and FTC regularly have a longer time to review transactions in the initial HSR waiting period through the "pull-and-refile" practice.[1] Similarly, the DOJ and FTC nearly always negotiate a timing agreement during a Second Request,[2] which has the effect of significantly extending the post-compliance review period.
- The FTC's recent practice of sending "Warning Letters" to merging parties notifying them of ongoing investigations beyond the waiting period demonstrates that the FTC's investigatory power is by no means limited by the statutory waiting period.[3]
- A legislative effort in New York to impose a 60-day waiting period on certain deals has already received significant opposition.[4] We would expect a federal proposal also to generate opposition from the business community.

In her statement, Commissioner Slaughter also supported the Merger Filing Fee Modernization Act, which has been introduced in Congress and would substantially increase merger filing fees for large transactions and increase federal

funding for antitrust authorities.[5] In contrast to the suggestion of longer review periods, we expect that this bill will ultimately be enacted with strong bipartisan support. This bill would be a modest change to antitrust law in comparison to other pending legislation, such as the American Innovation and Choice Online Act, which proposes substantial changes to antitrust regulations to large technology platforms and was just advanced by the Senate Judiciary Committee on January 20, 2021.

# FTC and DOJ announce joint review of merger guidelines

On January 18, 2022, the FTC and DOJ, held a joint press conference at which Chair Khan and AAG Kanter announced the launch of their agencies' joint review of the current merger guidelines, as well as the issuance of a Request for Information identifying key topics on which the agencies seek public comment to assist in their review. Key questions which the FTC and DOJ will consider include the following:

- Should the guidelines' traditional distinction between horizontal and vertical transactions be revisited?
- Are the guidelines adequately attentive to the range of business strategies that might drive acquisitions?
- Do the guidelines adequately assess whether mergers may lessen competition in the labor markets?
- To what extent should market definition play a role in analyzing the competitive effects of a deal?
- Have the DOJ and FTC adequately considered language in the Clayton Act prohibiting mergers that "tend to create a monopoly"?

These topics are consistent with Chair Khan's and AAG Kanter's overall criticisms of existing merger review. For example, in a January 24, 2022 speech, AAG Kanter advocated that merger enforcement, and therefore the merger guidelines, needed to "track market realities":

> "Our merger guidelines must reflect the text and evident purposes of the antitrust laws enacted by Congress; the economic realities faced by businesses, workers and consumers; and the most recent empirical evidence of how competition functions—or does not function—in today's economy."

It will likely be months before the DOJ and FTC agree on proposed revised guidelines, with an additional period for public comment on the draft guidelines before they are finalized. It remains to be seen whether the agencies will seek to diminish or eliminate the traditional distinctions between horizontal and vertical mergers in the guidelines, but at a minimum we expect that the final guidelines will be much more skeptical of vertical mergers—echoing the dissent of FTC Commissioner Rohit Chopra and the dissent of FTC Commissioner Rebecca Slaughter to the 2020 issuance of the Vertical Merger Guidelines that raised, among other things, doubts about the competitive benefits of vertical mergers.[6] Additionally, consistent with the policy statements in President Biden's Executive Order on Promoting Competition in the American Economy,[7] we expect the new guidelines to consider labor market effects, the competitive effects from the aggregation of user data, and possibly a broader view of anticompetitive harm beyond the impact on consumer welfare. If so, companies should expect to encounter increasingly skeptical enforcers—especially with regard to proffered procompetitive justifications—and face correspondingly longer reviews.

# Fresh skepticism of behavioral and structural merger remedies may signal more agency challenges

In his January 24, 2022 speech, AAG Kanter suggested that the DOJ may in the future seek to block transactions where traditionally the DOJ might have pursued a behavioral or structural remedy:

> "I am concerned that merger remedies short of blocking a transaction too often miss the mark. Complex settlements, whether behavioral or structural, suffer from significant deficiencies. Therefore, in my view, when the division concludes that a merger is likely to lessen competition, in most situations we should seek a simple injunction to block the transaction. It is the surest way to preserve competition."

He justified this view by noting that competition is complex and multidimensional, and it may be impossible to determine the "appropriate divestiture for evolving business models and innovative markets." AAG Kanter also contended that settlements "do not move the law forward," whereas litigation may open the door to judicial reconsideration of older precedents and their application to modern markets. AAG Kanter's views are consistent with those of Chair Khan, who wrote in an August 6, 2021 letter that "studies show that divestitures, too, may prove inadequate in the face of an

unlawful merger" and suggested that "antitrust agencies should more frequently consider opposing problematic deals outright."

The views of AAG Kanter and Chair Khan go beyond most recent policy statements on merger remedies. It is not surprising to see the agencies express skepticism regarding *behavioral* remedies, which is consistent with the position set forth in the DOJ's 2020 Merger Remedies Manual. That Manual, however, embraced structural remedies under many circumstances.[8] If the views of AAG Kanter and Chair Khan become actual agency policy, companies should expect even tougher negotiating challenges in securing divestitures and a much higher risk of litigation.

# Recent vertical merger challenges suggest aggressive and bipartisan agency approach

## FTC challenges proposed Lockheed/Aerojet merger

On January 25, 2022, the FTC sued to block Lockheed Martin Corporation's proposed vertical acquisition of Aerojet Rocketdyne Holdings Incorporated. According to the complaint, Lockheed Martin is the "largest defense contractor," and Aerojet is "the last significant independent, and, in some instances sole, U.S. supplier of several critical missile propulsion products used as inputs in multiple weapon systems." The FTC voted unanimously, 4-0, to issue the administrative complaint.

The FTC's complaint alleges that the acquisition would enable Lockheed to control "multiple critical inputs" for hypersonic cruise missiles and missile defense kill vehicles, and Lockheed would therefore "gain the ability to foreclose, raise costs for, or otherwise disadvantage, its prime contract rivals that rely on Aerojet's Critical Propulsion Technologies to compete effectively." The complaint also contends that the foreclosure of rivals "would decrease or eliminate competitive pressure on Lockheed, leading to an increase in price and/or decrease in quality or innovation," and that there are insufficient merger-specific efficiencies that would offset the likely significant anticompetitive effects.

## FTC challenges proposed Nvidia/Arm merger

On December 2, 2021, the FTC unanimously voted 4-0 to block the proposed vertical acquisition by Nvidia Corporation, a manufacturer of standalone graphics processing units, of U.K.-based Arm Limited, a licensor of microprocessor designs. The FTC's complaint alleges that allowing the proposed merger would give Nvidia the incentive and ability to use its control of Arm to undermine its competitors by denying them Arm technology, such as by "withholding a critical input from rivals, delaying or degrading access to the input (including delaying or degrading service and support), unfavorably changing the terms on which the input is made available to rivals, or otherwise using the critical input to raise their costs or disadvantage them." According to reports,[9] Nvidia is preparing to abandon the deal—a de facto victory for the FTC.

## Key takeaways from recent merger enforcement

It is not surprising to see the FTC review vertical mergers with heightened scrutiny given recent developments in the antitrust community, including President Biden's Executive Order. It is somewhat surprising, however, that both of the FTC's complaints were issued unanimously, which may suggest bipartisan agreement regarding more challenging standards for at least some types of vertical mergers before the current Commission. Companies contemplating vertical transactions should increasingly expect lengthier review periods and, if evidence of arguable foreclosure issues arise, a higher likelihood of challenges.

**If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.**


**D. Jarrett Arp**
+1 202 962 7150
jarrett.arp@davispolk.com

**Arthur J. Burke**
+1 212 450 4352
+1 650 752 2005
arthur.burke@davispolk.com

**Ronan P. Harty**
+1 212 450 4870
ronan.harty@davispolk.com

**Nathan Kiratzis**
+1 212 450 4157
nathan.kiratzis@davispolk.com

**Christopher Lynch**
+1 212 450 4034
christopher.lynch@davispolk.com

**Suzanne Munck af Rosenschold**
+1 202 962 7146
suzanne.munck@davispolk.com

**Howard Shelanski**
+1 202 962 7060
howard.shelanski@davispolk.com




[1] 16 CFR § 803.12.

[2] *See* FTC Model Timing Agreement (February 2019), https://www.ftc.gov/system/files/attachments/merger-review/ftc_model_timing_agreement_2-27-19_0.pdf; DOJ Model Timing Agreement (Sept. 2020), https://www.justice.gov/atr/page/file/1258826/download.

[3] Davis Polk, FTC to issue "Warning Letters" that deals remain subject to antitrust review post-closing (Aug. 5, 2021), https://www.davispolk.com/insights/client-update/ftc-issue-warning-letters-deals-remain-subject-antitrust-review-post-closing.

[4] *See, e.g.*, Partnership for New York City, 60 New York Business and Legal Experts Issue Open Letter Opposing Antitrust Legislation (Jan. 12, 2022), https://pfnyc.org/news/over-50-new-york-business-and-legal-experts-issue-open-letter-opposing-antitrust-legislation/.

[5] For more information see, Davis Polk, Antitrust and a new administration: Update on legislative proposals (June 22, 2021), https://www.davispolk.com/insights/client-update/antitrust-and-new-administration-update-legislative-proposals.

[6] *See* Davis Polk, DOJ and FTC Issue Final Revised Vertical Merger Guidelines (July 1, 2020), https://www.davispolk.com/insights/client-update/doj-and-ftc-issue-final-revised-vertical-merger-guidelines.

[7] *See* Davis Polk, President Biden signs Executive Order on promoting competition (July 12, 2021), https://www.davispolk.com/insights/client-update/president-biden-signs-executive-order-promoting-competition.

[8] *See* Davis Polk, DOJ Issues Updated Merger Remedies Manual, Emphasizing a Strong Preference for Structural Remedies (Sept. 8, 2020), https://www.davispolk.com/insights/client-update/doj-issues-updated-merger-remedies-manual-emphasizing-strong-preference.

[9] *See, e.g.*, Ian King et al., *Nvidia Quietly Prepares to Abandon $40 Billion Arm Bid*, Bloomberg (Jan. 25, 2022), https://www.bloomberg.com/news/articles/2022-01-25/nvidia-is-said-to-quietly-prepare-to-abandon-takeover-of-arm.