

Biden administration draws harder line on antitrust enforcement

Takeaways

- Enforcement authorities adopt stricter approach to antitrust issues.
- Previously accepted arrangements could be deemed anticompetitive.
- Businesses can manage investigations by taking affirmative steps now.

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The Biden administration's recent appointees are poised to implement several significant changes to antitrust enforcement. Federal Trade Commission (FTC) Chair Lina Khan and the nominee to lead the Department of Justice (DOJ) Antitrust Division, Jonathan Kanter, have advocated robust antitrust enforcement and departures from prior enforcement priorities. Khan and Kanter's aggressive approach will result in more challenges to mergers and business practices, including transactions that have historically been considered permissible.

'Holistic' antitrust approach on the horizon

The consumer welfare standard, the bedrock of U.S. antitrust policy for the last 30 to 40 years, holds that any transaction or course of conduct that tends to lower prices for consumers usually should not be challenged by the government.

However, the appointment of Lina Khan as FTC chair in March 2021 threatens to upend this bedrock principle. Khan rose to prominence through a piece she wrote in the *Yale Law Journal*, "Amazon's Antitrust Paradox," which critiqued the definition and application of the consumer welfare standard. Khan argued that the consumer welfare standard is ill-equipped to handle growing forces in the modern marketplace. Khan believes that the current standard is too narrowly focused on price, and neglects to take a holistic view of the idea of consumer welfare.

Khan wants to move past the established standard of evaluating only price effects and instead consider how a course of conduct or transaction affects consumer choice, the quality of the products available, the impact on labor, and more.

This theoretical argument has recently become policy at the FTC, with Khan distributing a memorandum to staff on Sept. 22, stating that the FTC needs to take a holistic approach to identifying harms, focus on power asymmetries, crack down on rampant consolidation, and address the "dominant intermediaries" who are in a position to dominate the supply chain based on their size and power. Khan also wants to focus FTC resources on the restrictive contract terms that are often imposed by dominant firms.





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Nominee Kanter has also offered some critiques of the application of the consumer welfare standard. Although he has not been as vocal as Khan in advocating antitrust reforms, Kanter is expected to increase antitrust enforcement and apply enhanced scrutiny to types of arrangements that have traditionally been viewed as competitive and lawful.

Anticipate and prepare for potential investigations and challenges

This shift in philosophy among enforcers will likely affect the day-to-day activities of market participants in the energy industry in a number of ways. First, the number of civil and criminal investigations is expected to increase. Even if such investigations do not find criminal or civil liability, they can deter potentially anticompetitive conduct. Second, contracts or clauses that restrict competition are more likely to be the subject of a lawsuit or investigation. These include exclusivity contracts, non-compete clauses, no-poach agreements, mandatory repair clauses, or predatory and bundled discounts. Third, businesses that directly face consumers will become a greater target for antitrust scrutiny. Further, in correspondence with the White House regarding gasoline price increases, the FTC stated it will challenge acquisitions of gasoline retailers by larger companies, target restrictive business practices (like minimum sale prices required by franchisors), and attempt to deter transactions likely to lead to anticompetitive effects. This expected surge in cases will also coincide with a gain in resources for enforcers.

The FTC and DOJ are likely to receive increased funding, allowing them to hire additional staff. Additionally, Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act) filing fees will likely increase in early 2022, which will contribute to the additional financial resources at the government’s disposal.

Companies should also expect a more stringent approach toward merger regulation. While previous regimes at the FTC had a practice of granting early termination to the statutory waiting period established by the HSR Act, this practice has been suspended indefinitely. Instead, the FTC likely will take, at a minimum, the entire waiting period to investigate a transaction. The FTC is also warning companies not to proceed with a transaction if an investigation is still underway. The FTC has started sending warning letters to parties, stating that the parties may close their transaction but the FTC is not precluded from finding the transaction unlawful at a later date. This new approach results in increased uncertainty for parties to transactions, as recently illustrated by 7-Eleven’s acquisition of Speedway from Marathon Petroleum. In that case, the parties completed the transaction following the termination of the statutory period despite a pending FTC investigation. The FTC later required that 7-Eleven divest approximately 8% of the acquired Speedway locations. Additionally, the FTC criticized the parties for consummating the transaction despite the ongoing investigation.

In light of the foregoing, companies should take several steps to deter and detect misconduct.

First, companies should develop and maintain robust antitrust compliance programs. These programs must include training tailored to the specific responsibilities of individual employees, adequate reporting procedures, monitoring, and audits. Additionally, company policy must permit and encourage reporting by employees. An extensive compliance program is a necessity in an era of heightened scrutiny. Should an antitrust violation occur, enforcement authorities often consider whether a company has implemented effective programs aimed at preventing and reporting misconduct. Enforcers may in turn offer compliant companies significantly reduced sentences, diminished penalties, or deferred prosecution or non-prosecution agreements.

Second, care should be taken to ensure documents and contracts are appropriately drafted and do not include unnecessarily inflammatory language, such as stating that a potential transaction will “reduce competition.” Likewise, in considering aspects of an agreement that could, in isolation, be viewed as anticompetitive (such as a non-compete clause), companies should consider whether such terms are necessary to further their goals, or whether less restrictive alternatives will be sufficient.

Finally, companies should ensure that their communications with competitors and trade associations are necessary and procompetitive. Similarly, all information-sharing participants must be informed of their legal obligations and keep documentary records about the content and purpose of their discussions. Even in an era of hyper-scrutiny, companies may be able to avoid investigations with these proper, affirmative steps.



Conclusion

The Biden administration's recent appointees to the FTC and DOJ have advocated for a stricter, more holistic approach to antitrust enforcement and have begun to target traditionally lawful activity. As a result, energy companies should expect an increase in enforcement actions. In anticipation of these changes, companies should take several steps to deter misconduct, including maintaining robust compliance programs and reporting procedures. By taking deliberate steps toward compliance, companies can both avoid and manage antitrust enforcement actions.

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Ed is an experienced antitrust lawyer and litigator with experience representing clients in jury and bench trials, appeals, arbitrations and regulatory investigations. Ed has cross-examined witnesses at trial and won multi-million dollar judgments and has also negotiated with the Department of Justice in criminal investigations that successfully concluded with no enforcement action recommended. In addition to litigating on behalf of clients and defending clients in antitrust and white-collar investigations, Ed provides counseling to clients on antitrust, anti-corruption and regulatory compliance.

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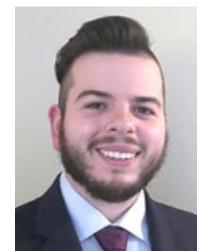
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