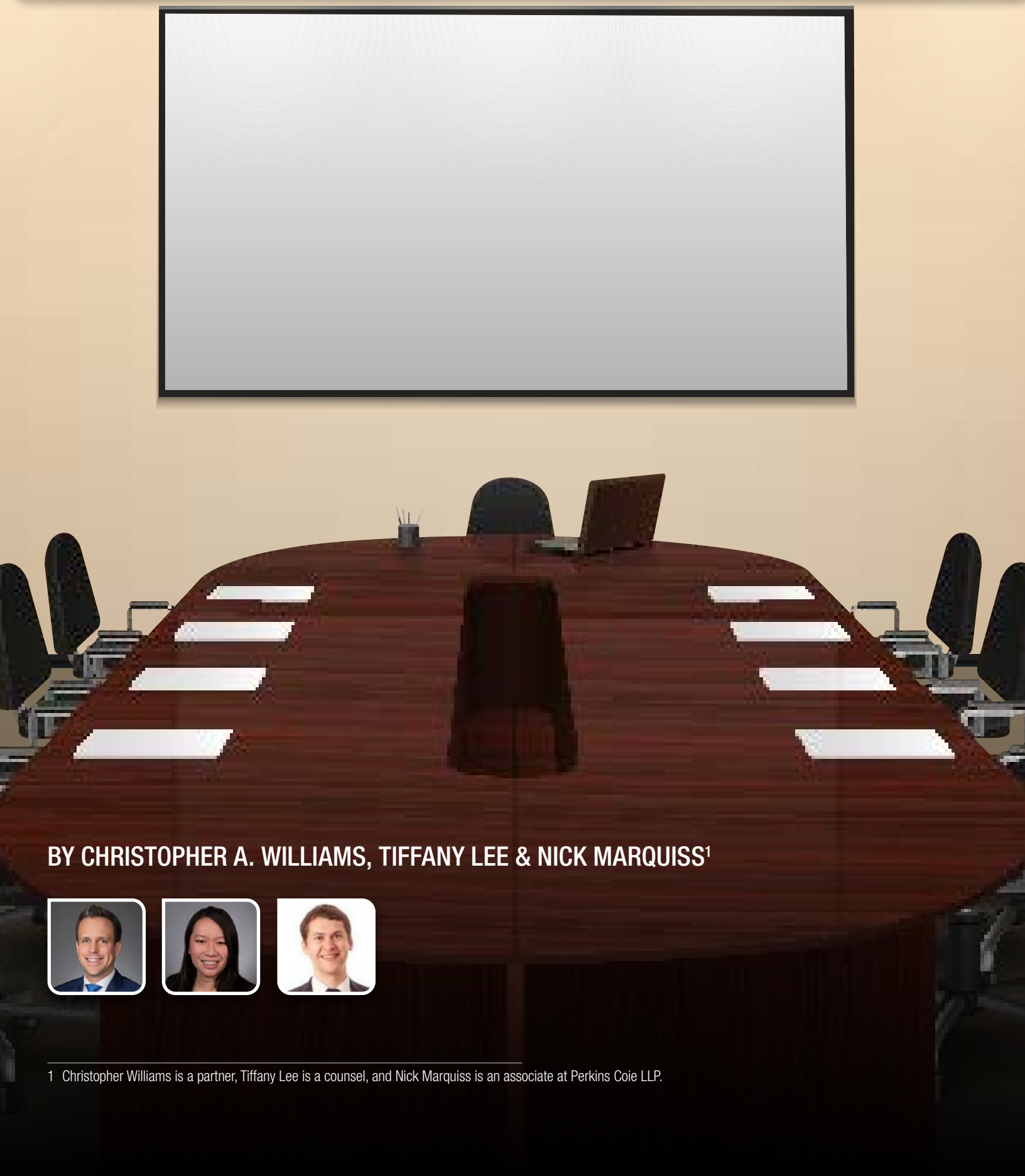
ROOM FOR AGREEMENT? ANTITRUST MERGER CONSENT DECREES POLICY AND PRACTICE UNDER THE BIDEN ADMINISTRATION



BY CHRISTOPHER A. WILLIAMS, TIFFANY LEE & NICK MARQUISS[1]

1 Christopher Williams is a partner, Tiffany Lee is a counsel, and Nick Marquiss is an associate at Perkins Coie LLP.

CPI ANTITRUST CHRONICLE
November 2023

Visit www.competitionpolicyinternational.com for access to these articles and more!

ROOM FOR AGREEMENT? ANTITRUST MERGER CONSENT DECREES POLICY AND PRACTICE UNDER THE BIDEN ADMINISTRATION

By Christopher A. Williams, Tiffany Lee & Nick Marquiss

Antitrust regulators at the Department of Justice Antitrust Division and the Federal Trade Commission have called to end what they perceive as an era of lax antitrust enforcement, challenging mergers in court instead of settling them with traditional remedies, such as divestitures of business assets. But despite these public pronouncements, this article shows, first, that the DOJ and FTC have taken a markedly different approach to merger remedies in practice, with the FTC settling mergers with traditional divestiture remedies at a significantly higher rate than the DOJ. This article offers several reasons explaining why the two agencies have taken different approaches to settlement agreements. We also show that federal and state antitrust authorities are more closely coordinating their approach to merger control under the new FTC and DOJ leadership. Finally, we conclude with several "practice tips" for parties interested in pursuing mergers in this new enforcement environment.

U.S. antitrust regulators are closely scrutinizing mergers and acquisitions as part of the current administration's tougher stance on antitrust enforcement. This trend comes as no surprise — leadership in both the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("DOJ") have been outspoken about flexing the full scope of their power to review and challenge anticompetitive mergers, including strengthening their ties with state attorneys general ("AGs"). The agencies have also demonstrated their willingness to block mergers in court, even under novel theories of harm, and do not appear deterred by recent losses in federal court.

Though federal antitrust enforcement agencies appear to have more aggressively challenged mergers in court, they have not entirely abandoned remedying transactions pursuant to consent decrees. This is especially true at the FTC, which has been more willing to enter consent decrees than the DOJ. Moreover, the two agencies have markedly differed in their approach to settling merger challenges. This article explores that difference in depth and offers several theories that may explain it. We also, albeit more briefly, explain how increased ties between federal antitrust enforcers and state AG offices may influence settlement agreements in the future. Finally, we conclude with several practice tips for parties contemplating mergers in this new enforcement environment.

I. BACKGROUND ON MERGER REMEDIES

Historically, the FTC and DOJ have resolved most antitrust enforcement actions by consent decree.[2] From 2001 to 2020, roughly 80 percent of merger challenges[3] were resolved by consent decree in lieu of litigation to block the transaction.[4] Of the litigation challenges, a significant number — approximately 21 percent — were settled post-complaint.[5] These consent decrees consist of structural or behavioral remedies that are intended to maintain or restore competition in the markets affected by the merger.

A structural remedy involves the divestiture or sale of a business or assets to a third party, typically to establish a new, viable competitor in the affected market. This includes (i) the divestiture of an ongoing, stand-alone business (e.g. a subsidiary or business division); (ii) the divestiture of local operating units in mergers involving local geographic markets (e.g. supermarkets, radio stations, and healthcare clinics); and (iii) in some cases, a more limited package of assets to be used by the divestiture buyer as part of a viable, ongoing business that is intended to compete with the merged firm.[6]

A behavioral remedy is a commitment by the merged firm to engage in or refrain from certain business conduct for a period of time, which requires monitoring for compliance during the duration of the consent order. Some examples of behavioral remedies include: (i) information firewalls; (ii) a commitment not to tie or bundle products (e.g. require interoperability with the tying product); (iii) an obligation to supply products or services at a particular price or on a nondiscriminatory basis; (iv) a license of intellectual property rights; and (v) a commitment not to reach exclusive arrangements with suppliers or distributors.

Both agencies have expressed a preference for structural relief — in particular, the divestiture of a stand-alone business — to address horizontal competition concerns.[7] In 2017, the FTC released a study of all 89 consent orders it had issued between 2006 and 2012, finding that its "process for maintaining competition when companies merge is generally effective."[8] The study concluded that all

2 Douglas H. Ginsburg & Joshua D. Wright, Antitrust Settlements: The Culture of Consent, in 1 William E. Kovacic: An Antitrust Tribute 177, 178 (Charbit et al. eds. 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/antitrust-settlements-culture-consent/130228antitruststlmt.pdf.

3 A challenge is defined in this paper to include (i) FTC and DOJ settlements filed simultaneously with a complaint (i.e. consents without litigation) and (ii) the FTC and DOJ filing a complaint (either administratively or in federal court) seeking to enjoin a merger, regardless of outcome. The definition of challenge excludes transactions that were abandoned or restructured prior to a complaint being filed. Complete pre-complaint abandonment and restructuring data from October 1, 2021, to the present is not publicly available.

4 Logan Billman & Steven C. Salop, *Merger Enforcement Statistics: 2001–2020*, 85 Antitrust Law Journal 1, 28 (2003) (derived from data in Table 8, which includes both consummated and unconsummated merger challenges and was compiled from the FTC and DOJ dockets, press releases, and Hart-Scott-Rodino Annual Reports).

5 *Id.*

6 The consent decree in the DOJ's challenge to Neenah Enterprises' acquisition of U.S. Foundry is an example of a recent limited assets package. In that settlement, the merging parties were required to divest over 500 gray iron municipal casting patterns to D&L Foundry — another established provider of gray iron municipal castings that had sales primarily outside of the states where the merging parties competed. See Press Release, Department of Justice Antitrust Division, Justice Department Requires Divestitures in Neenah Enterprises Inc.'s Acquisition of US Foundry (Oct. 14, 2021), https://www.justice.gov/opa/pr/justice-department-requires-divestitures-neenah-enterprises-inc-s-acquisition-us-foundry.

7 Press Release, U.S. Department of Justice, Justice Department Issues Modernized Merger Remedies Manual (Sept. 3, 2020), https://www.justice.gov/opa/pr/justice-department-issues-modernized-merger-remedies-manual ("The Merger Remedies Manual emphasizes that structural remedies are strongly preferred in horizontal and vertical merger cases because they are clean and certain, effective, and avoid ongoing government regulation of the market."); Richard Feinstein, Federal Trade Commission, *Negotiating Merger Remedies*, 5 (January 2012), https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf.

8 Press Release, Federal Trade Commission, FTC Releases Staff Study Examining Commission Merger Remedies between 2006 and 2012, https://www.ftc.gov/news-events/news/press-releases/2017/02/ftc-releases-staff-study-examining-commission-merger-remedies-between-2006-2012.

divestitures of an ongoing business were successful.[9] The divestiture of limited asset packages, on the other hand, had only a 60 percent success rate.[10]

Behavioral relief has generally been used to facilitate a divestiture or to remedy vertical concerns.[11] In the 2017 FTC remedy study, all behavioral remedies to vertical mergers were deemed successful. However, Republican administrations have shown more reluctance to accept behavioral remedies to address vertical concerns, largely due to an ideological aversion to "ongoing government regulation" of markets.[12]

It is important to note that not all mergers are remediable, which ultimately means that the government will sue to block such a transaction if the parties do not abandon it prior to litigation. For example, transactions involving the acquisition of a competitor that operates only in one product and geographic market is not remediable by a divestiture.[13]

II. CALLS BY ANTITRUST ENFORCERS FOR A DIFFERENT APPROACH TO MERGER ENFORCEMENT

Current leadership at the DOJ and FTC have called for an end to the "era of lax [antitrust] enforcement," including enforcement of mergers and acquisitions under Section 7 of the Clayton Act.[14] Both FTC Chair Lina Khan, who was sworn in on June 15, 2021, and DOJ Antitrust Division Assistant Attorney General ("AAG") Jonathan Kanter, who was confirmed on November 16, 2021, have expressed ambitious plans for merger enforcement, including an increased willingness to sue to block potentially anticompetitive mergers rather than agree to a risky merger remedy.

In June 2022, Chair Khan stated that the FTC intends to spend its "resources on litigating, rather than on settling,"[15] suggesting that consent orders will be a disfavored solution to merger challenges going forward. In February 2023, the former Director of the FTC's Bureau of Competition, Holly Vedova, explained the agency's current approach of accepting only "divestitures that allow the buyer to operate the divested business on a stand-alone basis quickly, effectively, and independently, and with the same incentives and comparable resources as the original owner."[16] Vedova added that the FTC would "no longer consider remedies where there is heightened risk of failure," such as divestitures of less than a stand-alone business, where there are future entanglements between the divestiture parties, or where the is no strong, independent divestiture buyer.[17] Instead, the agency will sue to block the merger.

In January 2022, AAG Kanter was even more outspoken against merger remedies, stating that "merger remedies short of blocking a transaction too often miss the mark," and adding that "in most situations . . . seek[ing] a simple injunction to block the transaction . . . is the surest way to preserve competition."[18] However, Kanter conceded that there is at least one scenario in which a divestiture may work, that is, when it involves a "sufficiently discrete and complete" business unit in a non-dynamic market.[19]

---

9 Federal Trade Commission, *The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics* (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

10 The FTC separately analyzed (i) divestitures of supermarkets, pharmacies, funeral homes and cemeteries, and healthcare clinics, finding a success rate of nearly 91 percent, and (ii) divestitures of pharmaceutical products, finding a success rate of 75 percent.

11 Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies (January 2012), 5, https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf.

12 U.S. Department of Justice, Antitrust Division, Merger Remedies Manual, 4 (Sept. 3, 2020), https://www.justice.gov/atr/page/file/1312416/download.

13 Additionally, behavioral relief is disfavored as a stand-alone remedy for horizontal mergers, as it would amount to government-imposed price regulation and would not restore competition in the relevant market.

14 Jonathan Kanter, Assistant Attorney General, Assistant Attorney General Jonathan Kanter Delivers Keynote at the University of Chicago Stigler Center (April 21, 2022) https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler.

15 Margaret Harding McGill, *FTC's New Stance: Litigate, Don't Negotiate*, AXIOS (June 8, 2022), https://www.axios.com/2022/06/09/ftcs-new-stance-litigate-dont-negotiate-lina-khan.

16 Holly Vedova, Director, Bureau of Competition, Remarks at 12th Annual GCR Live: Law Leaders Global Conference (Feb. 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/vedova-gcr-law-leaders-global-conference.pdf.

17 *Id.*

18 Jonathan Kanter, Assistant Attorney General, Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york.

19 *Id.*

AAG Kanter's public statements against merger remedies have only strengthened over time. In September 2023, Kanter highlighted that "the Antitrust Division has been careful not to pursue incomplete or uncertain remedies that ask the public to shoulder the risk of failure" and that the DOJ requires an "appropriate level of confidence that a remedy will be sufficient to address the risk of harm to competition presented by the underlying deal."[20] Despite losing all three district court challenges that were brought since his confirmation, including an appeal of one of those challenges,[21] Kanter boasted that the DOJ's remedy policy is working, noting that the agency is seeing fewer illegal mergers. Of course, this trend is just as likely explained by the slowdown in the economy, which has decreased M&A activity overall.

Where does that leave us? The FTC has expressed a willingness to accept the divestiture of a stand-alone business with no entanglements but will not hesitate to sue to block a merger if the proposed remedy has a material risk of failure. The DOJ, on the other hand, appears to be focused on a litigate-first strategy but remains open to the divestiture of an ongoing business unit under certain market dynamics.

III. MERGER REMEDY OUTCOMES IN KHAN'S FTC AND KANTER'S DOJ

We next analyze whether recent merger enforcement outcomes are consistent with agency rhetoric.[22] We caution against drawing any firm conclusions given that the data available so far assesses only a short period of time; plus, new FTC and DOJ leaders are still establishing their enforcement agendas across their respective agencies. Nevertheless, it is interesting to juxtapose these results, as we do below, with statements from agency leadership detailed in Section II.

Table 1 provides the outcomes of FTC and DOJ challenges initiated on or after June 15, 2021, the date Lina Khan was sworn in as FTC Chair.

Table 1: Outcomes of All Enforcement Actions Initiated on or After June 15, 2021

Description	FTC	DOJ	Total
Consent Decree (Filed Simultaneously with Complaint)[23]	15	6	21
Litigation[24]	11	8	19
Settled Post-Complaint	2	1	3
Abandoned Post-Complaint	5	2	7
Trial Wins	0	1	1
Trial Losses[25]	1	3	4
Outcome Pending[26]	3	1	4
Total Challenges	26	14	40

20 Jonathan Kanter, Assistant Attorney General, Remarks at the 2023 Georgetown Antitrust Law Symposium (Sept. 19, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-2023-georgetown-antitrust.

21 The DOJ successfully challenged Penguin Random House's proposed acquisition of Simon & Schuster on November 2, 2021, two weeks before Kanter's confirmation as assistant attorney general.

22 We compiled data from the FTC's Cases and Proceedings Legal Library (https://www.ftc.gov/legal-library/browse/cases-proceedings), the DOJ's Antitrust Case Filings database (https://www.justice.gov/atr/antitrust-case-filings), FTC and DOJ press releases, and case dockets to prepare the tables in this section. We considered challenges to both consummated and unconsummated mergers and acquisitions.

23 We included the FTC's consent order in QEP Partners/EQT Corporation, even though it did not include an alleged violation of Section 7 of the Clayton Act, because it involves the divestiture of EQT shares held by Quantum.

24 We excluded the DOJ's successful challenge to the alliance between American Airlines and JetBlue, despite it being categorized as a civil merger in the DOJ Antitrust Case database, because the challenge did not involve an acquisition of assets or an entity and only alleged violations of Section 1 of the Sherman Act.

25 The DOJ recently lost the appeal of its lawsuit to block United States Sugar Corporation's acquisition of Imperial Sugar Corporation. The DOJ has not timely appealed its decision to the Supreme Court, so we have categorized this action as a loss.

26 The FTC's challenge to Microsoft's acquisition of Activision Blizzard has been characterized as a pending outcome. While the FTC lost its motion for a preliminary injunction, the matter is under appeal and administrative litigation is pending.

Table 2 provides the outcomes of FTC and DOJ challenges on or after November 16, 2021, the date Jonathan Kanter was confirmed as Assistant Attorney General to the Antitrust Division.

Table 2: Outcomes of All Enforcement Actions Initiated on or After November 16, 2021

Description	FTC	DOJ	Total
Consent Decree (Filed Simultaneously with Complaint)[27]	11	0	11
Litigation	11	6	17
Settled Post-Complaint	2	1	3
Abandoned Post-Complaint	5	1	6
Trial Wins	0	0	0
Trial Losses[28]	1	3	4
Outcome Pending[29]	3	1	4
Total Challenges	22	6	28

Table 3 compares the percentages of challenges that resulted in litigation from 2011 to 2020; from June 15, 2021, to the present; and from November 16, 2021, to the present.

Table 3: Percentages of Litigation Challenges

Time Period	FTC	DOJ	Combined
2001 to 2020	19.5%	21.5%	20.2%
Khan as FTC Chair (June 15, 2021, to Present)	42.3%	57.1%	47.5%
Kanter as AAG (November 16, 2021, to Present)	50.0%	100.0%	60.7%

Notably, Khan's FTC has sued to block transactions at more than double the average rate from 2001 to 2020. Since Kanter joined the Antitrust Division, the DOJ has not agreed to any consent decrees in lieu of litigation. However, in the five months prior to Kanter's confirmation, the DOJ agreed to six merger remedies, two more than the FTC during the same period.

While the lack of consent decrees may only reflect the types of mergers before the DOJ during this period, it does not contradict Kanter's view that suing to block any allegedly problematic merger is a better alternative to a merger remedy. Kanter has stressed that the DOJ is a law enforcement agency and not a regulator, meaning that the courts — and not the DOJ — should determine whether a divestiture will protect competition.[30] He also wants to move the law forward, a goal that cannot be achieved through settlements.[31]

Has the DOJ's litigation-heavy strategy been effective? While there is risk that a divestiture may fail to remedy the anticompetitive concerns that arise from a challenged merger, litigation is not a risk-free proposition either. After bringing a lawsuit, the DOJ could either lose in court outright or win a "Pyrrhic" victory consisting of a proposed fix that may be less effective than what the agencies could have negotiated absent litigation. One wonders whether the DOJ's losses in lawsuits to block UnitedHealth's acquisition of Change Healthcare, Booz Allen Hamilton's acquisition of Everwatch, and United States Sugar's acquisition of Imperial Sugar contributed to its decision to reach a settlement mid-trial in its challenge to Assa Abloy's acquisition of Spectrum Brands.[32] To wit, in its competitive impact statement in the Assa Abloy litigation, the DOJ cautioned that the divestitures, while greater than earlier offers by Assa Abloy, do not "fully eliminate the risk

27 As noted above, we included the FTC's consent order in QEP Partners/EQT Corporation.

28 As noted above, we included the DOJ's lawsuit challenging United States Sugar Corporation's acquisition of Imperial Sugar Corporation as a loss.

29 As noted above, the FTC's challenge to Microsoft's acquisition of Activision Blizzard has been characterized as a pending outcome.

30 Jonathan Kanter, Assistant Attorney General, Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york.

31 *Id.*

32 Press Release, Department of Justice Antitrust Division, Justice Department Reaches Settlement in Suit to Block ASSA ABLOY's Proposed Acquisition of Spectrum Brand's 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.

to competition alleged in the Complaint."[33] Nevertheless, the DOJ agreed to settle "[b]ased on the totality of the circumstances and risks associated with this litigation."

While the FTC has pursued remedies more often than litigation during Khan's tenure, the FTC has filed complaints against fifteen mergers with five resulting in the parties abandoning the proposed merger. However, the FTC has faced setbacks in federal court in 2023, losing two motions for preliminary injunctions in cases with nontraditional theories of harm.[34] Since these decisions, the FTC has reached two post-complaint settlements. The first was the FTC's challenge to Intercontinental Exchange's acquisition of Black Knight, which was a horizontal merger challenge that resulted in the divestiture of Black Knight's Optimal Blue and Empower businesses to Constellation Web Solutions.[35] The second was the FTC's challenge to Amgen's acquisition of Horizon Therapeutics, which involved a novel portfolio effects theory of harm and resulted in behavioral relief,[36] a type of remedy former Director Vedova said is "strongly disfavor[ed] . . . because not only are they difficult to enforce, but also because they never seem to work."[37] The behavioral remedy in Amgen is likely an outlier and possibly a face-saving exercise to promote a "win" in a case that was headed to probable dismissal in federal court.

These recent post-complaint settlements do not mean that the FTC and DOJ have backed down on their readiness to litigate in favor of less-sufficient consent decrees. In fact, the agencies filed three merger challenges this year. On March 7, the DOJ sued to block JetBlue's proposed acquisition of Spirit. On July 17, the FTC filed an administrative complaint and preliminary injunction in federal court to block IQVIA's proposed acquisition of Propel Media. And most recently, the FTC filed a lawsuit in federal court on September 21, challenging a roll-up strategy by Welsh Carson and its portfolio company U.S. Anesthesia Partners to purchase nearly every large anesthesiology practice in Texas.

IV. UNDERSTANDING THE DIVERGING REMEDIES PRACTICE BETWEEN THE AGENCIES

Several theories may explain the diverging trends in remedies between the DOJ and the FTC. One theory is based on the nature of the agencies themselves. AAG Kanter is, in general, averse to merger remedies, and the DOJ's mission and culture is that of a law enforcement agency, whereas the FTC's mission and culture is, or is at least akin to, that of a regulatory agency. Together, these factors partly explain why the FTC has continued to resolve remedies pursuant to consent orders under Khan while the DOJ has not under Kanter. However, two other explanations likely contribute to this trend as well.

First, certain types of competitive overlaps and relevant markets have a history of being more successfully remedied by divestiture. Ten of the FTC's fifteen consent decrees under Chair Khan involved transactions where relevant geographic markets were local, and the overlaps in some (not all) of the geographic markets could be remedied by a sale of local operations (e.g. supermarkets and retail gasoline stations). Two of the consent decrees involved pharmaceutical mergers where there was only a subset of overlapping products. The FTC has historically allowed product divestitures in these circumstances. One of the consent decrees involved the divestiture of a consummated minority acquisition, which could be cleanly remedied by a sale of the shares to a third party. One involved the sale of a subsidiary that was a stand-alone business. The last consent decree involved the divestiture of manufacturing plants and was also subject to divestiture remedies by the European Commission. In contrast, the six DOJ challenges under Kanter appear, based on publicly available information, to have involved either competition issues where the entire transaction presented an issue or likely concerns by the DOJ about whether the divestiture was truly a stand-alone business.

Another explanation is the FTC's reinstitution of requiring prior approval orders in connection with its consent orders. Prior to 1995, the FTC required that all companies entering into any agreement that included a divestiture obtain prior approval from the FTC for any future transaction in the same relevant product or geographic market for which a violation was alleged. In 1995, the agency stopped requiring prior

33 Competitive Impact Statement in *United States of America v. ASSA ABLOY AB, et al.* (May 5, 2023), https://www.justice.gov/d9/case-documents/attachments/2023/05/05/413617.pdf.

34 *Fed. Trade Comm'n v. Meta Platforms Inc.,* No. 5:22-CV-04325-EJD, 2023 WL 2346238, at *33 (N.D. Cal. Feb. 3, 2023); *Fed. Trade Comm'n v. Microsoft Corp.*, No. 23-CV-02880-JSC, 2023 WL 4443412, at *22 (N.D. Cal. July 10, 2023).

35 Press Release, Federal Trade Commission, 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.

36 Press Release, Federal Trade Commission, Biopharmaceutical Giant Amgen to Settle FTC and State Challenges to its Horizon Therapeutics Acquisition (Sept. 1, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition.

37 Holly Vedova, Director, Bureau of Competition, Remarks at 12th Annual GCR Live: Law Leaders Global Conference (Feb. 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/vedova-gcr-law-leaders-global-conference.pdf; *see also* Lina Khan, Chair of the Federal Trade Commission, Prepared Statement of the Federal Trade Commission Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights (Sept. 20, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf (Chair Khan's testimony before the U.S. Senate that the FTC "now strongly disfavor behavior remedies").

approval unless there was a "credible risk" of an unlawful future merger.[38] In July 2021 — one month after Chair Khan assumed office — the FTC rescinded the 1995 Policy Statement and reinstated its pre-1995 practice of requiring prior approval by parties subject to a merger consent order.[39] The agency explained that it undertook this policy change since prior approval provisions can prevent facially anticompetitive deals, preserve FTC resources, and detect anticompetitive deals below the reporting thresholds established under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act).[40]

In merger settlements, the FTC now requires the merged firm to obtain prior approval for any acquisitions of businesses or assets in the same relevant product or geographic markets where harm to competition was alleged in the transaction subject to the consent order for a minimum of ten years. Additionally, the FTC's current policy is to require buyers of businesses or assets divested pursuant to the consent order to obtain prior approval for any future sale of such businesses or assets for a minimum of ten years. The Commission also stated that it would consider the use of prior approval broader than the affected product and geographic markets when it believes additional relief is needed. Some factors the Commission considers include: (i) whether the acquisition is "substantially similar" to a prior challenged transaction; (ii) the current level of concentration or tend toward concentration over the past ten years; (iii) the degree to which the transaction increases concentration; (iv) the degree of the parties' pre-merger market power; (v) the parties' history of acquisitiveness; and (vi) evidence of anticompetitive market dynamics.

The FTC has required the merged firm to agree to prior approval provisions in all of its merger settlement agreements since the Commission announced the reversion to its prior policy. In three merger settlements, the FTC required prior approvals broader than the affected markets. The first involved the merger settlement for DaVita's acquisition of Total Renal Care, where the FTC required the prior approval to acquire dialysis clinics beyond the alleged relevant geographic market of greater Provo, Utah to the entire state of Utah.[41] The next two applied to settlements of acquisitions by portfolio companies of the private equity firm, JAB Consumers Partners, in their acquisitions of SAGE Veterinary Partners and VIPW/Ethos Veterinary Health. Citing "the growing trend towards consolidation in specialty and emergency veterinary services markets across the country, as well as the likelihood of future acquisitions by [JAB Consumer Partners] in these markets, many of which may be non-HSR reportable," the FTC required statewide prior approval provisions despite the locally alleged geographic markets in those challenges.[42]

The FTC required prior approval provisions that applied to the purchasers of the divested assets in all but the first two consent orders that contained divestiture remedies. Most of these orders require the divestiture buyer to obtain prior approval for any sale the divested assets (i) to any third party for three years and (ii) to any competitor for an additional seven years (ten years total). The two JAB Consumer Products consents require, however, require the divestiture buyers to obtain prior approval for the sale of any of the divested clinics to any third party for ten years.

The DOJ, on the other hand, has not asserted the authority to agree to prior approval provisions in its consent orders. However, the DOJ has required prior notice provisions in merger settlements "when there are competitors to the parties whose acquisition would not be reportable under the HSR Act, and when market conditions indicate that there is reason to believe their acquisition may be competitively significant in the wake of the transaction."[43] A prior notice provision establishes a process similar to the HSR review process, requiring the parties to submit the same information on the HSR Notification and Report Form and observe the same waiting periods for an initial filing and Second Request (if one is issued). However, unlike a prior approval order, where the FTC's affirmative approval is required, the FTC or DOJ must still sue to block a transaction that is only subject to a prior notice provision.

---

38 Federal Trade Commission, FTC Acts to Reduce Prior-Approval Burden on Companies in Merger Cases (June 22, 1995), https://www.ftc.gov/news-events/news/press-releases/1995/06/ftc-acts-reduce-prior-approval-burden-companies-merger-cases.

39 Federal Trade Commission, FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers (July 21, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter-problematic-mergers.

40 Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (June 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

41 *Consent Order, In the Matter of Davita Inc., and Total Renal Care, Inc.* (Oct. 25, 2021), https://www.ftc.gov/system/files/documents/cases/davita_acco_9_29_final.pdf.

42 *Analysis of Agreement Containing Consent Orders to Aid Public Comment, In the Matter of JAB Consumer Partners/National Veterinary Associates/SAGE Veterinary Partners* (June 13, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2110140C4766NVASAGEAAPC.pdf (requiring prior approval for acquisitions of specialty or emergency veterinary clinics in California and Texas for a period of ten years); *Analysis of Agreement Containing Consent Orders to Aid Public Comment* (June 29, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2110174C4770JABEthosAAPC.pdf (requiring prior approval provisions for the acquisition of specialty or emergency veterinary clinics in California, Colorado, Virginia, Maryland, and the District of Columbia). The FTC also required nationwide prior notice provisions in JAB Consumer Partners' two merger settlements in addition to the statewide prior approval provisions.

43 Antitrust Division, U.S. Department of Justice, Merger Remedies Manual (September 2020), 31 https://www.justice.gov/atr/page/file/1312416/download.

The FTC's prior approval policy may influence its decision to accept a remedy rather than pursue litigation and therefore explain why it has entertained more settlements than the DOJ. First, the prior approval policy gives the FTC with leverage over the merged firm's future deals. It shifts the burden from the FTC demonstrate to a court that a merger is anticompetitive to the parties to convince the FTC that is not. Second, the policy as it applies to divestiture buyers helps to mitigate the risk of the divestiture buyer either selling to another party that presents competition concerns or stripping-and-flipping the divested business and thereby reducing competitive pressures in the affected markets.

V. A "UNIFIED" AND "COORDINATED" APPROACH TOWARDS FEDERAL-STATE COLLABORATION ON MERGER CONTROL

Federal antitrust agencies partnering with state AGs in merger enforcement is not new,[44] but both the FTC and the DOJ have taken steps to strengthen coordination with state officials.[45] The FTC, most recently, published an official protocol that sets forth a framework for the conduct of joint investigations between the Antitrust Division, the FTC, and state AG offices.[46] With respect to "settlement discussions" in particular, the protocol states: "While each federal and state governmental entity is fully sovereign and independent, an optimal settlement is most likely to be achieved if negotiations with the merging parties are conducted, to the maximum extent possible, in a unified, coordinated manner."[47]

One impact of closer collaboration between the federal agencies and state AGs is that state AGs have increased ability to coordinate with federal enforcers on litigation strategy and merger remedies. For example, New York, the District of Columbia, and Massachusetts have joined the DOJ's lawsuit blocking the JetBlue/Spirit merger.[48] And six state AGs and federal antitrust enforcers also joined forces in the lawsuit to stop the Amgen/Horizon merger; the states ultimately agreed to dismiss their lawsuit after the FTC reached a favorable settlement agreement with Amgen/Horizon.[49] By coordinating closely with states, the agencies have sought to strengthen merger enforcement, flexing all powers available to them, including the statutory powers of the states to monitor and enforce consent decrees or settlements.

VI. PRACTICE TIPS

Parties considering a merger or acquisition should consider the following in negotiating antitrust risk in the purchase agreement and in developing a strategy to overcoming any antitrust obstacles to closing.

- ***Be prepared to litigate***. Both the DOJ and the FTC have shown an increased willingness to sue to block transactions that raise competition concerns rather than to resolve such concerns by a divestiture or other remedy prior to litigation. And for the FTC, in particular, the agency has shown its willingness to continue to litigate in its administrative tribunal, even following loses at the preliminary injunction stage in Federal court. It could take up to 18 to 24 months, or even longer, especially in the case of administrative litigation, to fully litigate an agency merger challenge. For HSR notifiable transactions that may draw scrutiny from regulators, parties should consider upfront whether they want to commit to the costs and timeline of litigation and, if so, provide a sufficient termination date in the merger agreement to do so. For non-notifiable transactions, the acquiring party should consider the risk of a post-closing challenge and remedy. For transactions expected to draw close scrutiny from regulators, sellers are incentivized to negotiate antitrust reverse breakup fees or require the buyer to bear the costs of litigation.

- ***The investigating agency matters***. Under current leadership, the FTC has been willing to agree to a divestiture to remedy proposed competition concerns in lieu of litigation while the DOJ has not. The agencies have loosely divided jurisdiction over industries where they have developed expertise. Understanding which agency is likely to assert jurisdiction will impact strategy and whether a merger settlement is a likely option. The parties, in limited circumstances, may be able to influence which agency takes the transaction by approaching staff at the preferred agency before filing.

44 For example, states have traditionally joined the FTC and DOJ in challenging deals in the healthcare context.

45 Questions for the Record Jonathan Kanter Nominee to Be Assistant Attorney General of the Antitrust Division, *Questions from Senator Cruz* (Oct. 6 2021), https://www.judiciary.senate.gov/imo/media/doc/Kanter%20Responses%20to%20Questions%20for%20the%20Record.pdf.

46 Federal Trade Commission, Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General, https://www.ftc.gov/advice-guidance/competition-guidance/protocol-coordination-merger-investigations (last visited Oct. 12, 2023).

47 *Id.*

48 Press Release, Massachusetts Office of the Attorney General, AG Campbell Files Antitrust Lawsuit Challenging JetBlue's Acquisition of Spirit Airlines (March 7, 2023), https://www.mass.gov/news/ag-campbell-files-antitrust-lawsuit-challenging-jetblues-acquisition-of-spirit-airlines.

49 See *Consent Order, In the Matter of Amgen Inc. and Horizon Therapeutics plc.*, https://www.ftc.gov/system/files/ftc_gov/pdf/d09414amgenhorizonacco.pdf.

- ***Offering a complete divestiture package will maximize the chances of acceptance***. The agencies are most likely to accept the divestiture of an ongoing, stand-alone business, especially if a viable upfront purchaser of the business has been identified. However, the DOJ may still be skeptical if the transaction involves a dynamic industry, such as advanced technology markets.

- ***A fix-it-first or litigate-the-fix strategy may help improve the likelihood of success***. Merging parties may be able to reduce the risk of litigation by resolving the antitrust issues upfront with a "fix-it-first" strategy. For example, the merging parties could enter into an agreement with a third party to purchase one of the parties' overlapping businesses. This leaves the reviewing agency with the decision whether to litigate the adequacy of the remedy, or even whether to conduct an in-depth investigation in the first place. A "litigate-the-fix" strategy will also increase the merging parties' likelihood of success in litigation.

- ***Consider the impact of prior approval provisions***. Any acquiring party entering into a consent order with the FTC must be prepared to agree to a prior approval provision impacting, at the very least, future acquisitions in the markets affected by the transaction. If the acquiring party is considering other transactions in these relevant markets, it should consider the risk that the FTC will have leverage in stopping future transactions. Additionally, divestiture buyers should consider the impact of a prior approval provision on the valuation of the divested business given the additional regulatory constraints to reselling the business.

- ***Strategies for parties not willing to fight the agencies***. Some companies are not willing to commit to the time or cost of litigation. In these situations, sellers bear the brunt of the risk if the parties abandon the deal due to a challenge or delay in clearance. Given the increased risk of litigation, sellers are more incentivized to demand antitrust reverse breakup fees, both in frequency and amount.

- ***Do not forget about state enforcers***. The DOJ and FTC have invited closer coordination with State AGs, which means they can play a significant role in merger enforcement, especially where transactions present state-specific or local issues. Companies should not assume that satisfying a federal regulator may not be sufficient to settle a challenge by a particular state. Additionally, with increased federal and state cooperation, federal enforcers may be inclined to withhold settlement until all states are on board.

CPI COMPETITION POLICY® INTERNATIONAL

CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.