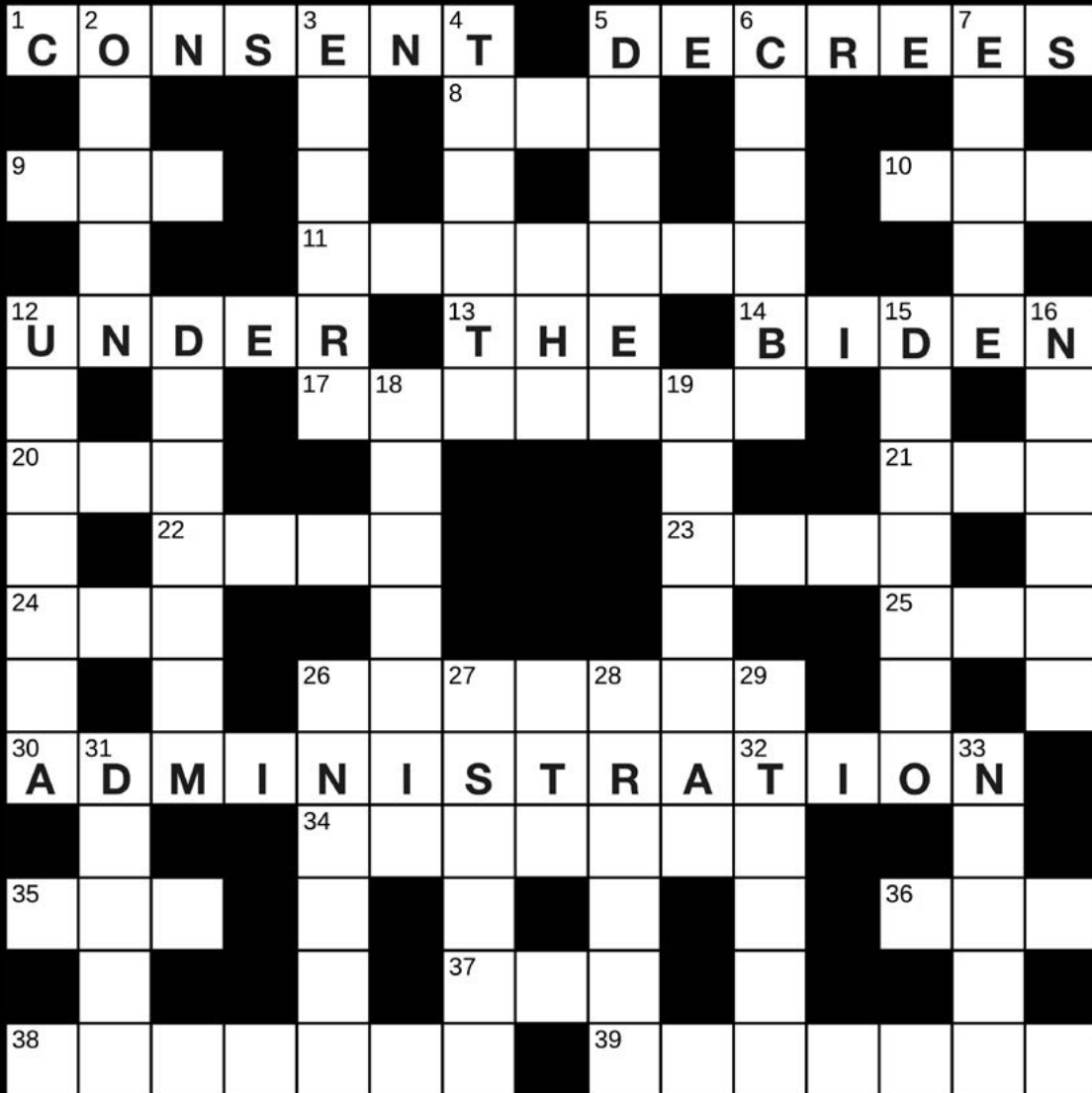


CONSENT DECREES UNDER THE BIDEN ADMINISTRATION



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Now that we are three years into the Biden Administration and multiple agency policies and guidelines have been rescinded and proposed, this article examines the impact of these new or, in some cases, revitalized Biden Administration competition policies on recent agency practices and enforcement actions. Without a doubt, significant, rapid policy and practice changes have occurred at both the Federal Trade Commission and the Antitrust Division of the United States Department of Justice, and parties seeking to enter a merger settlement with the government have encountered more aggressive regulators asking for more information and seeking more cumbersome terms. We examine recent merger settlements and "fix-it-first" attempts by merging parties under the current antitrust regime.

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I. BIDEN ADMINISTRATION ANTITRUST POLICY

On July 9, 2021, President Biden issued an Executive Order on Promoting Competition in the American Economy (the “Order”), a wide-ranging edict intended to promote competition in numerous sectors of the economy through 72 specific initiatives.² As announced in the Order, the “policy of [the Biden] Administration [is] to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony.”³ The Order instructs numerous federal agencies, including the primary antitrust enforcers, to undertake multiple actions to implement President Biden’s campaign goals of “fair competition” through “full and aggressive enforcement of [U.S.] antitrust laws,” and to address the effects of consolidation, “abusive actions by monopolies” and “bad mergers” in several areas of the economy.⁴

Consistent with the Biden Administration’s new objectives, the practices and rhetoric of the antitrust enforcement agencies immediately changed. When the new leaders of President Biden’s antitrust enforcement agencies began their respective tenures at the DOJ and the FTC, they pledged a firm commitment to litigate anticompetitive transactions and limit the agencies’ long-standing policy of entering into consent decrees with merging parties to address the potential anticompetitive consequences of a transaction. United States Assistant Attorney General Jonathan Kanter, in charge of the DOJ Antitrust Division, noted that the Division’s “duty is to litigate, not settle, unless a remedy fully prevents or restrains the violation. It is no secret that many settlements fail to preserve competition.”⁵ AAG Kanter went on to state:

“At the Department of Justice, we are law enforcers. It is not our role to micromanage corporate decision-making under elaborate consent decrees. It is our job to enforce the law. And when we have evidence that a defendant has violated the law, we will litigate to remedy the entire harm to competition. That will almost always mean seeking an injunction to stop the anticompetitive conduct or block an anticompetitive merger.”⁶

Although FTC Chair Lina Khan did not pledge to litigate against all anticompetitive mergers, she similarly stated that “[the FTC is] going to be focusing our resources on litigating, rather than on settling” in a June 2022 interview.⁷ Among other things, under Chair Khan’s leadership, the FTC has been aggressively enforcing its authority to strengthen its use of Section 5 of the FTC Act to prohibit “unfair methods of competition.”⁸ In August 2021, Chair Khan wrote to U.S. Senator Elizabeth Warren (D-MA) to express her “skepticism about the efficacy of behavioral remedies. Indeed, both research and experience suggest that behavioral remedies pose significant administrability problems and have often failed to prevent the merged entity from engaging in anticompetitive tactics enabled by the transaction.”⁹ In addition, Chair Khan subsequently testified to the Senate Judiciary Antitrust Subcommittee that “[t]here absolutely has been a problem with companies treating FTC orders as suggestions.”¹⁰

II. BACKGROUND

Both agencies have long held the authority to resolve potential competition concerns by negotiating a consent decree or settlement with the merging parties — before or after a Second Request is issued or litigation challenging the transaction is initiated.

2 The White House, *Executive Order on Promoting Competition in the American Economy* (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

3 *Id.*

4 *Id.*

5 Prepared Remarks, Antitrust Enforcement: The Road to Recovery, Apr. 21, 2023.

6 *Id.*

7 Axios interview, FTC’s new stance: Litigate, don’t negotiate, June 8, 2022.

8 FTC, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

9 Letter to United States Elizabeth Warren from FTC Chair Lina Khan, dated Aug. 6, 2021.

10 Chair Khan’s testimony before the Senate Judiciary Antitrust Subcommittee on Sept. 20, 2022. https://www.warren.senate.gov/imo/media/doc/chair_khan_response_on_behavioral_remedies.pdf. See e.g. John E. Kwoka & Diana L. Moss, Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement, 57 ANTITRUST BULL. 1, 24 (2012).

Both agencies also have the authority to initiate investigations when there is reason to believe parties have violated the terms of a consent agreement. The majority of consent decree enforcement actions occur through nonpublic administrative actions and result in a modification and/or extension of the original settlement. On the relatively rare occasions that enforcement of consent decrees has led to litigation, courts have upheld the agencies' right to demand the orders be followed.¹¹

Although the FTC does not have criminal jurisdiction the Commission has broad remedial powers to write and enforce orders,¹² and the FTC Act authorizes the Commission to obtain civil penalties for violations of a Commission order.¹³ The FTC Act authorizes the Commission to obtain civil penalties for violations of a Commission order.¹⁴ The Commission has broad remedial powers to write and enforce orders.¹⁵ Civil penalties for order violations can be substantial, with current maximum penalties of \$50,120 per violation per day.¹⁶ The Commission's proposed settlements and consent decrees are put out for public comments for 30 days.¹⁷ After evaluating any comments and weighing potential modifications, the FTC enters its final settlement orders. Over the years, the FTC has vigorously enforced existing Commission orders and obtained significant civil penalties for order violations.¹⁸

The DOJ has the authority to bring criminal and civil contempt claims for violation of consent decrees and seek, among other relief, civil penalties, injunctive relief, and imprisonment. Since March 2022, the DOJ has been revising the Antitrust Division Manual which, among other things, provides guidance to staff with regard to investigating and litigating claims for violating a Division consent order.¹⁹ Unlike the FTC, 15 U.S.C. § 16 (popularly referred to as the Tunney Act) requires judicial approval for DOJ to enter into a consent agreement.²⁰ Pursuant to the Tunney Act, a federal district court holds a hearing and approves a DOJ settlement if it is deemed in the public interest. In heavily litigated mergers, Tunney Act hearings can be lively and complex with third parties motioning to intervene in the hearing.

III. RAPID CHANGES IN LONG-STANDING POLICIES

Despite the agencies' authority to enter into settlements and consent decrees, since the Biden Administration, the FTC and DOJ have been less interested in negotiating consent decrees and more interested in enforcing existing decrees and expanding the scope of new decrees.

One of Chair Khan's first policy changes at the FTC was to implement a series of enforcement resolutions that would authorize FTC staff to use "compulsory process," such as civil investigative demands and subpoenas, to investigate firms that are subject to an FTC order to determine whether the firms have violated the FTC decree or engaged in related or similar anticompetitive conduct.²¹ These changes allowed staff to investigate potential violations by issuing CIDs not just to the firms subject to a consent decree, but also to other industry participants and expanded the scope of such investigation to violations adjacent to the subject of the consent decrees.²²

11 See *U.S. v. Boston Scientific*, 253 F. Supp. 85, 101 (D. Mass. 2003). The Supreme Court has recognized that the FTC is an expert body with wide latitude to design remedies. See *Jacob Siegel Co. v. Fed. Trade Comm'n*, 327 U.S. 608, 613 (1946); *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957).

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13 15 U.S.C. §§ 45(l) and 56 (a)(l) as amended.

14 15 U.S.C. §§ 45(l) and 56(a)(1) as amended.

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16 Press Release, FTC Publishes Inflation-Adjusted Civil Penalty Amounts for 2023. <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-publishes-inflation-adjusted-civil-penalty-amounts-2023>.

17 16 C.F.R. § 2.34(c) as amended. (Providing for a public comment period of 30 days, or some other period that the Commission may specify).

18 See e.g. Press Release, FTC Imposes \$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook (Jul. 24, 2019), <https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions>.

19 Division Manual removed for updating March 2022, <https://www.justice.gov/atr/division-manual>.

20 15 U.S.C. § 16, as amended.

21 Press Release, FTC Authorizes Investigations into Key Enforcement Priorities, July 1, 2021.

22 Prepared Remarks of Commissioner Rohit Chopra (1 July 2021), at 1–2, available at <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/prepared-remarks-commissioner-rohit-chopra-regarding-adoption-repeat-offender-enforcement-resolution>.

Another significant change came in July 2021, when the FTC returned to its long-standing policy of requiring merging parties to agree to prior notice and approval of future acquisitions in FTC consent decrees. After foreshadowing the policy change in public statements, the Commission voted to rescind the 1995 Policy Statement on Prior Approval and Prior Notice Provisions (“1995 Statement”).²³ The model merger consent decree now requires merging parties to notify and obtain prior approval from the FTC about future transactions in the market covered by the decree for a period of 10 years, including non-reportable transactions.²⁴

The reinstatement of prior notice and prior approval provisions of FTC consent order has had significant market implications, merging parties have to convince the FTC that a proposed transaction does not violate the antitrust laws instead of the FTC having the burden of proving a transaction is anticompetitive after an HSR is filed or the agency becomes aware of the transaction.²⁵ The FTC has used this policy change to inhibit private equity, healthcare, and technology companies, among other market consolidators, from using roll-up acquisitions – often below the HSR threshold or with little market impact as a stand-alone transaction to inhibit parties entering a consent agreement to continue purchasing in a market without government antitrust review.²⁶

In 2020, toward the end of the Trump Administration, the Antitrust Division established an Office of Decree Enforcement and Compliance and drafted model decree provisions. At present, the Division requires companies entering into a merger consent decree to expressly agree to lowering the evidentiary standard for a decree enforcement action; reimbursing the DOJ for its investigatory and litigation costs if the DOJ prevails; and extending the term of the decree if it is violated.²⁷

IV. BIDEN CONSENT DECREES AND FIX-IT-FIRST DIVESTITURES

To date, during the Biden Administration, Chair Khan and AAG Kanter have entered into a relatively small number of consent decrees. However, through negotiation or court decisions, both agencies have had to accept fix-it-first remedies. Reviewing the consent decrees that the agencies have entered into provides some insight into the agencies’ current position. One thing is certain: if a consent decree or fix-it-first remedy is reasonable, the FTC and DOJ will still enter into or risk being judicially forced to litigate the fix.

A. FTC

Kroger/Albertsons: In October 2022, Kroger announced its plan to buy one of its largest competitors Albertson Companies, Inc. for \$24.6 billion and create two complementary organizations to provide consumer retail and digital channels for food supply. Kroger pledged to update Albertson stores and bring value to consumers.²⁸ The combined company would control approximately a quarter of US retail food stores, and there was a massive public outcry from state Attorneys General, advocacy groups, Capitol Hill, and the public.²⁹ Numerous states and advocacy groups opposed the blockbuster transaction.³⁰ Kroger and Albertson proposed a fix-it-first divestiture³¹ including, an agreement with C&S Wholesale Grocers Inc. to offload a minimum of 413 stores across 17 states and the District of Columbia in an all-cash transaction.³² The FTC is still investigating and meeting with the public about the proposed transaction. A decision will be made in 2024.

23 STATEMENT OF THE COMMISSION ON USE OF PRIOR APPROVAL PROVISIONS IN MERGER ORDERS, July 21, 2021.

24 See *JAB Consumer Partners/National Veterinary Associates/SAGE Veterinary Partners, In the Matter of*. FTC’s consent order includes broad provisions requiring the private equity acquirer to receive prior approval for future acquisitions of clinics within 25 miles of an existing owned clinic anywhere in California or Texas. The order also requires prior notice of future acquisitions of clinics within 25 miles of an existing owned clinic anywhere in the United States.

25 See also DOJ requiring prior approval and notice. Proposed Final Judgment at 25–26, *United States v. Gray Television, Inc. et al.*, No. 1:21-cv-02041 (DDC 28 July 2021), available at <https://www.justice.gov/opa/press-release/file/1418006/download>.

26 Chair Khan’s testimony before the Senate Judiciary Antitrust Subcommittee on Sept. 20, 2022.

27 DOJ, Press Release, ‘Assistant Attorney General Makan Delrahim Announces Re-Organization of the Antitrust Division’s Civil Enforcement Program’ (20 August 2020), at 1 [DOJ Reorganization Press Release], available at www.justice.gov/opa/pr/assistant-attorney-general-makan-delrahim-announces-re-organization-antitrust-divisions-civil.

28 Kroger and Albertsons Companies Announce Comprehensive Divestiture Plan with C&S Wholesale Grocers, LLC in Connection with Proposed Merger, September 8, 2023.

29 See Supermarket News, Former FTC policy director: Kroger, Albertsons merger is facing ‘a hurricane storm’, dated October 02, 2023. <https://www.supermarketnews.com/retail-financial/former-ftc-policy-director-kroger-albertsons-merger-facing-hurricane-storm>.

30 See Letter to FTC Chair Khan from American Antitrust Institute dated Feb. 7, 2023. https://www.antitrustinstitute.org/wp-content/uploads/2023/02/Kroger-Albertsons_Ltr-to-FTC_2.7.23.pdf Ultimately, both Consumers and seven states filed actions, respectively, to block the merger.

31 See International Center for Law and Economics paper, Five Problems with a Potential FTC Challenge to the Kroger/Albertsons Merger, highlighting problems the FTC would potentially encounter in seeking to enjoin the transaction. <https://laweconcenter.org/wp-content/uploads/2023/07/Kroger-Albertsons-Merger.pdf>.

32 *Id.*

Black Knight/Intercontinental Exchange: In April 2023, FTC challenged the \$13 billion takeover of mortgage data company Black Knight by financial services giant Intercontinental Exchange (ICE). The FTC alleged the deal reduced competition in key areas of the mortgage origination process and led to both higher home prices for consumers and competitors in the mortgage data and services industry.³³

In September 2023, the parties entered into a consent decree with the FTC to resolve these concerns.³⁴ According to the FTC's Director of the Bureau of Competition, Henry Lui, "the Commission's order provides structural relief and a variety of tools to preserve competition in these critical markets."³⁵ The FTC consent order is consistent with the agency's new policies and requires the parties to commit to stringent restrictions and obligations that the FTC deems necessary to promote the success of the divested businesses.³⁶ Under the terms of the order, Black Knight's Optimal Blue business and Empower business, along with certain related products, will be divested to Constellation Web Solutions Inc. (Constellation), a provider of mortgage-related tools and software.³⁷ Along with agreeing to support the business and provide transition assistance, the consent order also requires ICE and Black Knight, for the next 10 years, to seek prior approval from the FTC before either reacquiring any divested asset or acquiring an interest in a loan origination system business.³⁸ Unsurprisingly, the order also requires ICE to provide prior notice to the FTC before acquiring an interest in a product, pricing, and eligibility engine business for that same period.³⁹

Horizon/Amgen: In May 2023, the FTC filed its first challenge to a pharmaceutical merger in recent history when it voted 3-0 to block Amgen Inc.'s ("Amgen") \$27.8 billion proposed acquisition of Horizon Therapeutics plc ("Horizon").⁴⁰ Noting that the "deal would allow Amgen to leverage its portfolio of blockbuster drugs to entrench the monopoly positions of Horizon medications used to treat two serious conditions, thyroid eye disease and chronic refractory gout," the FTC sought to litigate on an untested, cross-market theory and signify to the pharmaceutical industry that a new sheriff is in town.⁴¹ The FTC's complaint was a clear break from the past agency practice of reviewing the competitive effects of a pharmaceutical merger on the basis of individual indication, and it represents the first time the FTC has brought an action based on a pharmaceutical company's ability to use its monopoly power through "bundling" certain blockbuster drugs to restrict competition and raise prices.⁴² Specifically, the FTC alleged that the transaction would enable Amgen to engage in cross-market bundling by offering rebates on its existing drugs to insurance companies and pharmacy benefit managers in exchange for preferential treatment of Horizon's drugs Tepezza, a treatment for thyroid eye disease, and Krystexxa, a treatment for chronic refractory gout.⁴³

Prior to the litigation, Amgen had offered to commit to conduct remedies, including a prohibition on bundling the product, but the FTC rejected the proposal. The FTC argued that Amgen could offer "cross-market bundle" rebates that would make it nearly impossible for smaller rivals — or any entity without blockbuster drugs — to compete against the two drugs.⁴⁴ On September 1, 2023, however, the FTC entered into a proposed order that prohibited Amgen from bundling an Amgen product with either Tepezza or Krystexxa.⁴⁵ In addition, Amgen may not condition any product rebate or contract terms related to an Amgen product on the sale or positioning of either one of these drugs.

33 Press Release, FTC Secures Settlement with ICE and Black Knight Resolving Antitrust Concerns in Mortgage Technology Deal, Aug. 31, 2023, <https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-secures-settlement-ice-black-knight-resolving-antitrust-concerns-mortgage-technology-deal>.

34 *Id.*

35 *Id.*

36 Press Release, FTC Secures Settlement with ICE and Black Knight Resolving Antitrust Concerns in Mortgage Technology Deal, Aug. 31, 2023.

37 *Id.*

38 *Id.*

39 *Id.*

40 Press Release, FTC Sues to Block Biopharmaceutical Giant Amgen from Acquisition That Would Entrench Monopoly Drugs Used to Treat Two Serious Illnesses, FTC (May 16, 2023), <https://www.ftc.gov/news-events/news/pressreleases/2023/05/ftc-sues-block-biopharmaceutical-giant-amgen-acquisition-would-entrench-monopoly-drugs-used-treat>.

41 *Id.*

42 See *id.*

43 *Id.*

44 *Id.*

45 Press release, Biopharmaceutical Giant Amgen to Settle FTC and State Challenges to its Horizon Therapeutics Acquisition, FTC (September 1, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition>.

Amgen also is barred from using any product rebate or contract term to exclude or disadvantage any product that would compete with Tepezza or Krystexxa.⁴⁶

B. DOJ

WMS/Cargill/Sanderson Farms/Wayne Farms: In July 2022, the DOJ filed a civil lawsuit and a proposed consent decree against data consulting firm Webber, Meng, Sahl and Company (WMS) and its President, G. Jonathan Meng, as well as poultry processors Cargill, Cargill Meat Solutions, Sanderson Farms and Wayne Farms, to end an alleged conspiracy to suppress worker pay at poultry processing plants.⁴⁷ This action was one of the first antitrust consents based on harm to workers.⁴⁸ As Principal Deputy Assistant Attorney General Doha Mekki stated, “[t]hrough a brazen scheme to exchange wage and benefit information, these poultry processors stifled competition and harmed a generation of plant workers who face demanding and sometimes dangerous conditions to earn a living. Today’s action puts companies and individuals on notice: the Antitrust Division will use all of its available legal authorities to address anticompetitive conduct that harms consumers, workers, farmers, and other American producers.”⁴⁹

In October 2022, the consent decree was finalized which prohibits the defendants from sharing competitively sensitive information about poultry processing plant workers’ compensation. In addition, the consent order imposes, among other terms and conditions, a court-appointed compliance monitor who would ensure compliance with all federal antitrust laws, permit the Antitrust Division to inspect the processors’ facilities and interview their employees to ensure compliance with the consent decree. Further, Jonathan Meng, WMS’s President, is also subject to the terms of the consent decree in his individual capacity.⁵⁰ Finally, the companies also agreed to pay \$84.8 million in restitution for poultry processing plant workers who allegedly were harmed by the information exchange.⁵¹

Assa Abloy/Spectrum Brands: Despite its fierce rhetoric the DOJ still enters into consent decrees that preserve competition. In May 2023, the DOJ announced that it had reached a settlement in its litigation to block ASSA ABLOY AB’s (“ASSA ABLOY”) proposed \$4.3 billion acquisition of Spectrum Brand Holding Inc.’s hardware and home improvement division.⁵² Under the terms of the settlement, ASSA ABLOY must divest assets “ that are designed to allow Fortune to compete in the markets for premium mechanical door hardware and smart locks used in residential and multifamily buildings. These assets include ASSA ABLOY’s EMTEK and Schaub premium mechanical door hardware businesses, its Yale and August residential smart lock businesses in the United States and Canada, and other assets for multifamily smart lock applications in the United States and Canada” .⁵³ Notably, the settlement also includes, among other things, a monitor trustee, necessary intellectual property rights, and penalty provisions for not honoring the terms of the settlement.⁵⁴

UnitedHealth/Change Healthcare: In February 2022, the DOJ sought to enjoin the proposed \$13 billion merger of UnitedHealth Group and Change Healthcare. The DOJ alleged that UnitedHealth’s acquisition would give it access to rival health insurers’ data and provide an incentive to slow the delivery of new insurance claim processing tools.⁵⁵ Attorney General Merrick B. Garland commented that “If America’s largest health insurer is permitted to acquire a major rival for critical health care claims technologies, it will undermine competition for health insurance and stifle innovation in the employer health insurance markets. The Justice Department is committed to challenging anticompetitive mergers,

46 Press release, Biopharmaceutical Giant Amgen to Settle FTC and State Challenges to its Horizon Therapeutics Acquisition, FTC (September 1, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition>.

47 Press release, Justice Department Files Lawsuit and Proposed Consent Decrees to End Long-Running Conspiracy to Suppress Worker Pay at Poultry Processing Plants and Address Deceptive Abuses Against Poultry Growers, July 25, 2022. <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decrees-end-long-running-conspiracy>.

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 Press Release, Justice Department Reaches Settlement in Suit to Block ASSA ABLOY’s Proposed Acquisition of Spectrum Brands’ Hardware and Home Improvement Division, May 5, 2023. <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-suit-block-assa-abloy-s-proposed-acquisition-spectrum>.

53 *Id.*

54 *Id.*

55 Press Release, Justice Department Sues to Block UnitedHealth Group’s Acquisition of Change Healthcare, dated February 24, 2022. <https://www.justice.gov/opa/pr/justice-department-sues-block-unitedhealth-group-s-acquisition-change-healthcare>.

particularly those at the intersection of health care and data.”⁵⁶ In an attempt to respond to the government’s competitive concerns, the parties proposed a fix-it-first solution of divesting Change’s first-pass claims editing business, ClaimsXten, to a private equity firm. After determining that the proposed remedy failed to maintain competition in the alleged horizontal competitive overlap for health insurance claims editing, the government proceeded to file its injunctions raising both horizontal and vertical concerns.⁵⁷ The court, however, forced the DOJ to litigate the fix and accepted the merging parties’ proposed solution, holding that “competition in the post-divestiture market for first-pass claims editing will match, and perhaps even exceed, its current levels.”⁵⁸

V. CONCLUSION

Although the Biden Administration antitrust enforcement agencies have changed policies and aggressively investigated and litigated mergers that raised anticompetitive issues, both agencies continue to consider and enter into consent orders — sometimes by choice and sometimes during challenging litigation with unknown outcomes. In either circumstance, reasonable fix-it-first remedies and entering into consent agreements will continue to offer a good strategy for resolving the agencies’ competitive concerns.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *United States v. United Healthcare Group, Inc.*, (D.D.C. Sept. 21, 2022).



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