Navigating the FTC's Unprecedented Antitrust Agenda
CLE Presentation to ACC

July 20, 2023

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Agenda

- Overview of Government Merger Enforcement under President Biden
- FTC Challenge to Meta/Within Merger
- Recent FTC Developments
- What In-House Counsel Should Know
- Opportunity for Q&A

Government Merger Enforcement

Leadership at the Antitrust Enforcement Agencies

Biden administration leadership at the FTC and DOJ Antitrust Division criticize prior "under enforcement" of antitrust laws

- **Lina Khan, FTC Chair:**
  - Commissioner Khan was sworn in as FTC Chair in June 2021
  - A 2017 law school graduate, Chair Khan has advocated for increased antitrust enforcement, especially in the tech sector, as Counsel to the U.S. House Subcommittee on Antitrust, and as an Associate Professor at Columbia Law School

- **Jonathan Kanter, DOJ Assistant Attorney General**
  - Mr. Kanter was sworn in as AAG in November 2021
  - AAG Kanter has been a partner in the Washington D.C. offices of two national law firms prior to founding a boutique antitrust law firm in 2020

The Antitrust Enforcement Climate

Agencies are using aggressive antitrust enforcement as a central part of its economic agenda:

- Establishment of "Competition Czar" and Executive Order on competition policy to coordinate competition-focused decisions across federal agencies
- Communications attributing a wide range of economic issues (e.g., supply chain, wage stagnation, and inflation) on "market concentration"
- White House support for expansive antitrust legislation in Congress

FTC/DOJ Enforcement

Aggressive enforcement

- Record number of merger investigations
  - More and longer investigations
  - Fewer settlements, more litigation and more deals abandoned
  - More litigation applying rarely invoked legal theories
- Review and amend merger guidelines
  - FTC withdraws vertical merger guidelines (Sep. 2021)
  - DOJ withdraws healthcare merger policy (Feb. 2, 2023)
  - Anticipated new merger guidelines (announced Mar. 2023)

Agencies Pursuing Broader Array of Potential Theories of Harm

- **The FTC and DOJ are investigating increasingly broad theories of competitive harm**
- Particular emphasis on harm beyond price:
  - Greater focus on product quality, convenience, privacy/data, reduced innovation
  - Monopsony issues (i.e., buyer power)
  - Harm to employees (which we expect to appear in the revised Merger Guidelines)
    - President Biden's July 2021 Executive Order expressly aims to increase competition in labor markets through: (i) new rules, (ii) enhanced enforcement to limit labor restrictions, and (iii) challenges to transactions that harm employees
  - Vertical and Conglomerate: Ability and incentive to engage in post-merger bundling, tying, or exclusionary conduct
  - Big is bad" and hostility to mergers as legitimate means of expansion and innovation
- **Courts and resources remain an important check: Reliance on precedent and ideological makeup of courts make them less likely to accept untested/obscure theories; willingness of parties to litigate stretches agency resources**

Investigations Taking Longer, With Greater Uncertainty For Merger Partners

- Agencies suspended all Early Terminations in February 2021
- Agencies issuing more Second Requests and the bar to issue a Second Request is lower
  - The Chair of the FTC in some cases has overruled Staff to issue Second Requests
- Longer and more burdensome merger investigations
  - FTC/DOJ investigations currently average 11-12 months, up from ~7 months a decade ago
- Both the FTC and DOJ are now issuing "warning letters" claiming that investigations are ongoing and post-closing challenges may occur

"If you share the hostile view of mergers to which antitrust reformers subscribe, then **HSR . . . looks more like an opportunity to slow or stop M&A activity in general**. . . . Using HSR this way has several benefits:

First, it allows you to talk about it, broadcasting hostility to M&A that has a **positive branding effect for enforcers** and may also have some deterrent effect for M&A;

Second, you can **sow uncertainty and run up the cost of getting deals done,** taxing M&A and making the market for corporate control less efficient;

Third, these strategies can be **accomplished without courts**; and

Fourth, it **shields enforcers from political accountability** for enabling M&A."

– Former Commissioner Noah Phillips, *Disparate Impact: Winners and Losers from the New M&A Policy* (Apr. 27, 2022)

FTC/DOJ Litigation Strategy

FTC Chair Lina Khan

“I’m certainly not somebody who thinks that success is marked by a 100% court record. I think, as public enforcers, we have a special obligation to bring the hard cases.”

Assistant AG Jonathan Kanter

“I am here to declare that the era of lax enforcement is over, and the new era of vigorous and effective antitrust law enforcement has begun.”

The Regulatory Landscape has Become Much More Challenging in the Biden Administration

The Biden Administration has upended merger enforcement norms

- Appointed highly aggressive enforcers Lina Khan (FTC) and Jonathan Kanter (DOJ) and Special Assistant to the President for Technology and Competition Policy (Columbia Prof. Tim Wu, since returned to academia)
- Withdrawn/significantly revising Merger Guidelines, pursuing novel and discarded theories
- Signaled hostility to remedies
- Particular focus on technology and healthcare sectors, labor markets
- Similar aggressiveness being seen in Europe (Post-Brexit CMA, EC, member states), Australia (ACCC)
- Proposed unprecedented changes to HSR filings, enforceability of non-compete agreements, and interpretation of the FTC's authority.

Seldom Used Merger Theories

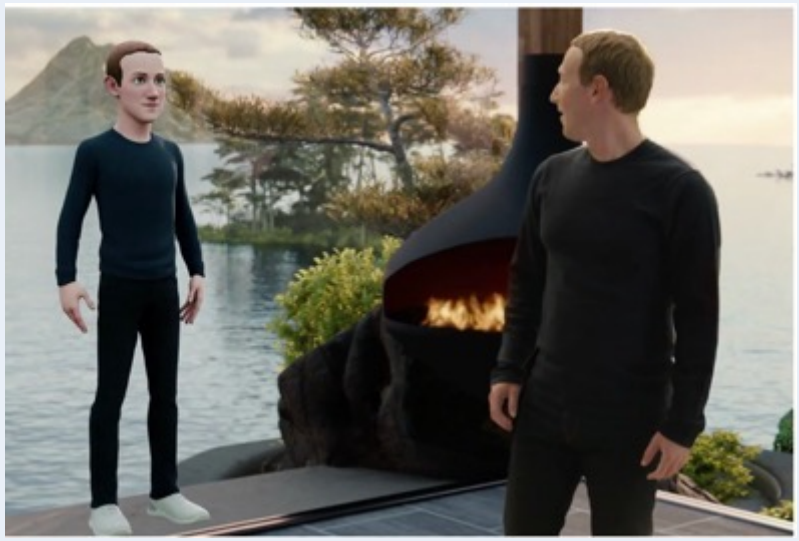
FTC Challenge to the Meta/Within Merger

The Meta/Within Merger

- Within developed “Supernatural,” a VR fitness app featuring trainer-guided workouts
- Acquisition would place Meta in the nascent VR fitness space, **a key piece of the company’s metaverse ambitions**
- Companies signed the agreement on October 29, 2021
- Meta **reports** the transaction to the FTC

Meta

WITHIN



The Meta/Within Merger

The FTC's Investigation: Old and New Theories of Harm

- Horizontal Overlaps
- Possible future entry by Meta ("Actual Potential Competition")
- Effect of potential entry by Meta on current market ("Perceived Potential Competition")
- Foreclosure of other fitness apps and other VR platforms

After a substantial investigation of over six months, **FTC Staff** recommended allowing the deal to close **without a challenge…**

FTC's Khan Overruled Staff to Sue Meta Over VR App Deal, Bloomberg News (July 29, 2022)

FTC Front Office Votes 3-2 to Challenge Meta/Within

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For Release

FTC Seeks to Block Virtual Reality Giant Meta's Acquisition of Popular App Creator Within

Agency Alleges that Meta and CEO Mark Zuckerberg are Attempting Illegal Acquisition to Expand Virtual Reality Empire

July 27, 2022

Tags: Competition | Bureau of Competition | Merger | Horizontal | Internet commerce | Technology | Gaming

The Federal Trade Commission is seeking to block virtual reality giant Meta and its controlling shareholder and CEO Mark Zuckerberg from acquiring Within Unlimited and its popular virtual reality dedicated fitness app, Supernatural. Meta, formerly known as Facebook, is already a key player at each level of the virtual reality sector. The company's virtual reality empire includes the top-selling device, a leading app store, seven of the most successful developers, and one of the best-selling apps of all time. The agency alleges that Meta and Zuckerberg are planning to expand Meta's virtual reality empire with this attempt to illegally acquire a dedicated fitness app that proves the value of virtual reality to users.

Related Cases

Meta Platforms, Inc./Mark Zuckerberg/Within Unlimited, FTC v.

Topics

Merger Review

Competition in the Technology Marketplace

The Washington Post
Democracy Dies in Darkness

Tech | Help Desk | Artificial Intelligence | Internet Culture | Space | Tech Policy

TECH POLICY

Federal Trade Commission sues to block Meta's acquisition of VR company

The agency argues the deal would put Facebook's parent company one step closer "to its ultimate goal of owning t entire 'Metaverse'"

By Cat Zakrzewski and Naomi Nix
Updated July 27, 2022 at 6:53 p.m. EDT | Published July 27, 2022 at 2:08 p.m. EDT

Lina Khan, chair of the Federal Trade Commission, speaks during a Senate confirmation hearing on April 21, 2021. (Saul Loeb/Reuters)

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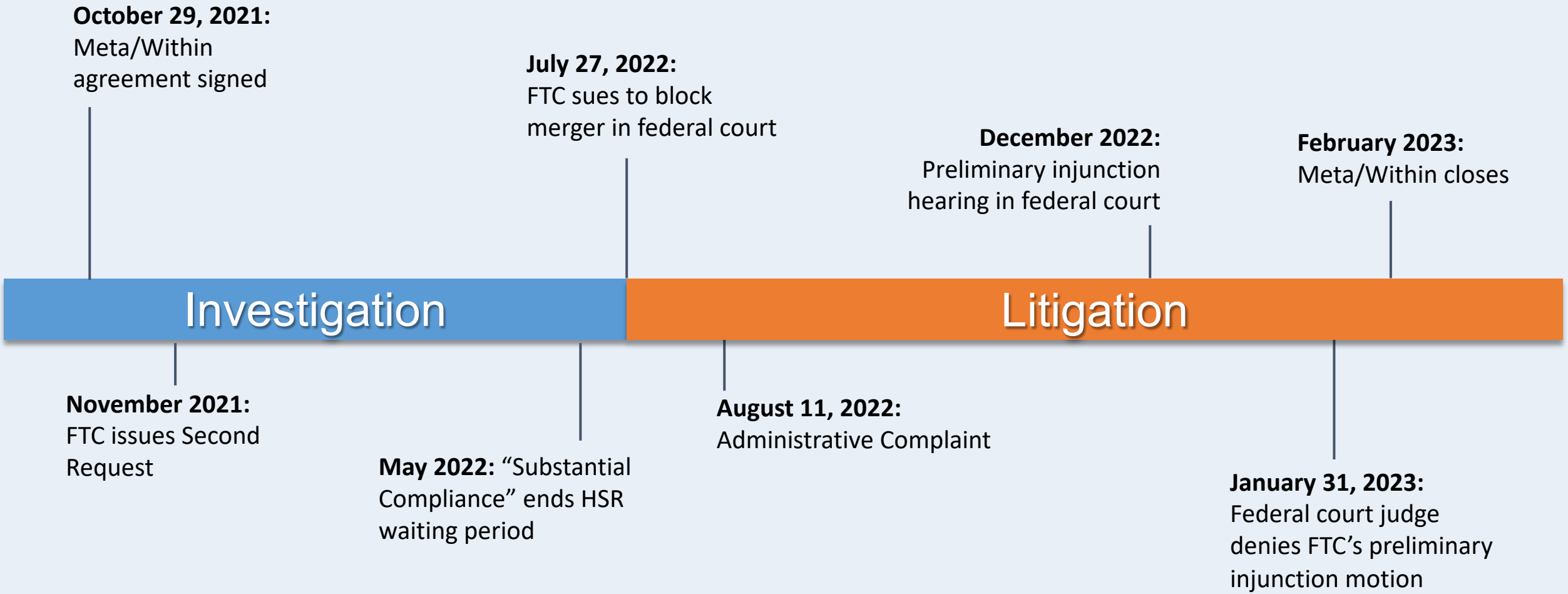
The FTC's Investigation and Litigation



The FTC's Two-Track Process

- When FTC challenges an unconsummated merger, it typically files for a preliminary injunction in federal court and an administrative action in its internal court at the same time
- The FTC alleged both current competition and potential competition ("actual" and "perceived") theories of harm
  - Following discovery dispute, FTC dropped its current competition theory of harm

The Preliminary Injunction Hearing

December 2022: 7-day evidentiary hearing

- 9 Meta witnesses
- 3 Within witnesses
- 11 third-party witnesses
- 5 expert witnesses

January 2023: Court denied the FTC's motion for a PI

- **NYT: "A stinging defeat for FTC Chair Lina Khan"**

February 2023: Meta and Within close transaction and FTC withdraws administrative complaint

Brown Shoe Carries the Day for Market Definition Over the Hypothetical Monopolist Test

For the reasons explained above, the Court finds that the following *Brown Shoe* "practical indicia" support the FTC's assertion that VR dedicated fitness apps constitute the relevant product market: industry or public recognition; peculiar characteristics and uses; unique production facilities; distinct customers; and (to a lesser degree) distinct prices. These factors indicate that VR dedicated fitness apps present in-market firms with an economic opportunity that is distinct from both other VR apps and other fitness offerings. *See Thurman Indus., Inc.*, 875 F.2d at 1375.

The Court therefore finds that the FTC has met its burden of showing that VR dedicated fitness apps constitute a relevant antitrust product market. *Brown Shoe*, 370 U.S. at 325–28; *see also Lucas Auto. Eng.*, 275 F.3d at 766–68 (relying on *Brown Shoe* factors alone in review of relevant market); *Klein*, 580 F. Supp. 3d at 766–73 (same); *Newcal Indus.*, 513 F.3d at 1051 ("Even when a submarket is an *Eastman Kodak* submarket, though, it must bear the 'practical indicia' of an independent economic entity in order to qualify as a cognizable submarket under *Brown Shoe*.").

FTC v. Meta Platforms Inc., No. 5:22-cv-04325-EJD, pp. 29-30 (N.D. Cal. Jan. 31, 2023) (Davila, J.)

The Court Credits the Potential Competition Doctrine But Says Business People Matter

States, 418 U.S. 906 (1974), and *aff'd*, 418 U.S. 906 (1974). Given the actual potential competition doctrine's consistent, albeit distant, history of judicial recognition, the Court declines to reject the theory outright and will apply the doctrine as developed. *See FTC v. Steris Corp.*,

Given the many *a priori* inferences required by the doctrine, the Court is wary of any inquiry that strays too close to the specters of ephemeral possibilities, yet it must nonetheless ensure the standard does not require the FTC to operate on certainties. The Court accordingly holds that the "reasonable probability" standard—as clarified by the Fifth Circuit to suggest a likelihood noticeably greater than fifty percent—is the standard of proof that the FTC must present.

subjective evidence. The FTC asserts that it may meet its burden using solely objective evidence regarding Meta's "overall size, resources, capability, and motivation." Mot. 18–19; *see also* FTC

Here, the Court will first consider whether the objective evidence presented by the FTC supports the findings and conclusions necessary to satisfy the actual potential competition doctrine. If the objective evidence is weak, inconclusive, or conflicting, the Court will consult subjective evidence to illuminate the ambiguities left by the objective evidence, with the understanding that the subjective evidence cannot overcome any directly conflicting objective evidence. *See Falstaff Brewing*, 410 U.S. at 570 ("[T]he subjective evidence may serve as a

FTC v. Meta Platforms Inc., No. 5:22-cv-04325-EJD, pp. 40-43, (N.D. Cal. Jan. 31, 2023) (Davila, J.)

The Court Finds the FTC's Evidence of Actual Potential Competition by Meta Insufficient

> Nevertheless, the FTC has implied that the Court may infer that Meta would have entered the market *de novo*—irrespective of its actual plans for entry—using "available feasible means" unbeknownst to the parties or the Court. *See* FTC Closing Hr'g Tr. 1494:16–18 ("We don't have to show that Meta actually had a subjective intention to enter the market."). To the extent the FTC implies that—based solely on the objective evidence of Meta's resources and its excitement for VR fitness—it would have inevitably found and implemented some unspecified means to enter the market, the Court finds such a theory to be impermissibly speculative.

> In setting forth this standard, the Court rejects the FTC's suggestion that it need only provide "[p]robabilistic proof of 'likely influence' on existing competitors."

FTC v. Meta Platforms Inc., No. 5:22-cv-04325-EJD (N.D. Cal. Jan. 31, 2023) (Davila, J.)

Example of Court Crediting Ordinary Course Documents

But even more pertinent … is the evidence that Meta had consciously considered and appeared doubtful of the proposition to build its own independent VR fitness app.

The pre-read strategy document prepared for Mark Rabkin's attention contains a separate section that "[i]t will be hard to build Fitness from scratch." … The document also recognized that Meta would have to "build new kinds of expertise at the intersection of software, instructor-led fitness, music, media." Id. The decision not to build Meta's own VR fitness app is corroborated by the lack of any other contemporaneous discussion on the topic.

FTC v. Meta Platforms Inc., No. 5:22-cv-04325-EJD, pp. 52 (N.D. Cal. Jan. 31, 2023) (Davila, J.)

The Court Also Finds the FTC's Evidence of Perceived Potential Competition by Meta Insufficient

> In summary, the Court finds that the objective evidence does not support a reasonable probability that firms in the relevant market perceived Meta as a potential entrant. Even if it did, the Court finds that there is no direct or circumstantial evidence to suggest that Meta's presence did in fact temper oligopolistic behavior or result in any other procompetitive benefits. Accordingly, the FTC has not demonstrated a likelihood of ultimate success as to its Section 7 claim arising from perceived potential competition.

FTC v. Meta Platforms Inc., No. 5:22-cv-04325-EJD , pp. 64 (N.D. Cal. Jan. 31, 2023) (Davila, J.)

Takeaways

- The FTC is seriously investigating and challenging transactions that would not have gone beyond the 30-day initial waiting period in the past
- Markets are being defined narrowly
- Non-traditional theories of harm are on the table
- The pre-signing merger analysis and antitrust agreement provisions matter more than ever
- Ordinary course documents are very important
- The testimony of the core business people in the trenches matter

FTC Act Section 5 Developments

Recent FTC Developments

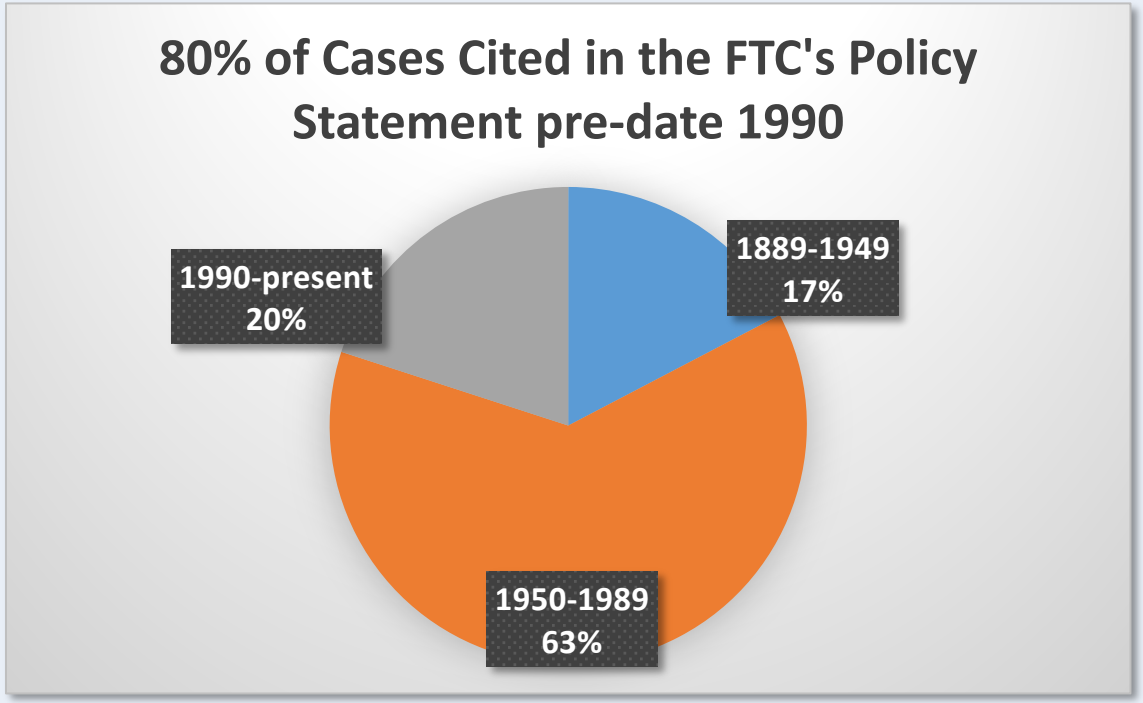
Recent FTC Developments

- Policy Statement on Section 5 of the FTC Act
- FTC's Proposed Rulemaking on Non-Compete Agreements
- Proposal of Major Changes to the HSR Act Filing Requirements
- Nomination of Republican FTC Commissioners

The FTC's Section 5 Policy Statement

- **An aggressive plan to use the FTC Act to regulate an expansive range of business practices on the basis that they are simply "unfair":**
  - Includes conduct that would not violate the Sherman and Clayton Acts, the primary antitrust statutes

- **The FTC's Policy Statement offers very little practical guidance**
  - The legal framework states that unfair conduct will be "*coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature*" that "*negatively affect[s] competitive conditions*"
  - The FTC has grounded its legal authority in opinions and case law that ignores the last 40 years of judicial precedent developing and applying the consumer welfare standard



The FTC's Section 5 Policy Statement (cont.)

- **The list of conduct that the FTC believes may violate Section 5 includes:**
  - A series of transactions that tend to bring about antitrust harms
  - Using market power in one market to entrench or impede competition in the same or related market (i.e., tying, bundling, exclusive dealing, loyalty rebates)
  - Practices that facilitate coordination
  - Parallel exclusionary conduct that may cause aggregate harm
  - Conduct that, taken cumulatively with other conduct, undermines competition
  - Interlocking directorates and officers of competing firms not covered by the Clayton Act
- **The FTC has a number of procedural tools available to test its Section 5 authority:**

FTC Legal Authority	Statute	Likelihood
Administrative litigation	15 U.S.C. § 45(b)	**Most Likely**
Seeking injunctive action in fed. court	15 U.S.C. § 53(b)	Moderately Likely
Rulemaking	15 U.S.C. § 46(g)	Less likely

The FTC's Section 5 Policy Statement (cont.)

- **The circumstances, context, and facts surrounding the conduct in question will continue to determine whether the FTC will take action to stop business conduct.**
  - What is the business justification for the conduct?
- **Businesses should:**
  - Provide employees and executives with updated guidance on conduct that may be subject to regulatory activity ***as we learn more about the FTC's agenda in this area***
  - Factor the risk of a new or extended conduct investigation into otherwise routine merger filings, second request document productions, third-party subpoenas, consumer protection CIDs or other interactions with the FTC

FTC's Proposed Rulemaking on Non-Compete Agreements

Non-Compete Agreements (FTC Proposed Rule)

- **Development:** On January 5, 2023, the FTC issued a notice of proposed rule-making (on a 30-1 vote) for a "Non-Compete Clause Rule" (NCCR) under FTC Act Section 5
- **Virtually all new and existing employee non-competes would be per se illegal**
- **The FTC rule would displace existing state laws and replace them with a uniform prohibition**
- Penalties would include injunctive relief and civil penalties up to $50,120 per day for each violation
- Once implemented, there is a 180-day "safe harbor" period for business to comply

Major Changes to HSR Filing Requirements

The First Comprehensive Re-evaluation Of HSR Since 1976 Includes

- The FTC and DOJ announced a Proposed Rulemaking that would significantly overhaul the HSR Notification Requirements
  - Expanded scope of 4(c)/4(d) documents to include those prepared by or for "supervisory deal team lead(s)" (who may not be an Officer or Director).
  - Submission of ordinary course business plans that discuss "market shares, competition, competitors, or markets" for any overlapping product(s) or service(s)
  - Narrative responses for horizontal and vertical overlaps and transaction details
  - Detailed information on employees, officers, board directors, and board observers
  - Expanded disclosures of 5% or greater minority holders
  - Expanded disclosures of prior transactions
  - Revised NAICS/NAPCS code revenue reporting
  - Additional requirements for filing based on agreements in principle
  - Identification of information relating to foreign subsidies and defense contracts

New FTC Commissioners

Republican Commissioner Nominees

- On July 3, 2023, President Biden nominated Utah Solicitor General **Melissa Holyoak** and Virginia Solicitor General **Andrew Ferguson** to fill the two Republican Commissioner seats at the FTC

- Without significant prior experience working in antitrust law, it is unclear how the nominees will embrace their roles as minority Commissioners at the FTC:
  - Both Utah and Virginia submitted an amicus brief in support of Illumina's constitutional claims to the 5th Circuit
  - The Attorneys General of Utah and Virginia have both participated in anti-Big Tech antitrust litigations (e.g., *New York, et. al. v. Facebook*, *Utah v. Google*, amicus brief in support of Epiq in *Epiq v. Apple*)

Utah Solicitor General Melissa Holyoak

Virginia Solicitor General Andrew Ferguson

What In-House Counsel Should Know

About The Regulatory Threat

- **More deals are being investigated and challenged by regulators** and taking longer to complete.
  - In 2022 the average duration of a significant antitrust merger investigation in the US was 11-12 months *before* regulators brought a litigation challenge.
- Efforts by the FTC and DOJ to advance **new and tenuous legal theories**, present an opportunity for clients to expose their overreach in litigation
- The **FTC always wins** in its administrative court, but it **has suffered a string of losses**
- Courts have also pushed back on **similar DOJ overreach** and provide an important check on the agency's regulatory authority.

About The Litigation Risk

- **Merger litigation is fast and furious**, in most instances with only a few months between the filing of the complaint and trial
  - In 2022, the average merger litigation in federal court lasted just under nine months between complaint and decision.
- The **PI hearing is usually the whole ball game**, and if clients can prevail in federal court, they can spare themselves the administrative proceeding
- These cases are **high risk and high profile**, and clients are best served by having a team of expert antitrust counsel and capable trial lawyers

Antitrust M&A: Strategies to Mitigate Risk

- **Document creation is more important than ever**
  - Involve counsel early in the deal process to advise on document creation
  - Train key personnel on document creation guidelines and educate advisors (including investment banks and consultants) before market analyses are prepared
  - Focus not only on avoiding "buzzwords," but "seeding" documents with positive themes (while always ensuring accuracy)
- **Conduct antitrust merger analysis early**
  - Assess likelihood of agency scrutiny, evaluating all relevant theories of harm
  - Determine whether remedies may be feasible
  - Think creatively about deal structure and whether to file HSR on letter of intent
  - Devise and implement a customer/industry outreach plan
  - Anticipate agency info requests, and prepare in advance to maximize chance of quick clearance

Questions?

Barbara Blank

Competition & Regulatory

Director & Associate General Counsel

Meta Platforms

Education

University of Chicago Law School (J.D., 2003)

University of Chicago (B.A., 2000)

Barbara Blank is Director and Associate General Counsel, Competition and Regulatory, at Meta, where she is responsible for a broad portfolio of competition matters in the US and abroad, including M&A, regulatory investigations, and counseling. Prior to joining Meta in April 2020, Barbara was Deputy Assistant Director of the Anticompetitive Practices Division at the Federal Trade Commission, where she oversaw a wide variety of antitrust matters, as well as led investigations and litigation in the areas of high-tech and digital markets. Previously, Barbara was an associate at WilmerHale.

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Education

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Michael Moiseyev serves as co-head of Weil's Antitrust/Competition practice in the U.S.

With a focus on transactions, Michael has a broad antitrust practice advising clients on both investigations and litigation. Drawing on his over 30 years of service at the Federal Trade Commission, including 16 years as Assistant Director leading the Mergers I Division in the Bureau of Competition, he provides clients with a unique, inside perspective on how the government investigates and litigates merger cases.

Utilizing his significant experience engaging with foreign competition authorities, including the European Commission, the UK Competition Markets Authority, and the Canada Competition Bureau, Michael represents companies worldwide in their most high-stakes litigations and complex transactions, securing approval from regulatory agencies across the globe. He has significant experience advising companies across industries and develops tailored approaches to navigate their most complex antitrust issues.

While in government service, Michael was one of the most well-known, respected, and successful antitrust officials in the country. As Assistant Director, he managed all aspects of the Mergers I division's enforcement work, including oversight of investigations, formulation of legal theories, and preparing and presenting enforcement recommendations. During his tenure, he oversaw more than 100 significant merger reviews in a broad range of industries, from healthcare products and services, to technology products, to defense, scientific, and industrial products. Michael was responsible for the antitrust review of many of the largest mergers of the last decade: the BMS/Celgene, Pfizer/Wyeth, Teva/Allergan, GSK/Novartis, and Takeda/Shire pharmaceutical mergers, the Medtronic/Covidien and Abbott/St. Jude medical device transactions, Microsoft/LinkedIn, the Essilor/Luxottica optical merger, and in industrial products the Holcim/Lafarge cement and Praxair/Linde industrial gases mergers. Other significant investigations conducted under his leadership include Mallinckrodt(Questcor)/Novartis, which produced the largest equitable monetary relief ever by the government in a merger case, Hertz/DollarThrifty, Walgreens/Rite Aid, ESI/Medco, Google/DoubleClick and OrbitalATK/Northrop Grumman. Additionally, he oversaw and participated in litigation conducted by his division, including FTC v. Steris, the first potential competition case brought by the government in over twenty years, and the administrative challenge of the consummated Otto Bock/Freedom Innovations acquisition.

At the FTC, Michael was regularly called on to participate in many of the agency's most significant merger policy initiatives. Most recently, that work has included: the Vertical Merger Guidance Task Force whose work culminated in the recently issued Vertical Merger Guidelines; the portion of the "Hearings on Competition and Consumer Protection in the 21st Century" relating to Acquisitions of Nascent and Potential Competitors in Digital Technology Markets; and the "FTC's Merger Remedies 2006-2012" report. His work has been recognized by the FTC through numerous awards and he is a five-time recipient of the agency's Janet Steiger Team award.

His international antitrust work has also included representing the FTC at the 2020 meeting of the International Competition Network Merger Working Group meeting in Australia, which brings together 140 competition agencies, from 130 jurisdictions, providing a forum for sharing experience and addressing practical competition policy and enforcement issues, frequent participation in the FTC's international technical assistance program, and a secondment to the OECD's Competition Law and Policy Section. He is frequently invited to present on antitrust topics before government, industry and legal audiences.

Key Representations

- Microsoft in its $68.7 billion acquisition of Activision Blizzard, Inc., a leading publisher of popular PC, console and mobile games. This is a cross-border matter in which Weil serves as lead global antitrust counsel coordinating the regulatory process across several jurisdictions worldwide.
- Microsoft in its $7.5 billion acquisition of ZeniMax Media, parent company of Bethesda Softworks, and other game studios.

Mike Moiseyev

- Meta Platforms (f/k/a Facebook) in its $1 billion acquisition of Kustomer, a customer relationship management (CRM) company.
- Meta Platforms (f/k/a Facebook) in its acquisition of Within, the immersive media startup behind the VR fitness service Supernatural.
- Kantar Group (a portfolio company of Bain Capital Private Equity) in its acquisition of Numerator.
- RentPath, a leading digital media company in the real estate industry, in securing a favorable settlement related to a terminated purchase agreement by CoStar, and it's subsequent $608 million sale to Redfin
- Regeneron in connection with a monopolization claim against Amgen for leveraging sales of Otezla and Embrel to boost sales of Amgen's drug, Repatha.
- Regeneron in connection with monopolization and other claims against Novartis relating to actions taken to prevent competition from Regeneron's PFS version of Eylea

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Education

Cardozo Law School (J.D., 2003)

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Eric S. Hochstadt is a partner in Weil's Litigation Department. Eric's practice focuses on civil antitrust, class action, and other complex and sports-related litigation, as well as criminal cartel investigations and antitrust counseling. He has represented clients in a broad range of industries, including broadcasting, e-commerce, electronics, financial services, pharmaceuticals, private equity, publishing, and transportation.

Eric has extensive experience with consumer and antitrust class action litigation, as well as antitrust lawsuits and commercial disputes between rivals or suppliers and distributors. He has litigated in state and federal courts around the country and participated in confidential arbitrations. He has litigated numerous dispositive and strategic motions, appeals, and has facilitated a number of favorable settlements, on behalf of litigation teams representing clients including CBS, eBay, Houghton Mifflin, GE, Mastercard, StubHub, and Sanofi among others.

Representative Experience

- *Federal Trade Commission v. Meta Platforms Inc., et al., No. 5:22-cv-04325* (N.D. Cal.) – Successfully represented with Meta Platforms with co-counsel in the federal proceeding relating to its proposed acquisition of virtual reality studio, Within Unlimited, best known for its fitness app Supernatural. Following a seven-day bench trial, the FTC's request for a preliminary injunction to block the proposed acquisition was denied.
- *Giordano, et al. v. Saks Incorporated,et al. No. 1:20-cv-00833 (E.D.N.Y.)* – Successfully secured a motion to dismiss without prejudice for Saks Fifth Avenue and co-defendant luxury retail brands in an alleged "no poach" antitrust class action in which Plaintiffs claimed Saks orchestrated "no hire" agreements with each luxury brand.
- *Regeneron Pharmaceuticals, Inc. v. Amgen Inc., No. 1:22-cv-00697-UNA* (D. DE) – Representing Regeneron in connection with a monopolization claim against Amgen for leveraging sales of Otezla and Embrel to boost sales of Amgen's drug, Repatha.
- *Regeneron Pharmaceuticals, Inc. v. Novartis Pharma AG, ET AL., No. 1:12-CV-1066* (N.D.N.Y.) – Representing Regeneron in connection with monopolization and other claims against Novartis relating to actions taken to prevent competition from Regeneron's PFS version of Eylea.
- *Confidential Arbitration (ICDR)* – As co-lead trial counsel, successfully representing a major e-commerce company in a contract dispute relating to a multi-year operating agreement with a former business partner. Following a five-day evidentiary trial and post-trial briefing, secured a victory and significant damages for the client.
- *In re: Wholesale Grocery Products Antitrust Litigation, MDL No. 02090* (D. Minn.) – As lead trial counsel, secured a complete defense jury verdict for C&S Wholesale Grocers in a multi-hundred million dollar antitrust class action alleging that C&S and Supervalu entered into a conspiracy to allocate certain geographic markets in violation of the Sherman Act. Eric was recognized along with Weil partner David Lender as The American Lawyer's "Litigators of the Week," in which the publication called the case "An Antitrust Unicorn – With $800M on the Line." The team also won Global Competition Review's "Litigators of the Week" accolades for its role in securing this win. The Financial Times also recognized this victory as "Highly Commended" in the Dispute Resolution section of the publication's 2018 "North American Innovative Lawyers" report. In 2020, following oral argument, the Eighth Circuit affirmed the verdict dismissing all claims and the Supreme Court declined further review.
- *Bio-Rad Laboratories Inc. et al. v. 10X Genomics Inc.*, No. 1:19-cv-12533 (D. Mass.) – Defended Bio-Rad Laboratories against post-merger antitrust counterclaims raised by defendant in a patent infringement litigation. Defendant alleged that Bio-Rad, through a 2017 merger, monopolized product and technology markets involving digital droplet genetic analysis, in violation of § 2 of the Sherman Act and § 7 of Clayton Act. 10X claimed it was harmed by Bio-Rad's prior successful patent enforcement litigations, and sought divestiture of the merged assets and patents. Ruling on Bio-Rad's motion to dismiss, the court rejected several of the defendant's antitrust claims in alleged markets where the defendant was the dominant firm. Subsequently, the parties reached a global settlement and agreed to a lifetime cross-licensing agreement regarding the patents-in-suit.

Eric Hochstadt

Market Recognition

Named by Euromoney as "Best in Litigation: General Commercial" in its inaugural "Americas Rising Stars Awards" in 2018

Named a Rising Star by New York Law Journal in 2019

Named to Benchmark Litigation's "40 & Under Hot List" from 2016 to 2020

- *Catalina Marketing Corporation v. Quotient Technology, Inc.*, No. 21-000946-CI (Fla. Cir. Ct., Pinellas County) – Representing plaintiff in pending action alleging that competitor Quotient engaged in predatory pricing and other unfair business practices in violation of the Florida Deceptive and Unfair Trade Practices Act, the California Unfair Practices Act, the California Unfair Competition Law, and constituting tortious interference. The court denied in full Quotient's motion to dismiss in July 2021 and the case is in discovery.
- *Davidow v. H&R Block Inc. et al.,* No. 4:18-cv-01022 (W.D. Mo) – Successfully defended H&R Block in several antitrust lawsuits that alleged a "no poach" conspiracy with franchisees to lower wages and reduce mobility. Weil successfully opposed multi-district litigation consolidation and was able to compel arbitration of this plaintiff's claim on an individual basis. Similar cases were resolved after having filed motions to compel arbitration and motions to dismiss. A parallel civil investigation by the Washington State Attorney General was also favorably resolved.
- *News Corporation v. CB Neptune Holdings, LLC et al.*, No. 1:21-cv-04610 (S.D.N.Y) – Successfully represented defendants in a post-closing purchase price adjustment dispute commenced by News Corporation in connection with its sale of News America Marketing to Charlesbank Capital Partners in 2020. The complaint sought declaratory judgement to prevent the independent accounting firm from considering allegedly untimely updated revenue figures for the closing net working capital adjustment under the parties' purchase agreement. The court granted Weil's motion to compel arbitration.
- *PlusPass, Inc. v. Verra Mobility Corp. et al.*, No. 2:20-cv-10078 (C.D. Cal.) – Defended The Gores Group LLC (TGG) against allegations by PlusPass, Inc. that TGG conspired with co-defendants and third parties to merge competing entities and foreclose competition through contracts with rental car companies. After filing a motion to dismiss, TGG was dismissed from the case.
- *Duke University, Allergan, Inc., and Allergan Sales, LLC, v. Akorn, Inc. and Hi-Tech Pharmacal Co., Inc.*, 3:18-cv-14035 (D.N.J.) – Successfully defended Allergan against antitrust counterclaims brought by Akorn related to the eyelash hair-growth drug product LATISSE®, including the allegation that this case and prior patent infringement lawsuits were "sham" litigations aimed a harming Akorn, and that these cases hurt competition in the broader market for generic competition with LATISSE®. Weil and patent co-counsel filed a motion to dismiss Akorn's patent and antitrust counterclaims and to strike their related affirmative defenses on the basis that Allergan's current and prior lawsuits were not "shams." The Court granted Allergan's motion to dismiss and also struck three of Akorn's related affirmative defenses, ultimately concluding that all of Allergan's prior litigations had objective merit and thus did not violate U.S. antitrust law.
- *FashionPass Inc. v. Rent the Runway Inc. et al.*, No. 2:19-cv-03537 (C.D. Cal) – Defended Rent the Runway (RTR) against allegations by FashionPass that RTR's contracts with fashion designers allegedly harmed competition and tortiously interfered with business opportunities. After obtaining a dismissal of the initial complaint, the matter was successfully resolved.

Eric is recognized by *Chambers USA* as a "Leading" Lawyer for Antitrust in New York, where clients note that he "brings a tremendous amount of value to his clients in terms of not only his work ethic and product, but by the creativity he brings to the table in terms of helping clients navigate issues where the market and the law is unclear," and "is extremely knowledgeable about the law in the US, EU and UK, " and "a sophisticated litigator, fluid communicator, strong leader, and very responsive." He also is recognized by *Legal 500* as a recommended lawyer for Antitrust and General Commercial Disputes nationwide and a "Next Generation Lawyer" for the Sports industry, by *Benchmark Litigation* as a "Future Star," and by *Best Lawyers in America* for Litigation - Antitrust. In 2019, Eric was recognized as a "Rising Star" by the *New York Law Journal*. In 2018, *Euromoney* named him "Best in Litigation: General Commercial" in its inaugural "Americas Rising Stars Awards." Since 2019, *Who's Who Legal* has recognized him a Competition Future Leader. Eric also has twice been listed as a "Rising Star" by *Law360* – in 2015 for Competition law and in 2018 for Class Action litigation.