



Developments in Competition Policy during the First Year of the Biden Administration

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During the first year of the Biden administration, competition policy underwent several significant developments. “Competition policy” refers broadly to a new and unique set of actions pursued by the Biden administration to improve market competition: whereas past administrations relied almost exclusively on antitrust enforcement actions to rein in anticompetitive conduct, the Biden administration is also placing an emphasis on regulatory actions. Through a series of appointments, an executive order, and legislative proposals in Congress,¹ this administration has demonstrated a belief that government should harness regulatory power to intervene directly in markets that are insufficiently competitive.

This policy brief begins by noting the status of a few key antitrust enforcement actions continued or initiated by antitrust enforcement agencies in 2021. It then summarizes key regulatory actions taken by the administration during 2021. It ends with a brief description of far-reaching legislative proposals that would dramatically transform antitrust enforcement into a vehicle for restricting the size and scope of large firms’ operations.

KEY ANTITRUST ENFORCEMENT ACTIONS

The two federal antitrust agencies, the US Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC), mostly maintained continuity in their enforcement efforts during the transition from the Trump administration to the Biden administration. A few agency actions are noteworthy.

Federal Trade Commission

The FTC continued to pursue its 2020 monopolization complaint against Facebook in federal district court, though the prospects for this lawsuit are uncertain.² Judge James Boasberg of the US District Court for the District of Columbia (an Obama appointee) dismissed the FTC's initial complaint as legally insufficient in June 2021. The FTC filed an amended complaint in August, which was still under consideration by the court at the end of 2021.³

The FTC filed or settled (or both) 25 antitrust complaints involving federal court and administrative proceedings in 2021.⁴ These matters involved alleged noncompete agreements, monopolization, and mergers. Two vertical merger cases (involving consolidations between firms at different levels of the production and distribution chain) merit special mention because they represent particularly aggressive enforcement postures with respect to transactions that present substantial economic benefits.⁵

On December 2, the FTC sued to block US chip supplier Nvidia Corp.'s \$40 billion acquisition of UK chip designer Arm Ltd.⁶ The FTC's complaint alleges that the combined firm would have the means and incentive to stifle innovative next-generation technologies, including those used to run data centers and driver-assistance systems in cars. However, as a former FTC general counsel and his coauthor recently pointed out, "information in the public record about the proposed consolidation strongly suggests that it could generate substantial efficiencies [economic benefits] that would enhance competition in markets for next-generation computers and mobile devices, in turn benefiting consumers."⁷

On March 30, the FTC filed an administrative complaint and authorized a federal court lawsuit to block Illumina's \$7.1 billion proposed acquisition of Grail⁸—a maker of a noninvasive, early-detection liquid biopsy test that can screen for up to 50 types of cancer in asymptomatic patients using DNA sequencing. Illumina is a leader in next generation sequencing platforms used to support genetic testing programs, and it created Grail as a separate company. Being independent enabled Grail to focus closely on obtaining capital and carrying out the R&D needed to develop the high-quality test. Illumina sought to reacquire Grail to allow the test to be scaled up, distributed, and marketed more effectively. This efficiency was designed to promote faster use of the test, which would be a major benefit to consumers, but the FTC sought to block the transaction, asserting that the transaction could subsequently harm competition in a purely theoretical future market for multicaner early detection tests. This FTC decision has been criticized by former FTC Chair Timothy Muris and FTC senior economist Bruce Kobayashi (among others) as sacrificing large tangible benefits based on merely speculative possible future competitive harm.⁹

Department of Justice

During 2021, the DOJ continued to prepare for trial of its monopolization lawsuit (joined by various states) against Google, originally filed in October 2020.¹⁰ The case, which is currently in the discovery stage (the stage that involves document reviews and requests by the opposing parties),¹¹ is scheduled for a federal district court trial in September 2023.¹²

The DOJ initiated 35 federal court enforcement actions (including settlements) in 2021, many of them involving criminal price fixing. Particularly noteworthy were the continued criminal prosecutions directed at price fixing by generic drug producers and at fraud affecting US Department of Energy procurements.¹³ Among the new criminal cases the DOJ pursued were indictments of four executives and an entire company as part of an ongoing investigation into a nationwide conspiracy to fix prices and rig bids for broiler chicken products.¹⁴

In the merger area, Visa and Plaid (a financial data aggregator) agreed to terminate their merger agreement in the face of a DOJ court challenge.¹⁵ Other significant DOJ merger challenges not yet decided involve federal court filings to block Penguin Random House's acquisition of rival publisher Simon & Schuster (on the basis of a monopsony theory of harm to authors);¹⁶ to stop US Sugar Corp. from acquiring its refined sugar processing rival, Imperial Sugar Co.;¹⁷ and to block a series of agreements between American Airlines and JetBlue through which the two airlines planned to consolidate their operations in Boston and New York City.¹⁸ The DOJ also sued to block a merger between two of the three largest insurance brokers in the world,¹⁹ leading the companies to abandon their consolidation.²⁰

KEY ADMINISTRATION POLICY INITIATIVES

In addition to pursuing antitrust enforcement, the administration during 2021 also initiated some significant regulatory interventions in the economy.

White House

On July 9, 2021, President Joseph R. Biden Jr. signed an executive order (EO) that enunciated an omnibus, or “whole of government,”²¹ approach to competition in the American economy.²² The EO enumerates areas in which the administration believes competition is lacking and government regulation can step in to repair the competitive imbalance. The EO issues many competition-related directives to federal agencies, and it highlights four explicit goals that have direct ramifications for antitrust enforcers:

- *Toughen antitrust assessments of mergers.* The EO directs the DOJ and the FTC to update their joint merger guidelines and generally to take a tougher stance in their antitrust assessments of proposed mergers throughout the economy.

- *Increase economic mobility by limiting noncompete agreements.* The EO encourages the chair of the FTC to use the agency’s rulemaking authority to “curtail the unfair use of non-compete agreements” to increase worker mobility.²³ In addition to highlighting noncompete agreements, the EO also highlights occupational licensing requirements and no-poach agreements as additional sources of labor market friction. The administration cites data that between 36 million and 60 million workers are subject to a noncompete agreement in some form and that nearly 30 percent of jobs in the United States require some form of license.²⁴
- *Reduce the power and influence of large platform companies.* The EO directs federal agencies to investigate and potentially act against technology platforms to rein in their influence on the US economy. Among the main goals of the EO are halting so-called killer acquisitions by increasing merger scrutiny, limiting the amount and kind of data that these platforms are able to collect, and banning certain types of conduct that are seen as unfair to small businesses. All these goals are to be implemented by FTC rulemaking initiatives, which would involve specifically labeling some actions as “unfair methods of competition” (UMC).²⁵
- *Intervene in healthcare by lowering the price of pharmaceuticals and reducing concentration (the extent to which market shares are concentrated among a small number of firms) in hospital markets.* The EO points to healthcare in the United States, where it claims that increased market concentration leads to higher prices and reduced quality. The EO cites evidence that prices for drugs in the United States are as much as 2.5 times higher than in other countries and that one-quarter of individuals find it difficult to pay for their medications.²⁶ In light of these facts, the EO directs the US Food and Drug Administration to increase support for bio-similar and generic drugs and to work with states and Indian tribes to import safe and low-cost pharmaceuticals from Canada. Additionally, the EO tasks the FTC with banning “pay-for-delay” settlements, in which a name-brand company pays a generic company to stay out of the market for some amount of time.²⁷

Hospital mergers also come under fire in the EO, which notes that many rural communities have been stripped of affordable options for healthcare services owing to hospital consolidation.²⁸ More generally, the EO asserts that the consolidation of industry across the economy is a problem, and it tasks the FTC and the DOJ with revising the merger guidelines to scrutinize mergers more strictly.²⁹ Furthermore, the EO charges the US Department of Health and Human Services with implementing and supporting rules about pricing transparency and addressing surprise billing practices by hospitals.

Federal Trade Commission

Mere weeks before President Biden’s competition EO was released, on June 15, 2021, Lina M. Khan’s nomination for commissioner of the FTC was approved by the Senate, and she was immediately named FTC chair. During her first seven months as chair, Khan has shaken up the organi-

zation, undoing policies that had been enacted on a bipartisan basis and laying the groundwork for expanded regulatory authority at the agency.

In one of her first acts as chair, Khan committed to holding open meetings to discuss matters of policy and take commission votes. This method of holding meetings has seldom been used in the past and is done in the name of transparency.³⁰ This transparency, however, may exist only on the surface, because the public comment portion of the commission voting cycle proceeds immediately before the taking of the vote or after the vote has already been finalized. This schedule effectively reduces the influence of the comments of the public on commission decisions, asking commissioners to vote on matters without first having heard from those who may be affected by the policies.

In three key areas, the FTC has reversed course, rejecting policies that have, in some cases, stood for several years and enjoyed some bipartisan support. The policies that have been rescinded are the 1995 prior notice and prior approval policy statement,³¹ the *Statement of Enforcement Principles regarding “Unfair Methods of Competition” under Section 5 of the FTC Act*,³² and the 2020 *Vertical Merger Guidelines*.³³

The 1995 prior notice and prior approval policy statement was seen at the time as a compromise to put the commission’s resources to their best use while reducing burdens placed on the business community.³⁴ Before the 1976 Hart-Scott-Rodino Act (HSR Act), prior approval orders were relatively common, given that companies were forced to seek approval from the commission for future mergers only if it was found that one of the companies had previously attempted an anticompetitive merger. The HSR Act, however, required notice for all mergers over a certain threshold, eliminating the need for prior approval of those mergers. Additionally, whereas mergers under the threshold are not reported to the commission, the commission still has statutory authority to investigate such transactions. The 1995 statement elaborated that prior approval would be required only of mergers posing a credible risk that the merging parties would again attempt the transactions.³⁵

The commission has not yet released a revised policy statement, leading to uncertainty as to the situations in which the commission will use such prior approval agreements. Revocation of the 1995 policy statement, then, signals to the market that the FTC will again enter into prior approval agreements with any company whose mergers are found to be anticompetitive. In the future, these companies will be required to seek approval from the commission for all mergers, not just those that are covered by the HSR Act filing threshold.

The *Statement of Enforcement Principles regarding “Unfair Methods of Competition” under Section 5 of the FTC Act* provided guidance as to the scope and scale of the FTC’s unfair methods of competition (UMC) authority.³⁶ Following this guidance, the commission sought to apply its stand-alone section 5 authority to promote consumer welfare using a “rule of reason” framework, generally

only in cases where other antitrust statutes (the Sherman Antitrust Act of 1890 and the Clayton Antitrust Act of 1914) were insufficient to address the threat of competitive harm.

By revoking this policy statement, the FTC has signaled to the market that stand-alone UMC violations will no longer necessarily be tied to rule of reason and consumer welfare analysis and may be sought alongside Sherman Act or Clayton Act enforcements. Khan argues that Congress directed the commission to enforce Section 5 regardless of whether it can be enforced under the other antitrust statutes and that a rule of reason framework effectively handicaps the commission's ability to police conduct in the economy before it actually harms consumers.³⁷ Revoking the policy statement may also signal a move away from a case-by-case litigation approach and toward greater use of section 5 rulemaking to define the boundaries of UMC violations.

The jointly issued 2020 VMG were an update to badly outdated 1984 guidance and sought to clarify for the business community the FTC and the DOJ's approach to analyzing and enforcing the antitrust statutes when it comes to vertical mergers. In September 2021, citing evidence purporting to show that elimination of double marginalization (the elimination of multiple monopoly markups by unmerged companies) and procompetitive economic benefits are rare in vertical mergers, the commission rescinded its reliance on the VMG, stating that the VMG "suffer[s] from serious deficiencies."³⁸ The commission, however, notes that the 2020 VMG was a significant improvement over the 1984 vertical merger guidelines when it came to raising rivals' costs, foreclosure, and the use of competitively sensitive information.³⁹ Until new vertical merger guidelines are promulgated, there will be no presumption of efficiencies for any merger—vertical or otherwise—effectively discarding any relevant expertise that has been amassed during the creation of the guidelines.

Most recently, on December 11, 2021, the FTC released a Statement of Regulatory Priorities,⁴⁰ outlining the commission's path forward. Chief among these priorities is the fast-tracking of rulemaking procedures in response to the assertion that case-by-case adjudication "has proven insufficient" at effectively controlling concentration in the economy.⁴¹ In particular, the statement outlines rulemakings dealing with noncompete clauses in employment contracts, pharmaceutical pay-for-delay agreements, and unfair competition in online marketplaces, among other topics, indicating that the commission is heeding the advice in the EO to act in these markets. Until a fifth commissioner is confirmed,⁴² any rulemaking proceedings not commanding bipartisan support will likely be on hold, but this statement indicates a clear intent to undertake significant rulemaking procedures soon.

Department of Justice

Compared with the White House and the FTC, the DOJ initially moved more slowly in initiating policy changes. After an extended waiting period, Jonathan Kanter was confirmed as assistant

attorney general for the Antitrust Division on November 16, 2021. Since his appointment, the DOJ has quickened the pace of change, issuing a December 6 draft policy statement for public comment dealing with standard essential patents (SEPs) and fair, reasonable, and nondiscriminatory (F/RAND) licensing commitments.⁴³

In the draft, the DOJ revises a previous statement discussing the remedies for the infringement of SEPs that are subject to F/RAND licensing commitments, and it outlines what demonstrates good-faith negotiation in this context.⁴⁴ This draft is a response to the EO's call to revisit a 2019 statement outlining an approach to SEP licensing known as the New Madison Approach (NMA).⁴⁵ Under the NMA, remedies for SEP patent infringements featured a property rule framework that allowed for the full consideration of injunctive relief, as opposed to a liability rule that features only damages. A damages-only framework tends to undervalue innovation and dismisses the dynamic nature of SEPs in the innovation economy.

This new draft reverses the NMA and notes that SEP holders should generally not be able to seek injunctive relief if they have made a F/RAND commitment. Although it addresses the idea that the interests of both SEP holders and implementers need to be adequately addressed and balanced, it pays little emphasis to the importance of strong patent protection.⁴⁶ This approach effectively tips the scales in favor of implementers and against developers of patented standardized technologies.

One other DOJ Antitrust Division policy proposal merits brief note: on December 17, the Division announced that it was seeking additional public comments until February 15, 2022, on whether and how it should revise its 1995 bank merger competitive review guidelines (the FTC does not review bank mergers).⁴⁷

Finally, a few Antitrust Division policy initiatives were taken in tandem with the FTC. Prominent among these were the December 7 launch of a joint European Commission, DOJ, and FTC policy dialogue on competition in technology sectors;⁴⁸ a December 6–7 workshop on promoting competition in labor markets;⁴⁹ and a September 15 statement that the division should “work closely with the FTC to update” the VMG (already rescinded by the FTC).⁵⁰ The labor workshop in particular (combined with the FTC's reference to a rulemaking on noncompete clauses in its recent Statement of Regulatory Priorities) highlights the enforcement agencies' interest in tackling labor monopsony problems.

LEGISLATIVE PROPOSALS

Numerous legislative proposals were made during 2021, in light of the *Investigation of Competition in Digital Markets*, a report from the House Committee on the Judiciary released in late 2020.⁵¹ Of the five proposals that have been introduced in the House, only two of them have been mirrored in the Senate. The first is named the American Innovation and Choice Online Act,⁵² and it is aimed

at preventing designated platforms from engaging in self-preferencing on their platform. The second is named the Platform Competition and Opportunity Act,⁵³ and it is aimed at preventing large platforms from engaging in merger and acquisition activities. Both acts designate conduct undertaken by a few large firms as wholly illegal and go further to designate such conduct as UMC, codifying the until-now poorly defined UMC authority of the FTC.

Both measures have similar thresholds for determining which companies in the economy are subject to the regulation: \$550 billion or more in market capitalization,⁵⁴ 50 million or more monthly active users, or 100,000 or more monthly active business users. The antipreferencing bill further specifies that market capitalization would be measured at the date of the bill's passage, so the handful of companies that exceed the threshold would be the only companies subject to this regulation *in perpetuity*.

Additionally, in both bills, the definitions of the illegal actions are overly broad. They would allow almost any action by a covered platform that would increase the size or scope of the firm's operations to be characterized as illegal. Among these are the unfair preferencing of a company's own products or the acquisition of any company unless the acquisition meets poorly defined criteria. One of the criteria for an acquisition to be legal is proving that the acquired company will not enhance or increase the acquiring company's position in the market, effectively rendering illegal mergers designed to lower costs or improve quality.

CONCLUSION

Competition policy developments in the first year of the Biden administration have a common theme. Very few concrete, actionable steps have been taken, but the groundwork has been laid for far greater government intervention to curtail disfavored types of business conduct. By bringing interventionist individuals into top positions at the antitrust agencies and releasing an executive order focused primarily on directing federal agencies to intervene to a greater extent in the economy, the new administration has made it clear that more aggressive antitrust enforcement actions—and novel competition rulemaking proposals—are in the offing. What's more, growing fervor in the halls of Congress has led to bipartisan support for bills that would expand the power of antitrust agencies to limit or block mergers and other transactions by dominant firms. These developments all point to what may be the largest antitrust policy shift in nearly half a century, one that could significantly reshape the fabric of the economy and the welfare of consumers. Year two of the Biden administration will provide greater insights regarding the extent to which such a dramatic policy transformation will actually come to pass.

ABOUT THE AUTHORS

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NOTES

1. Although the administration has not yet formally endorsed specific antitrust reform bills, the *New York Times* reports that it “has quietly supported legislation working its way through the House.” Jim Tankersley and Cecilia Kang, “Biden’s Antitrust Team Signals a Big Swing at Corporate Titans,” *New York Times*, October 28, 2021.
2. *FTC v. Facebook Inc.*, No. 1:20-cv-03590-JEB (D.D.C. Dec. 3, 2021).
3. “U.S. Judge Rejects Facebook Request to Dismiss FTC Antitrust Lawsuit,” *Reuters*, January 11, 2021. The judge underscored the uncertain posture of the FTC’s challenge: “Ultimately, whether the FTC will be able to prove its case and prevail at summary judgment and trial is anyone’s guess. The Court declines to engage in such speculation and simply concludes that at this motion-to-dismiss stage, where the FTC’s allegations are treated as true, the agency has stated a plausible claim for relief,” said Boasberg.
4. “Cases and Proceedings,” Federal Trade Commission, accessed December 21, 2021, <https://www.ftc.gov/enforcement/cases-proceedings>.
5. Vertical mergers are typically procompetitive. Geoffrey A. Manne and Kristian Stout, “Comments of ICLE on the Draft Vertical Merger Guidelines” (Matter no. P810034, International Center for Law and Economics, Portland, OR, 2020).
6. Federal Trade Commission, “FTC Sues to Block \$40 Billion Semiconductor Chip Merger,” press release, December 2, 2021, <https://www.ftc.gov/news-events/press-releases/2021/12/ftc-sues-block-40-billion-semiconductor-chip-merger>.
7. Alden F. Abbott and Andrew Mercado, “FTC Challenge to Nvidia-Arm Vertical Merger: Potential Efficiency Justifications,” *Truth on the Market*, December 8, 2021.
8. Federal Trade Commission, “FTC Challenges Illumina’s Proposed Acquisition of Cancer Detection Test Maker Grail,” press release, March 30, 2021, <https://www.ftc.gov/news-events/press-releases/2021/03/ftc-challenges-illumina-proposed-acquisition-cancer-detection>.
9. According to the authors, “it would be tragic if the FTC’s misapplication of the appropriate standards for evaluating a vertical merger were to delay the American people access to such an important lifesaving breakthrough in cancer treatment for the benefit of a hypothetical future competition.” Bruce H. Kobayashi et al., “Former FTC Policymakers Find FTC Complaint Against Illumina-GRAIL Merger Lacking in New CEI Paper,” news release, August 26, 2021, https://cei.org/news_releases/former-ftc-policymakers-find-ftc-complaint-against-illumina-grail-merger-lacking-in-new-cei-paper/.

10. US Department of Justice, “Justice Department Sues Monopolist Google for Violating Antitrust Laws,” press release no. 20-1124, October 20, 2020, <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws>.
11. United States v. Google, Case No. 1:20-cv-03010-APM, (D.D.C. Aug. 27, 2021).
12. Lauren Feiner, “DOJ Case against Google Likely Won’t Go to Trial until Late 2023, Judge Says,” CNBC, December 18, 2021.
13. “Antitrust Division Spring Update 2021,” US Department of Justice, accessed December 21, 2021, <https://www.justice.gov/atr/division-operations/division-update-spring-2021>.
14. US Department of Justice, “Four Executives and Company Charged with Price Fixing in Ongoing Investigation into Broiler Chicken Industry,” press release no. 21-714, July 29, 2021, <https://www.justice.gov/opa/pr/four-executives-and-company-charged-price-fixing-ongoing-investigation-broiler-chicken>.
15. “Antitrust Division Spring Update 2021,” US Department of Justice.
16. US Department of Justice, “Justice Department Sues to Block Penguin Random House’s Acquisition of Rival Publisher Simon & Schuster,” press release no. 21-1081, November 2, 2021, <https://www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon>.
17. US Department of Justice, “Justice Department Sues to Block U.S. Sugar’s Proposed Acquisition of Imperial Sugar,” press release no. 21-1163, November 23, 2021, <https://www.justice.gov/opa/pr/justice-department-sues-block-us-sugar-s-proposed-acquisition-imperial-sugar>.
18. US Department of Justice, “Justice Department Sues to Block Unprecedented Domestic Alliance between American Airlines and JetBlue,” press release no. 21-908, September 21, 2021, <https://www.justice.gov/opa/pr/justice-department-sues-block-unprecedented-domestic-alliance-between-american-airlines-and>.
19. US Department of Justice, “Justice Department Sues to Block Aon’s Acquisition of Willis Towers Watson,” press release no. 21-566, June 16, 2021, <https://www.justice.gov/opa/pr/justice-department-sues-block-aon-s-acquisition-willis-towers-watson>.
20. US Department of Justice, “Attorney General Merrick B. Garland’s Statement on Aon and Willis Towers Watson Decision to Terminate Merger Agreement,” press release no. 21-701, July 26, 2021, <https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-s-statement-aon-and-willis-towers-watson-decision>.
21. Exec. Order No. 14036, 86 Fed. Reg. 36987, 36989–90 (July 14, 2021) (see § 2).
22. Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 14, 2021).
23. Exec. Order No. 14036, 86 Fed. Reg. 36987, 36991–99 (July 14, 2021) (see § 5(g)).
24. White House, “Fact Sheet: Executive Order on Promoting Competition in the American Economy,” press release, July 9, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>.
25. Exec Order No. 14036, 86 Fed. Reg. 36987, 36991–92 (July 14, 2021) (see §§ 5(c), 5(h)(i), 5(h)(iv)). Legislative proposals also seek to define unfair methods of competition and expand the FTC’s enforcement authority.
26. Manne and Stout, “Comments of ICLE.”
27. Exec. Order No. 14036, 86 Fed. Reg., 36987, 36992 (July 14, 2021) (see § 5(f)(iii)). A more complex issue than it seems on its face, pay-for-delay settlements involve generic competitors attempting to enter the market when the brand-name competitor still holds a patent on a drug. For background on these settlements, see Federal Trade Commission Staff, *Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions* (Washington, DC: Federal Trade Commission, 2010).
28. Exec. Order No. 14036, 86 Fed. Reg. 36987, 36987–89 (July 14, 2021) (see § 1).
29. Exec. Order No. 14036, 86 Fed. Reg. 36987, 36991 (July 14, 2021) (see § 5(c)).

30. “The FTC hastily created public meetings without sufficient opportunity for stakeholders to respond with comments. . . . Further, the FTC invites only one-minute commentary for stakeholders and only after it has voted (often along partisan lines—a change from prior administrations where agreement on harms created more legitimacy for enforcement).” D. Daniel Sokol and Abraham L. Wickelgren, “Populism at the FTC Undermines Antitrust Enforcement,” *Promarket*, December 13, 2021.
31. Federal Trade Commission, “FTC Rescinds 1995 Policy Statement That Limited the Agency’s Ability to Deter Problematic Mergers,” press release, July 21, 2021, <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter>.
32. Federal Trade Commission, “FTC Rescinds 2015 Policy That Limited Its Enforcement Ability under the FTC Act,” press release, July 1, 2021, <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under>.
33. Federal Trade Commission, “Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary,” press release, September 15, 2021, <https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines>.
34. Lina M. Khan, *Remarks of Chair Lina M. Khan regarding the Proposed Rescission of the 1995 Policy Statement concerning Prior Approval and Prior Notice Provisions* (Washington, DC: Federal Trade Commission, 2021).
35. “The Commission believes that in most such situations the availability of HSR premerger notification and waiting period requirements will adequately protect the public interest in effective merger enforcement, without being unduly burdensome.” Federal Trade Commission, Notice and Request for Comment regarding Statement of Policy concerning Prior Approval and Prior Notice Provisions in Merger Cases, 60 Fed. Reg. 39745, 39746 (August 3, 1995).
36. Lina M. Khan, *Remarks of Chair Lina M. Khan on the Withdrawal of the Statement of Enforcement Principles regarding “Unfair Methods of Competition” under Section 5 of the FTC Act* (Washington, DC: Federal Trade Commission, 2021).
37. “In effect, the Statement surrenders the FTC’s unique advantages as an expert body with the power to adjudicate cases, issue rules and guidance, and conduct marketplace studies.” Khan, *Remarks of Chair Lina M. Khan on the Withdrawal of the Statement*, 1.
38. Lina M. Khan, *Remarks regarding the Proposed Rescission of the FTC’s Approval of the 2020 Vertical Merger Guidelines* (Washington, DC: Federal Trade Commission, 2021). The DOJ has not yet formally announced that it no longer relies on the VMG, but it is generally expected to do so shortly with the arrival of new Assistant Attorney General Jonathan Kanter.
39. Lina M. Khan, Rohit Chopra, and Rebecca Kelly Slaughter, *Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines* (Washington, DC: Federal Trade Commission, 2021).
40. Federal Trade Commission, *Statement of Regulatory Priorities*, December 10, 2021, https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf.
41. Federal Trade Commission, *Statement of Regulatory Priorities*, 1.
42. As of December 21, the FTC had only four sitting commissioners: two Democrats and two Republicans. On December 1, the Senate Committee on Commerce (which was deadlocked 14-14) voted to send to the full Senate President Biden’s nomination of Democrat Alvaro Bedoya to serve as the fifth FTC commissioner. Hunton Andrews Kurth, “FTC Commissioner Nominee Bedoya Advocates for Privacy Protections during Confirmation Hearing,” *Privacy and Information Security Law Blog*, November 22, 2021.
43. US Department of Justice, “Public Comments Welcome on Draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents Subject to F/RAND Commitments,” press release no. 12-2107, December 6, 2021, <https://www.justice.gov/opa/pr/public-comments-welcome-draft-policy-statement-licensing-negotiations-and-remedies-standards>. A September 2021 speech by Jeffrey Wilder, Economics Director of Enforcement for the DOJ Antitrust Division, lays the groundwork for the revision in calling for “a balanced approach” and in noting that “President Biden’s Executive Order on promoting competition asked the agencies to take another look at the SEP Remedies Statement.” Jeffrey M. Wilder, “Leveling the Playing Field in the Standards Ecosystem: Principles for a Ba-

- lanced Antitrust Enforcement Approach to Standards-Essential Patents” (remarks, IAM and GCR Connect SEP Summit, Washington, DC, September 29, 2021), <https://www.justice.gov/opa/speech/antitrust-division-economics-director-enforcement-jeffrey-wilder-iam-and-gcr-connect-sep>.
44. US Department of Justice, *Draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments*, December 6, 2021.
 45. Alden F. Abbott and Andrew Mercado, “The New Madison Approach to Antitrust and Patent Licensing: A Property Rights and Innovation Perspective,” *Antitrust Chronicle* 1, no. 2 (Summer 2021): 8-14; Alden F. Abbott et al., *Putting Innovation First: The “New Madison Approach” to Patent Licensing and Antitrust* (Washington, DC: Regulatory Transparency Project, 2021).
 46. Eileen McDermott, “DOJ Issues Revised Draft Joint Policy Statement on Remedies for SEPs Subject to FRAND,” *IP-Watchdog*, December 7, 2021.
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