

The FTC And DOJ Are Rewriting The Rules

By **Bryan Koenig**

Law360 (September 6, 2022, 5:30 PM EDT) -- As the Biden administration's competition enforcers pursue individual cases, they are just as focused on pushing through sweeping changes to U.S. antitrust law, kicking off that process in January when the agencies announced plans for a major overhaul of their merger guidelines.

But overhauling the guidelines, likely in a way meant to make it easier to challenge more transactions, is just one part of broader efforts by the Federal Trade Commission and the U.S. Department of Justice's Antitrust Division.

With leadership likely picked for their anti-Big Tech bona fides, the agencies are widely expected to make further movement on the guidelines later this year or early next year, in only the next step of wide-ranging regulatory and policy efforts to undo what critics say have been decades of underenforcement.

Whatever changes occur will likely bolster an enforcement regime that Polsinelli PC's Arindam Kar says is "probably the most robust I've seen." And that drive comes from the top down. The White House issued a sweeping executive order last year trying to stimulate competition across the U.S. economy, and President Joe Biden described antitrust enforcement in recent decades as a failed experiment. "It's obviously driven from the Biden administration," Kar said.

Even as the agencies mull an overhaul to their guidelines, they are also acting alone to push for changes to the way courts and private parties see antitrust enforcement.

On its own, the DOJ's Antitrust Division under Assistant Attorney General Jonathan Kanter has leaned on its amicus program, invigorated during former President Donald Trump's administration, in which the agency has weighed in on private antitrust cases to give its preferred take on antitrust law.

So far this year, that legal advocacy has included a statement of interest partially backing the Washington, D.C., attorney general's local court case against Amazon, which has so far been rejected and represents the only government enforcement action yet filed against the online retail giant. However, Amazon is also under investigation by the FTC.

In other filings, the DOJ has repeatedly supported private plaintiffs suing DaVita and UnitedHealth Group unit Surgical Care Affiliates following its criminal prosecution. Government attorneys waded into a suit from minor league baseball teams that lost their affiliations with MLB clubs, urging a New York

federal court to view baseball's antitrust exemption narrowly and noting that the exemption is based on a rationale that has been discredited by the U.S. Supreme Court. They've pushed back on the scope of an antitrust exemption available to more than a dozen top private universities, including Brown, Duke and Yale, accused of conspiring to limit financial aid. And they've backed a trucker "no-poach" suit by arguing that the "no-hire" agreements among employers should be treated as "per se," or automatically, illegal under U.S. antitrust law.

At the appellate level, the DOJ also filed an amicus brief backing 48 attorneys general trying to revive their lawsuit running parallel to the FTC action accusing Facebook of illegally monopolizing personal social networking services. The DOJ is looking to participate in D.C. Circuit oral arguments set for Sept. 19.

In turn, the FTC under Chair Lina Khan has focused on individual cases and sending a variety of signals, apparently meant to dissuade a range of potentially problematic mergers, as it works behind the scenes on rulemakings that will likely try to tip the scales away from what Biden administration officials criticize as decades of underenforcement and a permissive attitude toward potentially harmful conduct and transactions.

After a busy 2021 spent changing FTC policy and investigative practices, some of the agency's momentum was hampered in the first half of this year thanks to a 2-2 party-line split. That finally ended in May, when Alvaro Bedoya was confirmed as the commission's fifth member and tie-breaking third Democrat.

But the FTC has also been able to put out key policy signals with a unified front, including the 5-0 vote approving a policy statement warning drug companies and pharmacy benefits managers that enforcers are looking to go after rebates and other pricing schemes the agency said block patients' access to cheaper medications.

Along divided party lines, the FTC's three Democrats used a clearance settlement for a \$1.1 billion merger of veterinary clinics to highlight their general concerns about broad corporate concentration and especially private equity-backed consolidation.

The agency seems particularly interested in the prospect of private equity "roll up strategies" buying up market power one relatively small transaction at a time. In prior administrations, such deals may not have drawn any scrutiny because they were so small and didn't upend the market by themselves. "And yet they seem to be raising issues at the FTC," said Steve Cernak of Bona Law PC.

In addition to focusing on private equity and labor impacts, former FTC attorney and financial technology specialist Christopher Leach, now with Mayer Brown LLP, noted a general agency focus on an interdisciplinary approach bridging the divide between the commission's consumer protection and competition enforcement mandates.

"The agency is talking about using its authorities holistically," Leach said.

Leach also pointed to the June launch of a study, with the force of an agency subpoena, into the business practices of vertically integrated pharmacy benefit managers — a prime target for the FTC — requiring the six largest companies in the industry to hand over business records to help the agency determine whether they are negatively impacting affordability and access to prescription drugs.

"Even though it's not a law enforcement investigation, it's the agency going out and forcing companies to give them documents," in a probe that could lead into an enforcement investigation, Leach said.

--Additional reporting by Cara Salvatore, Hannah Albarazi, Linda Chiem, Ivan Moreno, Hailey Konnath, Matthew Perlman, Alyssa Aquino, Clarice Silber, Al Barbarino, Justin Wise, Jack Queen, Nadia Dreid, Gina Kim, Dave Simpson, Benjamin Horney and Dorothy Atkins. Editing by Nicole Bleier.

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