

ACC NCR Advanced Topics for In-House Lawyers

Session Four: Antitrust 2.0 – New Administration, New Priorities

Panelists



Debbie Feinstein
Partner, Arnold & Porter



Andre Geverola
Partner, Arnold & Porter



Jonathan Gleklen
Partner, Arnold & Porter

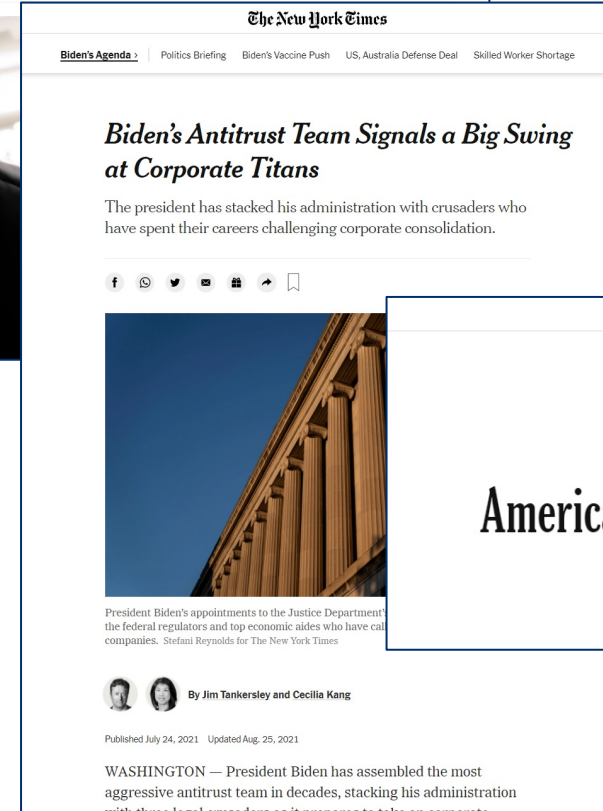
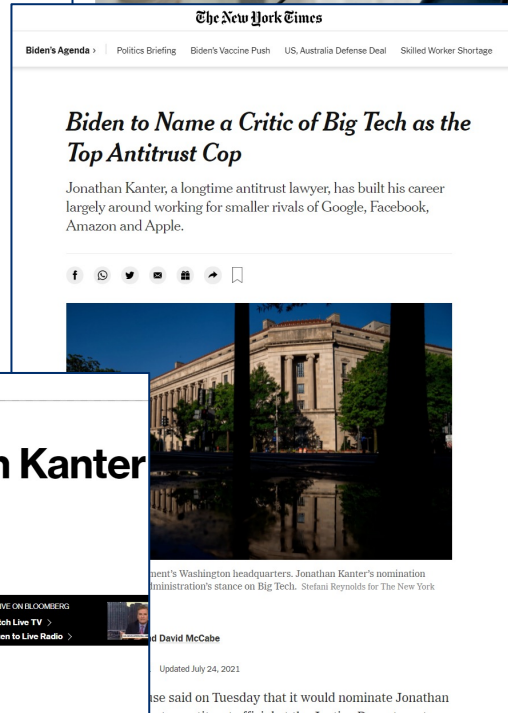
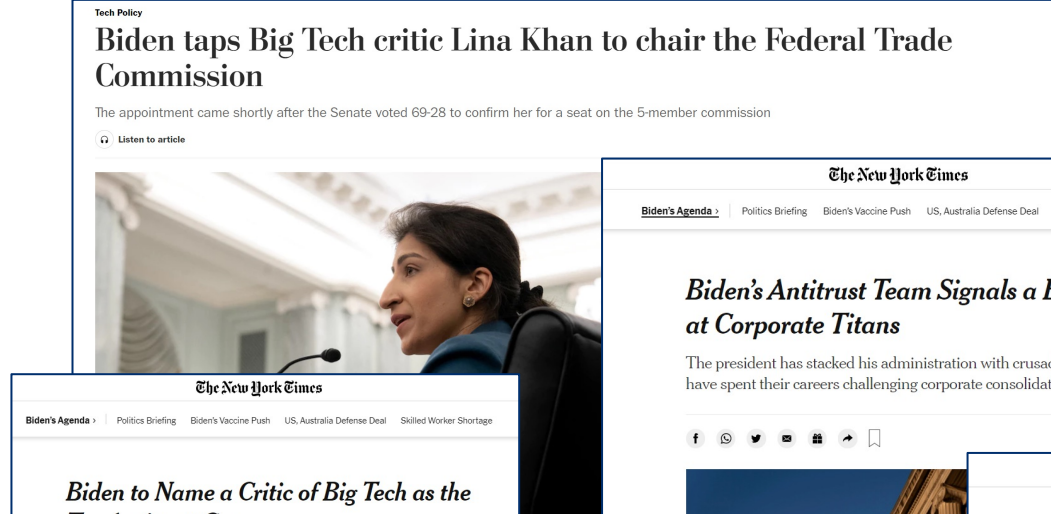


Brinkley Tappan
Asst. VP & Senior Legal
Counsel, AT&T

Antitrust in the New Administration



Antitrust Enforcement Climate



New Enforcers

FTC



Lina Khan
FTC Chair



Alvaro Bedoya
FTC Commissioner
(Nominated)

DOJ



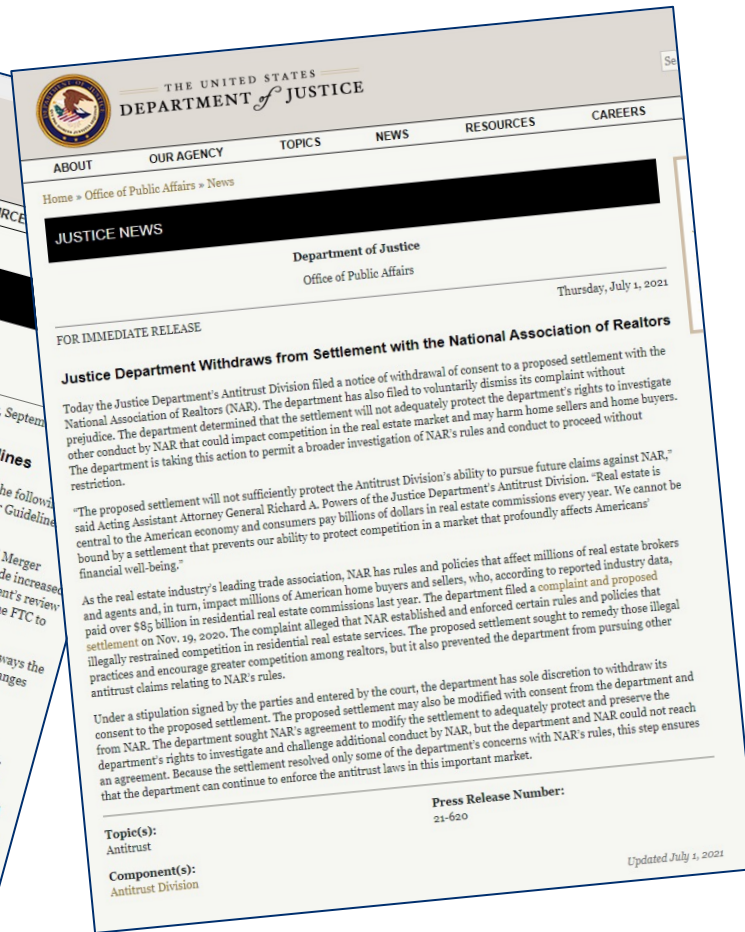
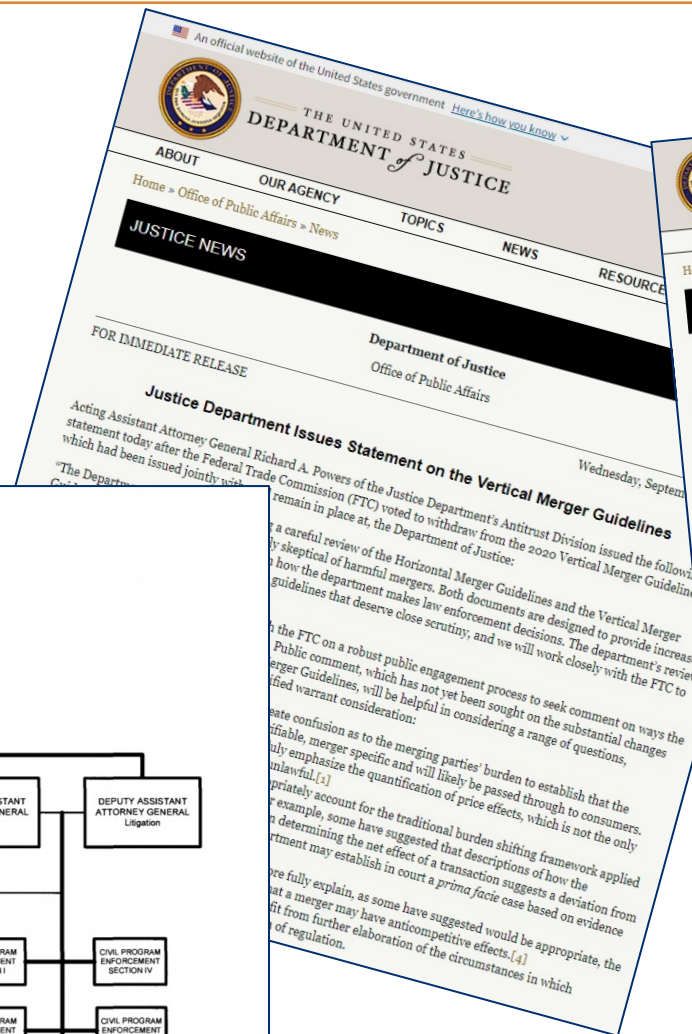
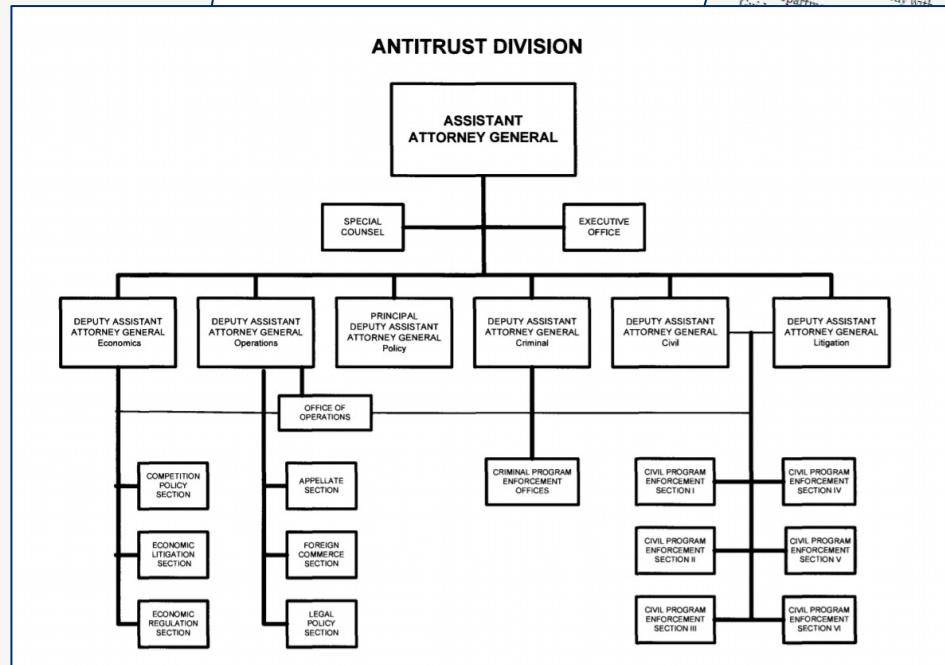
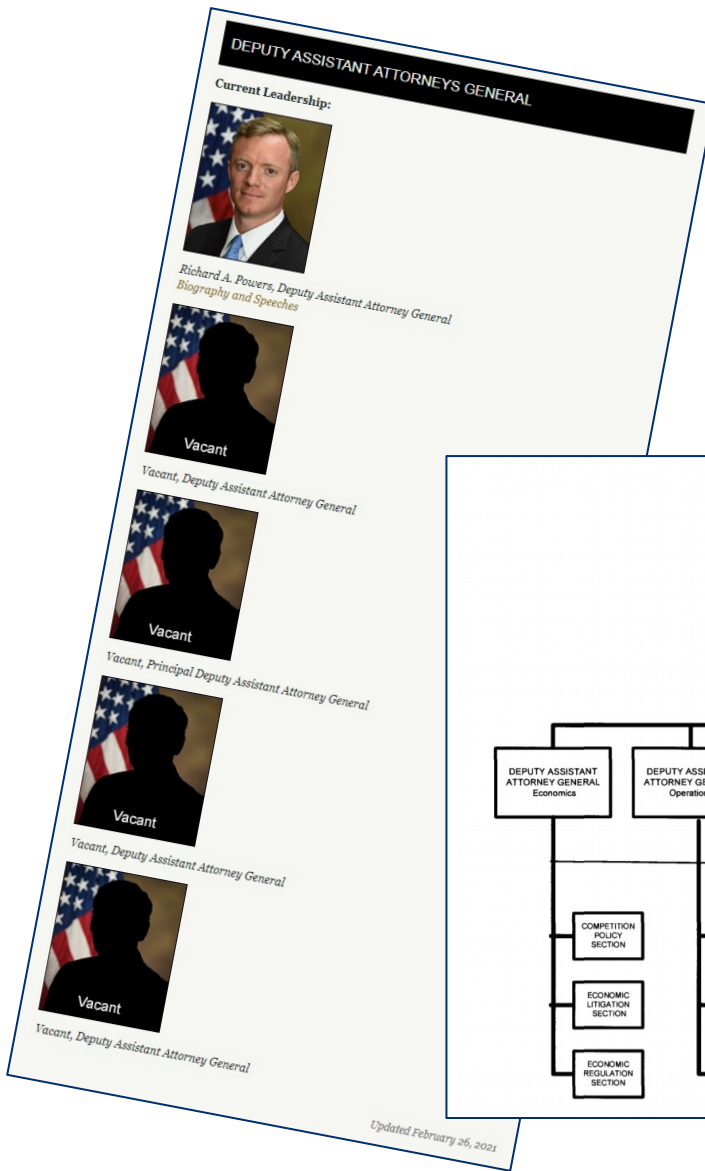
Jonathan Kanter
DOJ Antitrust AAG
(Nominated)

White House

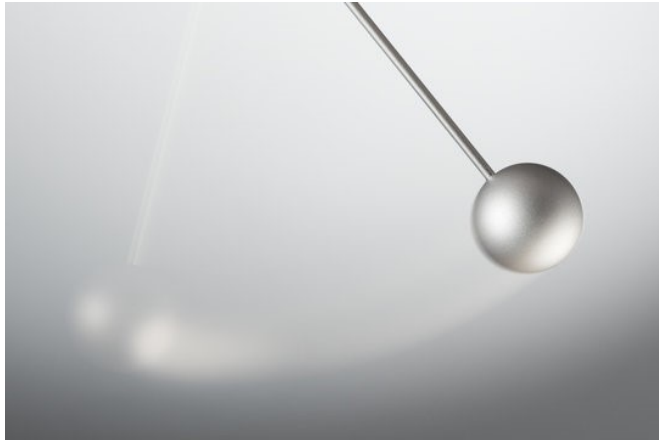


Tim Wu
Special Assistant to
the President for
Technology &
Competition Policy

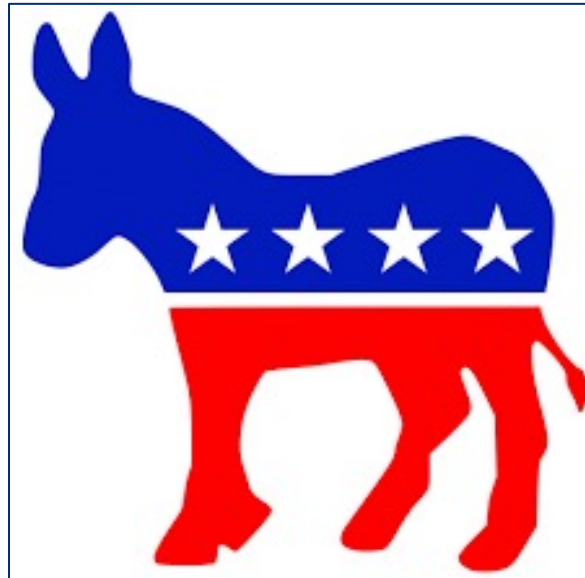
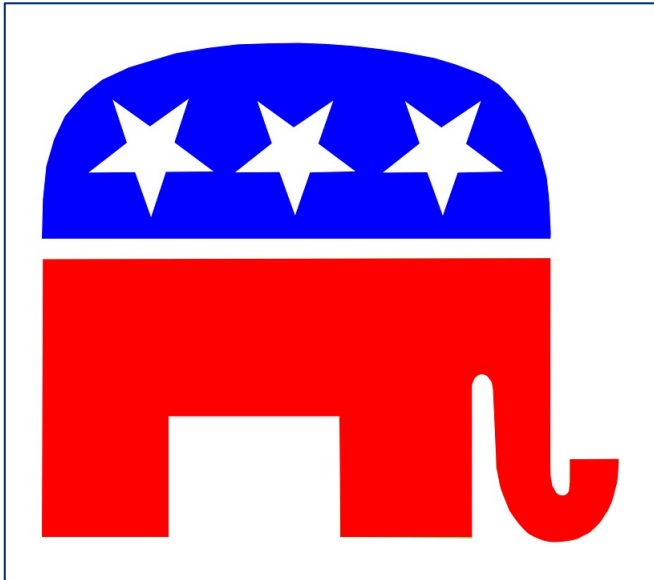
What Happens While There Is No Confirmed DOJ Leadership?



Are Democratic Administrations Different From Republicans?



“Compared to the pendulum narrative, the article’s interpretation of modern antitrust experience more strongly emphasizes elements of continuity and the cumulative nature of public antitrust enforcement.”
The Modern Evolution of U.S. Competition Policy Enforcement Norms
- Bill Kovacic (Former Republican FTC Chair)



TECHNOLOGY

New FTC Chair Lina Khan Wants To Redefine Monopoly Power For The Age Of Big Tech

July 1, 2021 - 11:45 AM ET



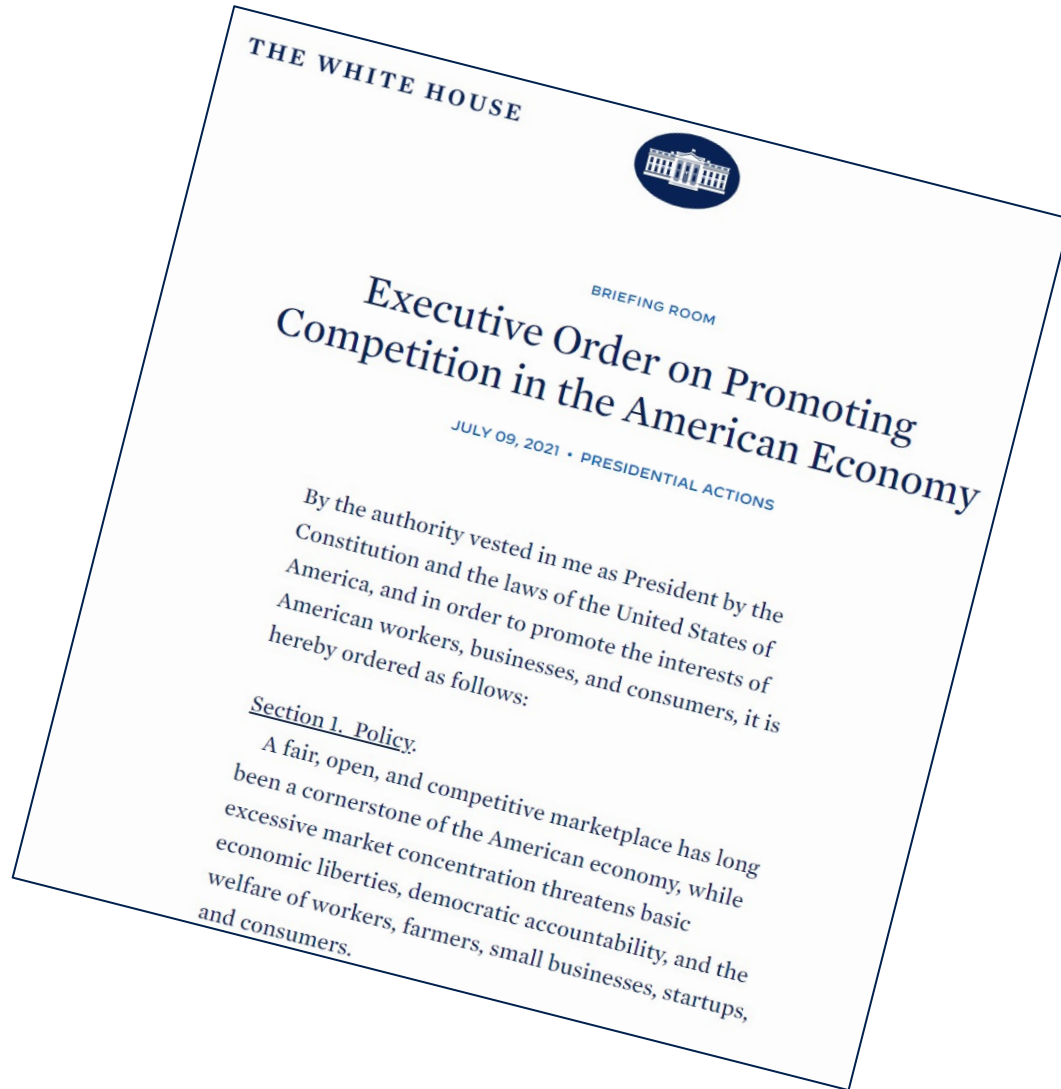
SHANNON BOND

The Antitrust Revolution Has Found Its Leader

With Lina Khan as chair, the FTC may have an anti-monopoly majority for the first Time in a generation. And Wall Street is nervous.

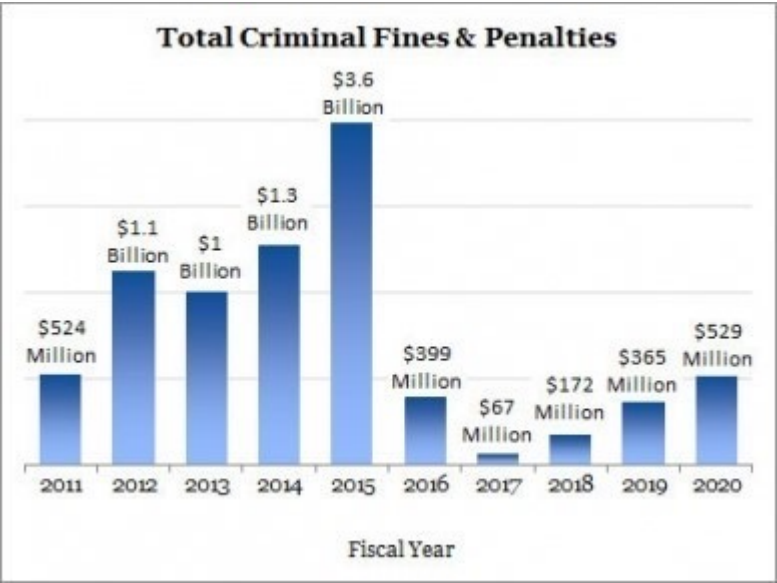
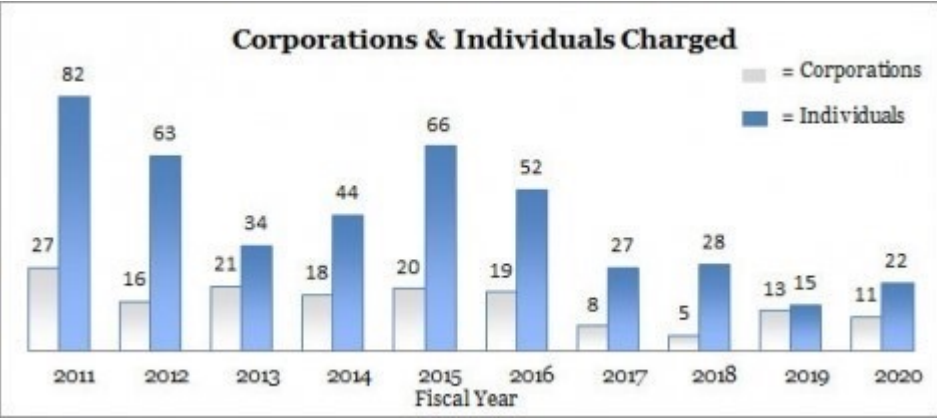
Matt Stoller Jun 16 ❤️ 72 💬 15 ➦

The Biden Executive Order



- Labor markets
- Agriculture
- Big Tech
- Pharma
- Telcos
- Airlines
- Rail & Shipping
- Healthcare
- Defense
- Alcohol
- Financial Services

Criminal Enforcement In The New Administration



THE UNITED STATES DEPARTMENT OF JUSTICE

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JUSTICE NEWS

FOR IMMEDIATE RELEASE

Department of Justice
Office of Public Affairs

Thursday, July 15, 2021

DaVita Inc. and Former CEO Indicted in Ongoing Investigation of Labor Market Collusion in Health Care Industry

A federal grand jury in Denver returned a two-count indictment charging DaVita Inc. and its former CEO, Kent Thiry, for conspiring with competing employers not to solicit certain employees. DaVita owns and operates outpatient medical care centers across the country, focusing on dialysis and kidney care. These charges are the result of the Antitrust Division's ongoing investigation into employee allocation agreements in the health care industry. DaVita's co-conspirator Surgical Care Affiliates LLC and its related entity (collectively SCA) were charged in January, and that case is pending in the Northern District of Texas.

The indictment alleges that DaVita and Thiry both participated in two separate conspiracies to suppress competition for the services of certain employees. Count One charges DaVita and Thiry for conspiring with SCA to allocate senior-level employees by agreeing not to solicit each other's senior-level employees from as early as February 2012 until as late as July 2017. Count Two charges DaVita and Thiry for conspiring with another health care company from as early as April 2017 until as late as June 2019 to allocate employees by agreeing that the other health care company would not solicit DaVita's employees.

"Those who conspire to deprive workers of free-market opportunities and mobility are committing serious crimes that we will prosecute to the full extent of the law," said Acting Assistant Attorney General Richard A. Powers of the Justice Department's Antitrust Division. "We are grateful for our partnership with the FBI and our shared commitment to rooting out illegal collusion targeting labor markets."

"These charges show a disturbing pattern of behavior among health care company executives to conspire to limit the opportunities of workers," said Assistant Director in Charge Steven M. D'Autunno of the FBI's Washington Field Office. "The FBI is dedicated to working with our partners to hold those accountable who would engage in labor market collusion to the detriment of their employees."

DaVita and Thiry are charged with two counts of violating the Sherman Act. The defendants are scheduled for their initial court appearance on July 20 before U.S. Magistrate Judge Kristen L. Mix of the U.S. District Court for the District of Colorado. If convicted, DaVita faces a maximum penalty of a \$500 million fine per count, and Thiry faces a maximum penalty of 10 years in prison and a \$1 million fine per count. The maximum fine per count, and Thiry's gain derived from the crime or twice the loss suffered by victims if either amount is greater than the statutory maximum. A federal district court judge will determine any sentence after considering the U.S. Sentencing Guidelines and other statutory factors.

Today's announcement is the result of an ongoing federal investigation being conducted by the Antitrust Division's Washington Criminal II Section and the Washington Field Office of the FBI.

Anyone with information in connection with this investigation should contact the Antitrust Division's Complaint Center at 888-647-3258, or visit <http://www.justice.gov/atr/report-violations>.

An indictment is merely an allegation, and all defendants are presumed innocent until proven guilty beyond a reasonable doubt in a court of law.

Attachment(s):
Download [DaVita Thiry Indictment.pdf](#)

Topic(s):
Antitrust

Component(s):
Antitrust Division

Press Release Number:
21-658

Updated: July 15, 2021

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JUSTICE NEWS

FOR IMMEDIATE RELEASE

Department of Justice
Office of Public Affairs

Monday, April 19, 2021

Second Individual Charged with Fixing Wages for Health Care Workers and Obstructing FTC Investigation

A federal grand jury in the Eastern District of Texas returned a superseding indictment charging two Texas men with conspiring to fix prices by lowering rates paid to certain health care workers and then conspiring and endeavoring to obstruct a Federal Trade Commission (FTC) investigation of their conduct.

According to court documents, Neeraj Jindal and John Rodgers violated the Sherman Act by agreeing with co-conspirators in 2017 to pay lower rates to certain physical therapists and physical therapist assistants in north Texas, including the Dallas-Fort Worth metropolitan area. At the time, Jindal was the owner and Rodgers was a clinical director of a Texas-based therapist staffing company providing in-home physical therapy services. The superseding indictment alleges their company paid lower rates for several months after entering into the agreement.

Additionally, Jindal and Rodgers are charged with conspiring to obstruct and make false statements in proceedings before the FTC and endeavoring to obstruct those proceedings. According to the superseding indictment, Jindal and Rodgers conspired and then made false and misleading statements and withheld and concealed information during the FTC's investigation to determine whether their company or other therapist staffing companies violated the Federal Trade Commission Act. The superseding indictment follows an indictment against Jindal returned in December 2020.

"The charges announced today underscore the Antitrust Division's ongoing commitment to enforcing antitrust laws, particularly when the victims are American workers who deserve the benefits of competitive wages, mobility, and competition among employers for their services," said Acting Assistant Attorney General Richard A. Powers of the Justice Department's Antitrust Division. "This prosecution also demonstrates how seriously we take our obligation to protect the integrity of investigations into anticompetitive conduct, whether those investigations are conducted by the Department of Justice or another agency."

"Wage-fixing agreements are, at their core, an attempt to artificially rig the labor market to depress wages and deprive workers of competitive salaries and benefits," said Acting U.S. Attorney Nicholas J. Ganjei for the Eastern District of Texas. "The present charges demonstrate that the Department of Justice and its partner agencies will not stand by and allow the exploitation of American workers and the manipulation of the market."

New Antitrust Legislation?

117TH CONGRESS
1ST SESSION

S. 225

To reform the antitrust laws to better protect competition in the American economy, to amend the Clayton Act to modify the standard for an unlawful acquisition, to deter anticompetitive exclusionary conduct that harms competition and consumers, to enhance the ability of the Department of Justice and the Federal Trade Commission to enforce the antitrust laws, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 4, 2021

MS. KLOBUCHAR (for herself, Mr. BLUMENTHAL, Mr. BOOKER, Mr. MARKEY, and Mr. SCHATZ) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To reform the antitrust laws to better protect competition in the American economy, to amend the antitrust laws to modify the standard for an unlawful exclusionary conduct to deter anticompetitive exclusionary conduct that harms competition and consumers, to enhance the authority of the Department of Justice and the Federal Trade Commission to enforce the antitrust laws, and to make such other changes as may be necessary or appropriate.

1 *Be it enacted by the Senate and House*
2 *tives of the United States of America in Con*

117TH CONGRESS
1ST SESSION

H. R. 3816

To provide that certain discriminatory conduct by covered platforms shall be unlawful, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 11, 2021

Mr. CICILLINE (for himself, Mr. GOODEN of Texas, Mr. NADLER, and Mr. BUCK) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide that certain discriminatory conduct by covered platforms shall be unlawful, and for other purposes.

*Senate and House of Representa-
of America in Congress assembled,*

ed as the “American Choice and

MINATORY CONDUCT.

shall be unlawful for a person op-
m, in or affecting commerce, to
n connection with the operation
nat—

117TH CONGRESS
1ST SESSION

H. R. 3825

To promote competition and economic opportunity in digital markets by eliminating the conflicts of interest that arise from dominant online platforms' concurrent ownership or control of an online platform and certain other businesses.

IN THE HOUSE OF REPRESENTATIVES

JUNE 11, 2021

MS. JAYAPAL (for herself, Mr. GOODEN of Texas, Mr. CICILLINE, Mr. BUCK, and Mr. NADLER) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To promote competition and economic opportunity in digital markets by eliminating the conflicts of interest that arise from dominant online platforms' concurrent ownership or control of an online platform and certain other businesses.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 **SECTION 1. SHORT TITLE.**
4 This Act may be cited as the “Ending Platform Mo-
5 nopolies Act”.

117TH CONGRESS
1ST SESSION

H. R. 3826

To promote competition and economic opportunity in digital markets by establishing that certain acquisitions by dominant online platforms are unlawful.

IN THE HOUSE OF REPRESENTATIVES

JUNE 11, 2021

Mr. JEFFRIES (for himself, Mr. BUCK, Mr. CICILLINE, Mr. NADLER, and Mr. GOODEN of Texas) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To promote competition and economic opportunity in digital markets by establishing that certain acquisitions by dominant online platforms are unlawful.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Platform Competition
5 and Opportunity Act of 2021”.

6 SEC. 2. UNLAWFUL ACQUISITIONS.

7 (a) VIOLATION.—It shall be unlawful for a covered
8 platform operator to acquire directly or indirectly—

State Attorney General Enforcement



What Are The States Doing in Antitrust?

THE WALL STREET JOURNAL.

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BUSINESS

States Sue Drug Companies, Executives Over Alleged Price Fixing

The lawsuit, which was filed in Connecticut, involves at least 80 skin products



Letitia James
NY Attorney General

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Attorney General James Leads Multistate Lawsuit Seeking to End Facebook's Illegal Monopoly

AG James Leads Bipartisan Coalition of 48 Attorneys General Charging Anticompetitive Conduct

Facebook Thwarted Competition, Reduced Consumer Privacy for Profits

NEW YORK – New York Attorney General Letitia James today [filed a lawsuit against Facebook Inc., alleging that the company has and continues today to illegally stifle competition to protect its monopoly power](#). The lawsuit alleges that, over the last decade, the social networking giant illegally acquired competitors in a predatory manner and cut services to smaller threats — depriving users from the benefits of competition and reducing privacy protections and services along the way — all in an effort to boost its bottom line through increased advertising revenue. Attorney General James leads a bipartisan coalition of 48 attorneys general from around the nation in filing today's lawsuit to stop Facebook's anticompetitive conduct.

THE WALL STREET JOURNAL.

Jonathan Glek

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TECH

Ten States Sue Google, Alleging Deal With Facebook to Rig Online Ad Market

Texas-led coalition accuses Alphabet unit of striking arrangement with rival tech giant to preserve its own dominance; legal action follows federal case

DOJ's backing of T-Mobile, Sprint merger challenged by state attorneys general

The AGs suing to block the deal say the Department of Justice conducted only a " cursory examination " of the merger.



Marguerite Reardon Jan. 9, 2020 10:40 a.m. PT



The Technology 202 • Analysis

D.C. attorney general targets Amazon's wholesale biz in expanded antitrust suit

Government Procurement



The Procurement Collusion Strike Force

Procurement Collusion Strike Force

Coordinated national response to collusion and antitrust crimes in public procurement

The Procurement Collusion Strike Force (PCSF) leads a coordinated national response to combat antitrust crimes and related schemes in government procurement, grant, and program funding at all levels of government—Federal, state, and local. The PCSF is comprised of the Antitrust Division of the U.S. Department of Justice, multiple U.S. Attorneys' Offices around the country, the Federal Bureau of Investigation (FBI), and the Inspectors General for multiple Federal agencies.

REPORT POSSIBLE VIOLATIONS

Click to Report COVID-19 Procurement Collusion by Email

→ PCSF and the COVID-19 pandemic recovery

Click to Report Other Procurement Collusion by Online Form

→ View other ways to

PCSF National Partners

Department of Justice
Antitrust Division

13 United States Attorneys' Offices (USAOs) around the country:

Central District of California (Los Angeles)

Eastern District of California (Sacramento)

District of Colorado (Denver)

District of Columbia (Washington, DC)

Southern District of Florida (Miami)

Northern District of Georgia (Atlanta)

Northern District of Illinois (Chicago)

Eastern District of Michigan (Detroit)

Southern District of New York (Manhattan)

Southern District of Ohio (Columbus)

Eastern District of Pennsylvania (Philadelphia)

Northern District of Texas (Dallas)

Eastern District of Virginia (Alexandria)

Department of Defense OIG
Defense Criminal Investigative Service (DCIS)

U.S. Postal Service OIG

General Services Administration (GSA) OIG

Department of Justice OIG

Federal Bureau of Investigation (FBI)

Field offices/ICU squads located in 13 districts

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FOR IMMEDIATE RELEASE

Wednesday, June 30, 2021

Belgian Security Services Company and Three Former Executives Indicted for Bid Rigging on U.S. Department of Defense Contracts

A federal grand jury returned an indictment against Belgium-based Seris Security NV (Seris) and three executives for their roles in a conspiracy to fix prices, rig bids and allocate customers for defense-related security services, including a multimillion-dollar contract issued in 2020 to provide security services to the U.S. Department of Defense for military bases and installations in Belgium. This is the second charge and first indictment involving an international conspiracy obtained by the Procurement Collusion Strike Force (PCSF) and follows G4S Secure Solution NV's (G4S) [agreement to plead guilty](#) in the investigation.

"The companies and individuals indicted are alleged to have rigged bids submitted to the U.S. Department of Defense and others, and abused the public trust placed in them as providers of security services at critical locations," said Acting Assistant Attorney General Richard A. Powers of the Department of Justice's Antitrust Division. "We are committed to prosecuting procurement collusion that victimizes U.S. government agencies, wherever it occurs, and we are determined to hold those who seek to exploit U.S. government programs accountable to the fullest extent of the law."

"Today's announcement demonstrates the culmination of extremely well-coordinated, diligent and tireless efforts by the FBI and our law enforcement partners working on the Procurement Collusion Strike Force to root out collusion that targets U.S. taxpayer dollars funding contracts overseas," said Assistant Director in Charge William F. Sweeney Jr. of the FBI's New York Field Office.

"The Defense Criminal Investigative Service (DCIS) is committed to protecting the integrity of the Department of Defense procurement system," said Deputy Director Paul K. Sternal of DCIS. "This indictment demonstrates our resolve, alongside Department of Justice and Procurement Collusion Strike Force partners, to bring those who corrupt the competitive DoD contracting process and endanger U.S. national security to justice."

The indictment, returned in the U.S. District Court for the District of Columbia, charges former G4S Chief Executive Officer Jean Paul Van Avermaet; Seris Security NV (Seris); former Seris Chief Executive Officer Danny Vandormael; and former Seris Director of Guarding & Monitoring Peter Verpoort with conspiring to fix prices, rig bids and allocate customers for contracts for the provision of security services that protect the national security interests of the United States in Belgium. All of the defendants worked in Belgium and are Belgian nationals.


According to the indictment, the charged individuals, on behalf of their companies, along with other co-conspirators, participated in a conspiracy to fix prices, rig bids and allocate customers for contracts to provide security services in Belgium, including contracts for the U.S. Department of Defense and the North Atlantic Treaty Organization. Those services included protecting military buildings and installations via the physical presence of guards, mobile monitoring and

Arnold & Porter

Compliance



New DOJ Approach to Compliance Programs



THE UNITED STATES
DEPARTMENT OF JUSTICE

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JUSTICE NEWS

Department of Justice
Office of Public Affairs

FOR IMMEDIATE RELEASEThursday, July 11, 2019

Antitrust Division Announces New Policy to Incentivize Corporate Compliance

During remarks today, Assistant Attorney General Makan Delrahim announced the Antitrust Division's new policy for incentivizing antitrust compliance. For the first time, the Division will consider compliance at the charging stage in criminal antitrust investigations, a change which is reflected in the Justice Manual. The Division also announced revisions to its Manual and published a document to guide prosecutors' evaluation of corporate compliance programs at the charging and sentencing stage.

"The Antitrust Division is committed to rewarding corporate efforts to invest in and instill a culture of compliance," said Assistant Attorney General Delrahim. "The Division's Leniency Policy has long provided the ultimate credit for effective antitrust compliance programs. Beyond leniency, recently we have credited prospective compliance efforts at sentencing. Crediting compliance at charging is the next step in our continued efforts to deter antitrust violations and reward good corporate citizenship. We also remain dedicated to predictability and transparency. As such, in concert with today's policy changes, the Division issued a public guidance document that outlines what prosecutors look for when evaluating antitrust compliance programs."

The Justice Manual previously explained the Antitrust Division's policy "that credit should not be given at the charging stage for a compliance program." That text has been deleted.

The Division also updated its Manual. The revisions address evaluating compliance programs at the charging and sentencing stage, and Division processes for recommending indictments, plea agreements, and selecting monitors.


For the first time, the Division also published a guidance document that focuses on evaluating compliance programs in the context of criminal violations of the Sherman Act. It is intended to assist Division prosecutors in their evaluation of compliance programs at both the charging and sentencing stage of investigations, and to provide compliance officers and the public greater transparency of the Division's compliance analysis. To that end, it contains two sections: the first relates to evaluating antitrust compliance programs at the charging stage, and the second addresses compliance considerations at sentencing.

Topic(s):
Antitrust

Press Release Number:
19-756

Component(s):
Antitrust Division

Updated July 11, 2019

U.S. Department of Justice

U.S. Department of Justice
Antitrust Division

Evaluation of Corporate Compliance Programs in
Criminal Antitrust Investigations

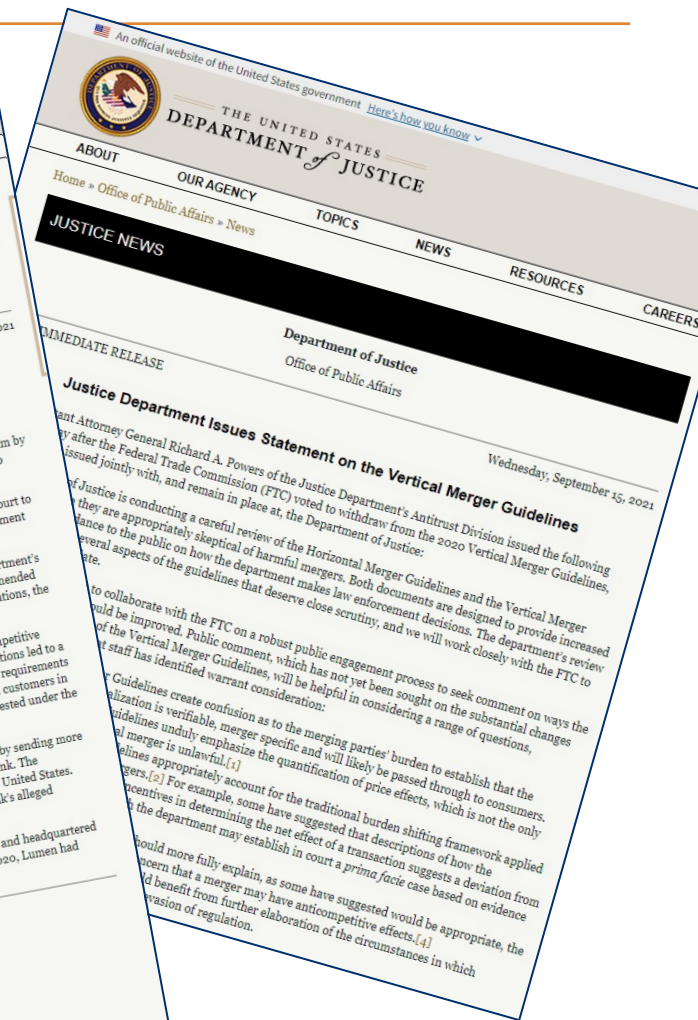
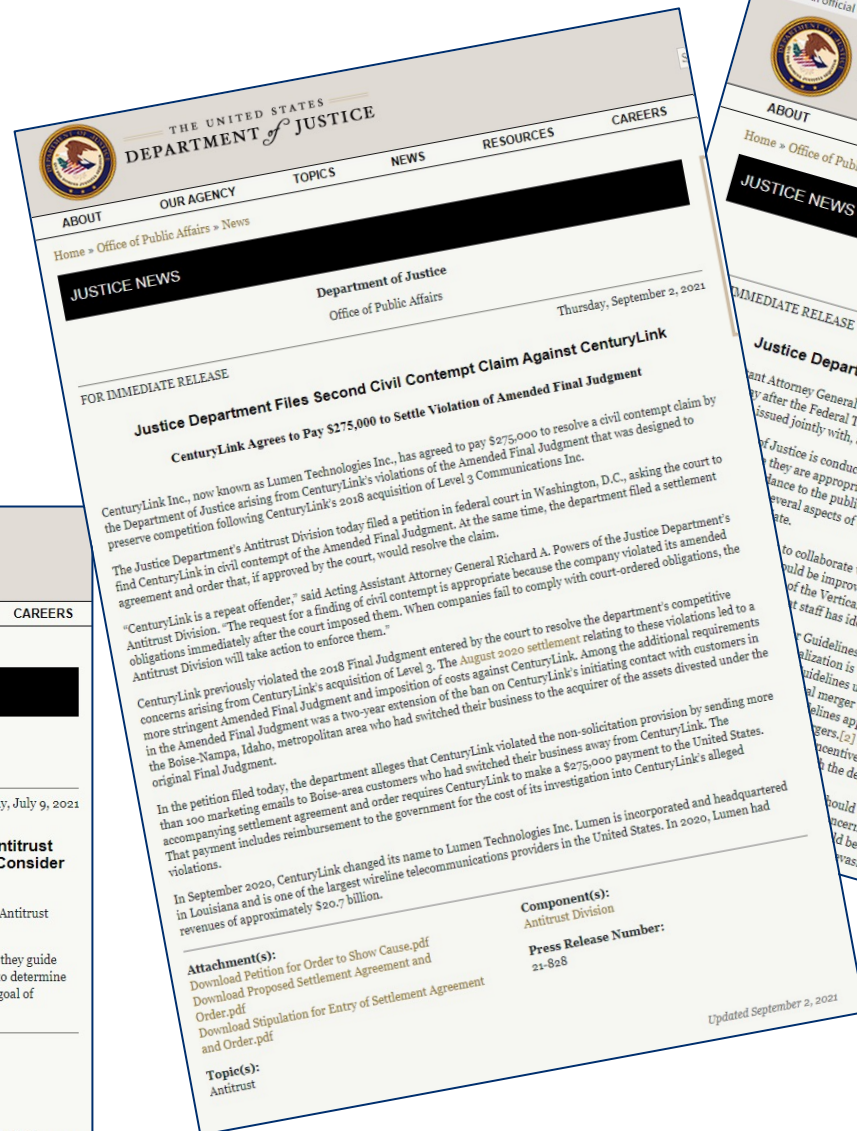
July 2019

1. Design and comprehensiveness
2. Culture of compliance
3. Responsibility for the compliance program
4. Risk assessment
5. Training and communication
6. Periodic review, monitoring and auditing
7. Reporting
8. Incentives and discipline
9. Remediation and the role of the compliance program in the discovery of the violation

Mergers



How is the Biden DOJ Approaching Mergers?



Important Merger Developments at the FTC



FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

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Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary

September 15, 2021

2020 guidance withdrawn to prevent industry and judicial reliance on unsound economic theories; FTC to work with DOJ to update merger guidance

FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers

July 21, 2021

Eliminating the policy statement restores a valuable tool to stop illegal mergers

FTC Fines Capital One CEO Richard Fairbank for Repeatedly Violating Antitrust Laws


September 2, 2021

On multiple occasions, Wall Street banker failed to comply with federal antitrust laws when he illegally finalized stock acquisitions

FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies

September 15, 2021

Report analyzes acquisitions by Alphabet/Google, Amazon, Apple, Facebook, and Microsoft



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Director
Bureau of Competition

August 3, 2021

By Electronic Mail

Jane Doe
Law Firm XYZ
Washington, DC 20001

Re: *Company A Side/Company B Side Transaction*, FTC File No. XXX-XXXX

Dear Ms. Doe:

As you know, the Federal Trade Commission's Bureau of Competition has been conducting a nonpublic investigation to determine whether the above-referenced transaction may violate Section 7 of the Clayton Act, 15 U.S.C. § 18, or Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Although the waiting period will expire imminently, the Commission's investigation remains open and ongoing.

Please be advised that if the parties consummate this transaction before the Commission has completed its investigation, they would do so at their own risk. Any inaction by the Commission before the expiration of the waiting period should not be construed as a determination regarding the lawfulness of the transaction. Indeed, no such determination could be made unless and until the Commission completes its investigation. The parties cannot stop the investigation or avoid an enforcement action by consummating. To the contrary, and in keeping with its commitment to aggressive enforcement, the Commission may challenge transactions—before or after their consummation—that threaten to reduce competition and harm consumers, workers, and honest businesses.

Accordingly, even if the parties consummate the above-referenced transaction, the Commission may still take further action as the public interest may require, which may include any and all available legal actions and seeking any and all appropriate remedies.

Sincerely,

Holly Vedova
Acting Director
Bureau of Competition

Other Topics

