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The Antitrust Paradox VS. *The New Brandeisians*

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On July 9, 2021, President Biden signed an *Executive Order on Promoting Competition*. That Executive Order sets forth the Biden Administration's plan for a more aggressive antitrust enforcement policy and reflects the Administration's belief that several industries in the United States have become too concentrated, thereby allowing firms to exercise market power, depress wages and stifle competition.

The Biden Administration's agenda emphasizes new social policy goals with respect to the range of considerations relevant to antitrust enforcement. Since the 1970s, antitrust enforcement has in large part been focused on consumer welfare issues. This consumer welfare standard was advanced by Robert Bork, a former law professor and federal judge. In his seminal treatise, *The Antitrust Paradox*, Judge Bork argued that the intent of the Sherman Act was to protect consumer welfare, not to control the broader economic and corporate power of corporations. Under Judge Bork's theory of antitrust, mergers and trade restraints allow business to lower costs and improve services, thereby benefiting the consumers and improving efficiency. This theory of antitrust and merger enforcement soon gathered support in academic circles and in the federal judiciary. For the last 40 years, antitrust merger enforcement has been focused primarily on potential collusion among rivals. Scrutiny of corporate consolidation has been largely focused on whether a transaction would benefit consumers or conversely result in higher prices or a reduction in product qualities.

Against this backdrop, many contemporary academics have argued that antitrust investigation and enforcement decisions should also take into account a broader array of factors, such as the potential impact of a transaction or conduct on employment, small businesses and macroeconomic metrics. Known in some circles as the "New Brandeisian" approach to antitrust enforcement, the Biden Administration has endorsed this paradigm shift. The so-called New Brandeisians borrow their name from Justice Louis Brandeis's reliance while in private practice on a legal brief in *Muller v. Oregon*, that relied heavily on scientific information and social science as opposed to law. This philosophical shift is playing out initially in the Department of Justice ("DOJ") and the Federal Trade Commission

("FTC"), both of which have statutory oversight over antitrust and merger and acquisition activity. Firms involved in M&A activity need to be mindful of the changing regulatory and enforcement landscape. The Biden Administration has made it clear that federal regulators will adopt a more aggressive approach and will pursue increased scrutiny on antitrust and monopolistic activities in the merger and acquisition space. The new Chair of the FTC, Lina Khan, is a former academic who has advocated strongly for broadening antitrust merger enforcement and moving away from the consumer welfare standard. This philosophical change will have ramifications for businesses and M&A activity for the foreseeable future.

Because the consumer welfare antitrust enforcement standard has been articulated and is well settled in United States Supreme Court precedent, the Biden Administration is introducing its policies in a variety of ways. Executive agencies, most notably the FTC, have been encouraged to use new regulations to promote competition and to protect workers and small businesses. The FTC has also taken steps to identify target industries for scrutiny and to allow staff more flexibility to open antitrust investigations. With the change in philosophical focus, however, there is a degree of uncertainty at the FTC as new guidance is implemented and existing guidance changed. This is evident with respect to the recent withdrawal by the FTC of the Vertical Merger Guidelines and the Statement of Enforcement Principals Regarding Unfair Methods of Competition under Section 5 of the Sherman Act. Unlike the Department of Justice, the FTC is not limited to enforcing the Sherman Act and the Clayton Act, the two principal federal antitrust statutes. The FTC has separate rulemaking authority, as well as an internal administrative quasi-judicial system, to enforce the provisions of the Federal Trade Commission Act ("FTC Act"). This recent withdrawal of long-standing guidance suggests that the FTC may seek to invoke broader authority under the FTC Act.

Of particular note for practitioners and companies looking to pursue a merger or acquisition is the FTC's increased enforcement of its regulatory authority under the Hart-Scott-Rodino Act ("HSR"). Under HSR, certain proposed mergers that meet the multipart statutory test require both parties to a transaction to submit the transaction to federal regulators for prior approval before closing. After filing with the FTC and the DOJ, HSR provides for an initial waiting period (typically 30 days) to allow the agencies to determine if the government wants to investigate the proposed transaction more thoroughly. If FTC or DOJ elects to investigate, it will issue a "second request" to the parties. That second request will seek a substantial amount of data, information and documents from the parties to the transaction. The pre-merger waiting period will not expire in such a case until both parties have "substantially complied" with the second request requirements. This process can be time-consuming and very expensive.

Under HSR, parties to a transaction can request that the initial waiting period of 30 days be shortened. Historically, such "early termination" requests have been granted when neither agency identifies a need for further investigation or when a transaction does not raise competitive concerns. In 2021, the FTC, as part of its increased enforcement philosophy, announced it was "suspending" the grant of early terminations under HSR. The stated reason for the termination was the increase in pre-merger filings due to M&A activity and lack of adequate staffing. The practical implication of this policy shift, however, is to increase delays and the potential for heightened scrutiny of merger activities.

Similarly, in August of 2021, the FTC announced via blog post that it would "adjust" its merger review process to address the increase in pre-merger filings under HSR. FTC has begun sending notifications to parties to proposed transactions advising that the agency has not completed its non-public investigation during the waiting period and parties who choose to close despite HSR having not sent a second request, risk the FTC taking action at a later date. While the FTC has always had the legal ability to challenge transactions even when HSR clearance has been obtained, the FTC's confusing messaging on these issues has led to further ambiguity and uncertainty in the M&A arena.

FTC Chair Khan has noted that the FTC will evaluate potential harms to workers in small businesses as part of its antitrust M&A enforcement authority. Chair Khan has also noted the following initiatives so that the FTC can channel its enforcement resources on areas likely to have the greatest impact: reviewing dominant firms where lack of competition makes unlawful conduct more likely; revising merger guidelines and identifying "ways to deter unlawful transactions"; addressing "gatekeepers and dominant middlemen across the economy" that are exercising market power; addressing the growing role of private equity and other investment vehicles that may distort competition; and confronting contract terms that arise from "market power abuses" and create "consumer protection concerns," such as non-compete clauses.

The FTC has also identified the following areas for increased scrutiny: unlawful mergers in any industry; technology companies in digital platforms; hospitals, pharmaceutical companies and pharmacy benefit managers; labor markets (with a particular emphasis on conduct that may limit wages and worker mobility); exploitation of the COVID-19 pandemic; and so-called "repeat" offenders. Recently, Chair Khan has advanced a new concept of "monopsony" in an effort to focus attention on how large firms, especially in the technology space, use pre-eminent market power to dominate the market as a buyer.

These philosophical and substantive changes in antitrust merger enforcement at the DOJ and FTC must be accounted for by companies contemplating a merger or substantial transaction. Practitioners should note that the FTC may keep merger investigations open beyond the HSR waiting period. Counsel need to account for this potential by drafting carefully drawn contract language and closing conditions. In addition, transaction reviews are likely to be more time-consuming and costly given the FTC's stated intention to investigate a wider scope of topics and to seek additional and more expansive discovery during the second request and substantial completion process.

While it is unlikely, given the broad scope and judicial endorsement of the consumer welfare standard, that antitrust enforcement will change immediately, the Biden Administration, through both its policy statement, broad rulemaking and FTC enforcement remedies, is taking significant steps to articulate a much broader view of antitrust enforcement. The fact that the FTC is relying substantially on Executive Order(s) calls into question the long-term impact of these initiatives, but the FTC is clearly seeking to change the long-standing antitrust paradigm. Firms and practitioners in the M&A area should take note.

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