Unit 1: Merger Antitrust Law: Introduction to Substance and Process

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Topics

- The federal antitrust statutes[1]
- The consumer welfare standard
- Merger guidelines
- Antitrust enforcement
  - Five types of enforcement agents
  - Four types of sanctions/relief
  - Four types of proceedings
- Government organization
- HSR merger review process

[1] States may also have their own antitrust laws that govern mergers, but to date these laws have been either coextensive or less interventionist than federal antitrust law. As a result, we will not consider state merger antitrust law separately in this course.

Statutes

Clayton Act § 7

- Provides the U.S. federal antitrust standard for mergers

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.[1]

  - *Simple summary*: Prohibits—
    1. acquisitions of stock or assets that
    2. "may substantially lessen competition or tend to create a monopoly"
    3. "in any line of commerce" (product market)
    4. "in any part of the country" (geographic market)

Called the *anticompetitive effects test*

Collectively called the *relevant market*

  - This summary assumes that the jurisdictional prerequisites are satisfied
    - Since the reach of Section 7 today is coextensive with the Commerce Clause, the jurisdictional prerequisites are almost always satisfied

[1] 15 U.S.C. § 18 (remainder of section omitted)

Other federal antitrust statutes

- The other major provisions that can apply to business combinations
  - Sherman Act § 1
    - Prohibits "contracts, combinations . . . and conspiracies in restraint of trade"
  - Sherman Act § 2
    - Prohibits monopolization, attempted monopolization, and conspiracies to monopolize
  - Federal Trade Commission Act
    - Section 5 prohibits "unfair methods of competition"
    - NB: Unlike other provisions, not included in the definition of "antitrust law" in Clayton Act § 1
      - This will be important in private antitrust actions

Historically, these statutes have been regarded as either coextensive with or less restrictive than Clayton Act § 7, so Section 7 has provided the antitrust test for all mergers. Consequently, invocation of the Sherman Act or the FTC Act is usually superfluous and plaintiffs rarely allege violations of these statutes.

The Sherman Act

- Sherman Act § 1

> Every **contract, combination** in the form of trust or otherwise, or **conspiracy**, in **restraint of trade** or commerce among the several States, or with foreign nations, is declared to be illegal.[1]

- Requires:
  1. *Plurality*: Two or more persons with the legal capacity to conspire with one another
  2. *Agreement*: An agreement among these persons
  3. *Restraint*: The objective of the agreement is a restraint of trade
     - *Definition*: A limitation of the economic freedom of action by at least on the agreeing parties
  4. *Unreasonableness*: An anticompetitive effect established through either—
     - A *conclusive presumption* of unreasonableness (the "per se rule")
     - A *rebuttable presumption* of unreasonableness (the "quick look")
     - *Affirmative proof by* the plaintiff that the objective of the agreement, if achieved, would be anticompetitive (the "rule of reason")

Section 1 applies only *to multilateral conduct*

[1] 15 U.S.C. § 1.

The Sherman Act

- Sherman Act § 1
  - Application to mergers or acquisitions
    1. *Plurality*: Satisfied as long as the merging firms are independent sources of economic decision-making (almost always the case except for intraenterprise restructurings)
    2. *Agreement*: Satisfied by the agreement to merge or, in the case of a consummated merger, the transaction itself (which is a "combination" in the language of Section 1)
    3. *Restraint*: Satisfied since the merger eliminates the independent decision making of at least one of the merging parties
    4. *Unreasonableness*: Subject to the rule of reason—requires affirmative proof of anticompetitive effect

Today, proof of unreasonableness under Section 1 is congruent to the proof of an anticompetitive effect under Section 7, so Section 1 is superfluous as a binding constraint on mergers

[1] 15 U.S.C. § 1.

The Sherman Act

- Sherman Act § 2

> Every person who shall **monopolize**, or **attempt to monopolize**, or **combine or conspire** with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.[1]

- There are three different offenses defined in Section 2:
  1. Monopolization
  2. Attempted monopolization
  3. Conspiracy to monopolize

Section 2 applies to unilateral as well as multilateral conduct

[1] 15 U.S.C. § 2.

The Sherman Act

- Sherman Act § 2
  - Monopolization: Requires[1]—
    1. *Monopoly power*: Monopoly power in a relevant market
    2. *Anticompetitive exclusionary conduct*: The willful acquisition or maintenance of that monopoly power through anticompetitive acts that foreclose or impede competitors in the relevant market
  - *Attempted monopolization*: Requires[2]—
    1. *Anticompetitive exclusionary conduct*
    2. *Specific intent to monopolize* a relevant market
    3. A *dangerous probability of achieving monopoly power* in the relevant market if the anticompetitive exclusionary conduct is allowed to continue
  - *Conspiracy to monopolize*: Requires[3]—
    1. *Agreement*: A *combination* or conspiracy
    2. *Overt act*: An overt act in furtherance of the conspiracy
    3. *Specific intent*: Specific intent of the conspirators to monopolize a market

[1] United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); *accord* Pacific Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 447-48 (2009); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 595-96 (1985).
[2] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).
[3] United States v. Yellow Cab Co., 332 U.S. 218, 224-25 (1947); Am. Tobacco Co. v. United States, 328 U.S. 781, 788, 809 (1946).

The Sherman Act

- Sherman Act § 2
  - Application to mergers and acquisitions
    - Generally, Section 2 is more lenient than Section 1 towards business conduct because Section 2—
      - Applies only to anticompetitive exclusionary acts against competitors and not anticompetitive acts generally, *and*
      - Requires the defendant to have monopoly power and not just market power
  - However—
    - Beginning late in the Trump administration, the federal enforcement agencies have started testing whether Section 2 of the Sherman Act could be used to challenge the acquisition of "nascent competitors" by firms with monopoly power[1]
    - Nascent competitors are firms with the potential—usually because of the new technology they are developing—to challenge a dominant firm
    - At the time of acquisition, this potential is likely to be uncertain in both timing and magnitude, and consequently the acquisition may not be "reasonably probable" to substantially lessen competition and hence not prohibited under Section 7
    - The idea is that the acquisition of such a nascent competitor is an anticompetitive exclusionary act that can predicate a Section 2 monopolization or attempted monopolization violation—although no court has yet to adjudicate the merits of such a claim[2]

[1] *See* First Amended Complaint for Injunctive and Other Equitable Relief §§ 62-129, FTC v. Facebook, Inc., No. CV 20-3590 (JEB) (D.D.C. filed Aug. 19, 2021) (challenging acquisitions of WhatsApp and Instagram). The original complaint, which was dismissed with leave to replead, was filed by the Trump administration on December 9, 2020.

[2] We will examine this theory in detail in the unit on potential competition mergers near the end of the course.

The FTC Act

- FTC Act § 5

> **Unfair methods of competition** in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.[1]

  - Violations
    - Any violation of the Sherman or Clayton Act is an "unfair method of competition" prohibited by Section 5
    - In addition, conduct that violates the "spirit" of the Sherman or Clayton Act may also be a violation of Section 5
      - However modern courts have rejected attempts by the FTC to use Section 5 to prohibit conduct that falls outside the letter or the spirit of the Sherman or Clayton Acts
      - In particular, courts have refused to extend Section 5 to prohibit conduct that falls outside a "fundamental" requirement of a Sherman Act or Clayton Act
        - *Example*: Section 5 cannot reach nonconspiratorial oligopolistic conduct even if the conduct supports supracompetitive prices[2]
  - Enforcement
    - Unlike the Sherman and Clayton Act, the FTC Act is not included in the definition of "antitrust law" in Clayton Act § 1
    - Only the FTC can prosecute Section 5 cases
    - The private right of action provided in Clayton Act § 4 applies only to "antitrust laws," and courts have held that there is no implied private right of action to enforce FTC Act § 5

[1] 15 U.S.C. § 45(a)(1).
[2] *See* E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984), *vacating* 101 F.T.C. 425, 592 (1983).

The FTC Act

- Application to mergers and acquisitions
  - Likely to be a renewed effort by the FTC to extend the reach of Section 5 beyond that of Section 7, especially in the area of "nascent competition"
  - Likely to be a new effort by the FTC to promulgate rules defining particular practices as "unfair methods of competition," including perhaps some types of merger and acquisitions
- Application to merger agreements
  - FTC merger challenges almost always allege two violations:
    - A Clayton Act § 7 violation if the transaction is consummated
    - A FTC Act § 5 violation for the signing of the merger agreement
  - Observations
    - The DOJ does not allege that the mere *signing* of the merger agreement violates any law
    - The FTC approach avoids a mootness problem if the parties abandon the merger
      - The abandonment may moot the Section 7 claim if the merger is unlikely to be revived in the foreseeable future
        - When the transaction is reportable under the Hart-Scott-Rodino Act, the agencies usually accept the withdrawal ("pulling") of the premerger notification forms as sufficient to moot the claim
      - BUT abandonment of the merger, under the FTC approach, does not moot the Section 5 claim since (in the FTC's view) the signing violated Section 5 and that violation can be redressed through a prohibitory injunction
    - The FTC's view that the signing of the merger agreement violates Section 5 has never been tested in court

The FTC Act

- 2015 FTC Policy Statement
  - Adopted August 13, 2015[1]
    - "Section 5's ban on unfair methods of competition encompasses not only
      - "those acts and practices that violate the Sherman or Clayton Act but also
      - "those that contravene the spirit of the antitrust laws and
      - "those that, if allowed to mature or complete, could violate the Sherman or Clayton Act."
    - "[T]he Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare"
    - "[T]he act or practice will be evaluated under a framework similar to the rule of reason"
  - Withdrawn July 1, 2021 (3-2 vote)[2]
    - The majority found the 2015 statement too limiting:

> [T]he 2015 Statement contravenes the text, structure, and history of Section 5 and largely writes the FTC's standalone authority out of existence. In our view, the 2015 Statement abrogates the Commission's congressionally mandated duty to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute.[3]

[1] Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" under Section 5 of the FTC Act (Aug. 13, 1995).
[2] Press Release, Fed. Trade Comm'n, FTC Rescinds 2015 Policy that Limited Its Enforcement Ability under the FTC Act (July 1, 2021).
[3] *Id.* at 1.

The FTC Act

- 2015 FTC Policy Statement
  - Observations
    - Although earlier courts had interpreted Section 5 to have broad reach,[1] the 2015 policy statement was written in light of the rejection by more modern courts of several attempts to expand the reach of Section 5:
      - *Boise Cascade Corp. v. FTC*,[2] where the Ninth Circuit rejected an FTC order finding that the non-collusive, industry-wide adoption of a delivered pricing system in the Northwest plywood market was per se illegal under Section 5
      - *Official Airline Guides, Inc. v. FTC*,[3] where the Second Circuit rejected an FTC order finding that a monopolist-publisher of airline flight schedules had a unilateral right to deal with a noncompetitor and that the publisher violated Section 5 when it refused to publish commuter airline schedules, which placed the commuter airlines at a competitive disadvantage relative to certified air carriers
      - *E.I. du Pont de Nemours & Co. v. FTC*,[4] where the Second Circuit again rejected an FTC order finding that the non-collusive, industry-wide adoption by manufacturers of lead antiknock gasoline additives of a "most favored nations" clause violated Section 5
    - The 2022 FTC majority clearly intends to test the limits once again of Section 5
      - Mergers and acquisitions are almost certainly one of the targets, especially in connection with—
        - Acquisitions by dominant firms (particularly in the tech industry)
        - Acquisitions of nascent competitors
        - Vertical acquisitions

[1] *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) (endorsing the FTC's broad reading of Section 5 and signaling that it vested the FTC with far-reaching enforcement authority of "public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws").
[2] 637 F.2d 573 (9th Cir. 1980). [3] 630 F.2d 920, (2d Cir. 1980). [4] 729 F.2d 128 (2d Cir. 1984) (*Ethyl*).

The Consumer Welfare Standard

Consumer welfare standard

- Modern view[1]
  - Mergers are socially harmful when they harm consumers (customers) by—
    1. Increasing market price or decreasing market output;
    2. Shifting wealth from consumers to producers; or
    3. Creating economic inefficiency ("deadweight loss")
  - Other potential socially adverse effects when they harm consumers by—
    4. Decreasing marketwide product or service quality
    5. Decreasing the rate of technological innovation or product improvement
    6. Decreasing marketwide product choice
  - This approach to antitrust law is commonly known as the *consumer welfare standard*
    - Animates modern U.S. antitrust law generally
    - Focuses on the efficiency of the market in delivering value to consumers
    - Emerged in the Supreme Court in the late 1970s and the DOJ/FTC in the early 1980s

[1] The slides develop the consumer welfare standard in the context of mergers, but the ideas apply generally to identify all types of anticompetitive conduct under the standard.

Consumer welfare standard in practice

- Important note!
  - The textbook public policy explanation is NOT what courts and enforcement agencies use in applying the antitrust law or making enforcement decisions
    - There is no attempt to estimate consumer surplus (Area A in the diagram)
    - There is no attempt to estimate the deadweight loss (Area C) nor does the law provide a cause of action or relief to marginal customers harmed by an anticompetitive practice
  - Instead, the courts and the agencies focus on a more generalized notion of whether customers are worse off with the merger than without it
  - Some operational tests in practice: If the merger—
    - Expands market output, the merger is procompetitive regardless of price effects
    - Reduces market output, the merger is anticompetitive
    - Results in a price increase for some or all customers and no price decrease for any customers, the merger is anticompetitive (unless output expands, usually because of a product or service quality increase)
    - Increases price for some customers but decreases it for others, then the merger is anticompetitive if the wealth transfer to producers from the price increase is greater than the wealth transfer to customers from the price decrease
    - Reduces product or service quality in the market as a whole or reduces the rate of innovation, the merger is anticompetitive

The Biden administration may try to modify some of these tests or adopt new tests
More on this throughout the course

Merger Guidelines

Merger Guidelines

- Since 1968, the antitrust agencies have variously published merger guidelines ostensibly to inform the public of how the agency will exercise its prosecutorial discretion in challenging mergers
  - Merger guidelines go to the exercise of agency prosecutorial discretion—they are *not* binding on the courts
    - Supposedly explain the analytical framework the agencies use in reviewing mergers
  - In practice, the guidelines generally describe a nonbinding lower bound for agency prosecution
    - Importantly, for reasons of resource constraints if nothing else, almost all challenges over the last 30 years to horizontal mergers have alleged an egregious violation of the guidelines

The next few slides give you a brief introduction to how the merger guidelines have evolved since they were first introduced in 1968. We will examine the details and applications of the guidelines throughout the course.

Merger Guidelines

- History
  - 1968 DOJ Merger Guidelines[1]
    - The first merger guidelines
    - Set thresholds based on the market shares of the merging parties and the market concentration for presuming anticompetitive effect[2]
      - Attempted to make the thresholds for merger antitrust enforcement somewhat higher than what the Supreme Court president prescribed
  - 1982 DOJ Merger Guidelines[3]
    - One of the most influential events in merger antitrust history
    - Introduced the consumer welfare standard and the hypothetical monopolist test for market definition
    - Provided an algorithmic approach to assessing both horizontal and vertical mergers
      - Identified required empirical inputs to the analysis
      - Once the inputs have been determined, produced an enforcement outcome
    - The FTC explicitly refused to join these guidelines because it wanted more latitude in the exercise of its enforcement discretion
    - By 1990, the 1982 guidelines approach had been largely adopted by the courts

[1] U.S. Dep't of Justice, Merger Guidelines (May 30, 1968).
[2] The rule that maps market shares and changes in market concentration into an anticompetitive effect is call the "*Philadelphia National Bank* presumption" after the Supreme Court case in which it was introduced. *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).
[3] U.S. Dep't of Justice, Merger Guidelines, 47 Fed. Reg. 28,493 (1982).

Merger Guidelines

- History (con't)
  - 1984 DOJ Merger Guidelines[1]
    - Contained only minor refinements over the 1982 guidelines
    - FTC still declines to join
  - 1992 DOJ/FTC Horizontal Merger Guidelines
    - First joint agency guidelines
    - Addressed only horizontal mergers
      - Even so, the treatment of vertical mergers in 1982 guidelines was widely considered inadequate and no longer reflected how the DOJ would approach vertical mergers
      - But differences between the agencies remained, so they could not agree on guidelines for vertical mergers
    - Maintained the hypothetical monopolist test for market definition
    - Required a much more sophisticated economic analysis to predicate a horizontal merger challenge
    - Created rigorous standards and a high bar for various (negative) defenses
    - Approach quickly adopted by the courts
    - 1997 amendment significantly revised the efficiency defense[3]
      - Although touted by the agencies as a significant benefit to the business community because it made clear that the agencies recognized an efficiency defense, the specific requirements of the defense are only rarely satisfied in practice (more on this later in the course)

[1] U.S. Dep't of Justice, 49 Fed. Reg. 26,823 (1984).
[2] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (1992).
[3] Press Release, Fed. Trade Comm'n, FTC/DOJ Announce Revised Guidelines on Efficiencies in Mergers (Apr. 8, 1997).

Merger Guidelines

- History (con't)
  - 2010 DOJ/FTC Horizontal Merger Guidelines[1]
    - Backed away from the 1992 merger guidelines requirements
      - Demoted the role of market definition in the analysis
      - Rejected the algorithmic approach of the 1982 and 1992 guidelines: Identified factors to consider in the analysis but did not map them into enforcement outcomes
    - *Limited influence*: Courts have tended to adhere to judicial precedent established in the wake of the 1982 and 1992 guidelines

[1] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines, 57 Fed. Reg. 552 (rev. Apr. 2, 1992).
[2] Promoting Competition In The American Economy, Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 14, 2021) (issued July 9, 2021)
[3] Press Release, U.S. Dep't of Justice & Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022); *see* U.S. Dep't of Justice & Fed. Trade Comm'n, Request for Information on Merger Enforcement (Jan. 18, 2022) (seeking comments on how the merger guidelines should be revised).

Merger Guidelines

- History (con't)
  - 2022 DOJ/FTC Vertical Merger Guidelines[1]
    - Released near the end of the Trump administration—joined by both the DOJ and FTC
    - Replaced the long-outdated and universally ignored vertical merger section of the 1982/1984 DOJ Merger Guidelines
    - Updated the guidelines applicable to mergers of firms in the same chain of manufacture and distribution (such as input suppliers and manufacturers)
    - 15 months later, eight months into the Biden administration, the FTC—but not the DOJ—withdrew from the VMGs[2]

[1] U.S. Dep't of Justice & Fed. Trade Comm'n, Vertical Merger Guidelines (June 30, 2020).
[2] News Release, Fed. Trade Comm'n, Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary (Sept. 15, 2021); News Release, U.S. Dep't of Justice, Justice Department Issues Statement on the Vertical Merger Guidelines (Sept. 15, 2021).

Merger Guidelines

- History (con't)
  - 2021 Executive Order No. 14036 (July 9, 2021)[1]
    - Calls on the Attorney General and the FTC Chair "to review the horizontal and vertical merger guidelines and consider whether to revise those guidelines."[2]
    - Both sets of guidelines are currently under review[2]

[1] Promoting Competition In The American Economy, Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 14, 2021) (issued July 9, 2021)
[2] Press Release, U.S. Dep't of Justice & Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022); *see* U.S. Dep't of Justice & Fed. Trade Comm'n, Request for Information on Merger Enforcement (Jan. 18, 2022) (seeking comments on how the merger guidelines should be revised).

Merger Guidelines

- History (con't)
  - 2023 Draft Merger Guidelines
    - On July 19, 2023, after eighteen months of study, the FTC and DOJ released draft merger guidelines for public comment[1]
      - The comment period will end on September 18, 2023, unless the agencies extend the comment period
      - It is widely expected that the agencies will finalize the draft merger guidelines in essentially their current form
      - In any event, it is undoubtedly the case that the FTC and DOJ are following the 2023 merger guidelines today and probably have been doing so informally over the last two years

We will examine the merger guidelines and assess their significance in predicting enforcement challenges and antitrust outcomes throughout the course

[1] U.S. Dep't of Justice & Fed. Trade Comm'n, Draft Merger Guidelines (July 19, 2023) ("2023 DMG); *see* Press Release, Fed. Trade Comm'n, FTC and DOJ Seek Comment on Draft Merger Guidelines (July 19, 2023); Press Release, U.S. Dep't of Justice, Justice Department and FTC Seek Comment on Draft Merger Guidelines (July 19, 2023).

Antitrust Enforcement

Five types of enforcement agents

1. Department of Justice (DOJ) Antitrust Division
2. Federal Trade Commission (FTC)
3. State Attorneys General
   - Injunctive relief actions on behalf of the state
   - Parens patriae actions
     - Representative actions brought by the state attorney general for damages sustained by citizens of the state
4. Individual private parties
   - Customers (and sometimes suppliers)
   - Competitors
   - Possibly others
5. Private class actions

For reasons that we will discuss, the DOJ and FTC are by far the most active enforcers of the merger antitrust laws. The State AGs and private parties rarely bring merger antitrust actions, although there are some notable exceptions.

Four types of sanctions/relief

1. Criminal fines/imprisonment
   - In practice, not applicable to mergers
     - By statute, available only for violations of Sherman Act §§ 1-2
     - By its terms, Clayton Act § 7 can be enforced only through civil injunctive relief actions
     - Only the DOJ can bring a criminal antitrust prosecution and the DOJ criminally prosecutes only "hardcore" antitrust violations (i.e., horizontal price fixing, horizontal market divisions, some horizontal group boycotts)
       - Mergers have never been pursued criminally
2. Injunctive relief
   - Types of injunctive relief
     - Temporary restraining orders (TROs)
     - Preliminary injunctions
     - Permanent injunctions
   - Can be used to—
     - Prevent the consummation of a merger that has not already been consummated
     - Unwind or force corrective divestitures or other actions of transactions that have been consummated to restore competition
   - Most merger challenges are preclosing and the most common form of adjudicated relief is a "blocking" injunction, which enjoins the consummation of the merger

Four types of sanctions/relief

3. Treble damages
   - Only available to parties injured as a result of antitrust violation
   - Mergers are usually challenged preconsummation—before they can cause any injuries that could predicate treble damages relief

4. Monetary equitable relief
   - Both agencies occasionally have sought disgorgement of ill-gotten gains from an unlawful merger
     - Again, mergers are usually challenged preconsummation, and therefore before the merging parties could obtain any ill-gotten gains that could predicate disgorgement
     - In practice, only the FTC has sought disgorgement and then only in consummated mergers where the likelihood of private damage actions is low
     - Private plaintiffs—or, more accurately, plaintiff lawyers—do not want disgorgement in government cases, arguing that treble damages will give victims much greater relief
   - On April 22, 2021, the Supreme Court in *AMG* held that the FTC had no authority, nor did the courts have any power to grant at the FTC's request, monetary equitable relief[1]
     - There are efforts in Congress to give the FTC authority to seek disgorgement[2]

[1] AMG Capital Mgmt., LLC v. FTC, No. 19-508, 141 S. Ct. 1341 (U.S. Apr. 22, 2021).
[2] *See, e.g.*, Consumer Protection and Recovery Act, H.R. 2668, 117th Cong. § 2 (2021) (reported by the H. Comm. on Energy and Commerce on June 10, 2021).

Four types of sanctions/relief

- No civil penalties
  - Unlike the European Union and some other jurisdictions, the federal antitrust statutes currently do not provide for civil penalties or fines for violating the antitrust laws
  - Legislation has been introduced to change this, although the idea of civil penalties has yet to gain much traction.[1]
    - Some examples
      - Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. §§ 9-10 (2021) (providing for a maximum penalty of "15 percent of the total United States revenues of the person for the previous calendar year or 30 percent of the United States revenues of the person in any line of commerce affected or targeted by the unlawful conduct during the period of the unlawful conduct")
      - American Innovation and Choice Online Act, S. 2992, 117th Cong. § 3(c)(5)(B) (reported as amended to Senate Mar. 2, 2022) (providing for a maximum penalty of "15 percent of the total United States revenue of the person for the period of time the violation occurred")
    - There is a serious question of whether penalties with these maximums are criminal fines and not civil penalties, which would entitle defendants to full Fifth and Sixth Amendment protections

Four types of federal antitrust proceedings

1. Criminal prosecutions in federal district court
   - Only used for "hardcore" antitrust violations (e.g., horizontal price fixing)
   - Not used in challenging mergers (as a matter of prosecutorial discretion)
2. Civil judicial adjudications in federal district court
3. FTC administrative adjudications
4. Agency administrative resolutions (consent decrees)
   a. DOJ: In federal district court
   b. FTC: In an FTC quasi-adjudicative proceeding

There also can be state court antitrust proceedings under state antitrust law, although these are infrequent—Most state merger challenges are brought in federal district court

Summary

	Forum	Criminal*	Injunctive Relief	Damages
DOJ	Federal court	Sherman Act §§ 1-2 (under federal law)	Sherman Act § 4 Clayton Act § 15	Clayton Act § 4A
FTC	Administrative court		Clayton Act § 11 FTC Act §§ 5, 13	
State AGs**	Federal court for federal and state claims	(under state law where available)	Clayton Act § 16	Clayton Act § 4C (on behalf of resident natural persons)
Private**	Federal court for federal and state claims		Clayton Act § 16	Clayton Act § 4

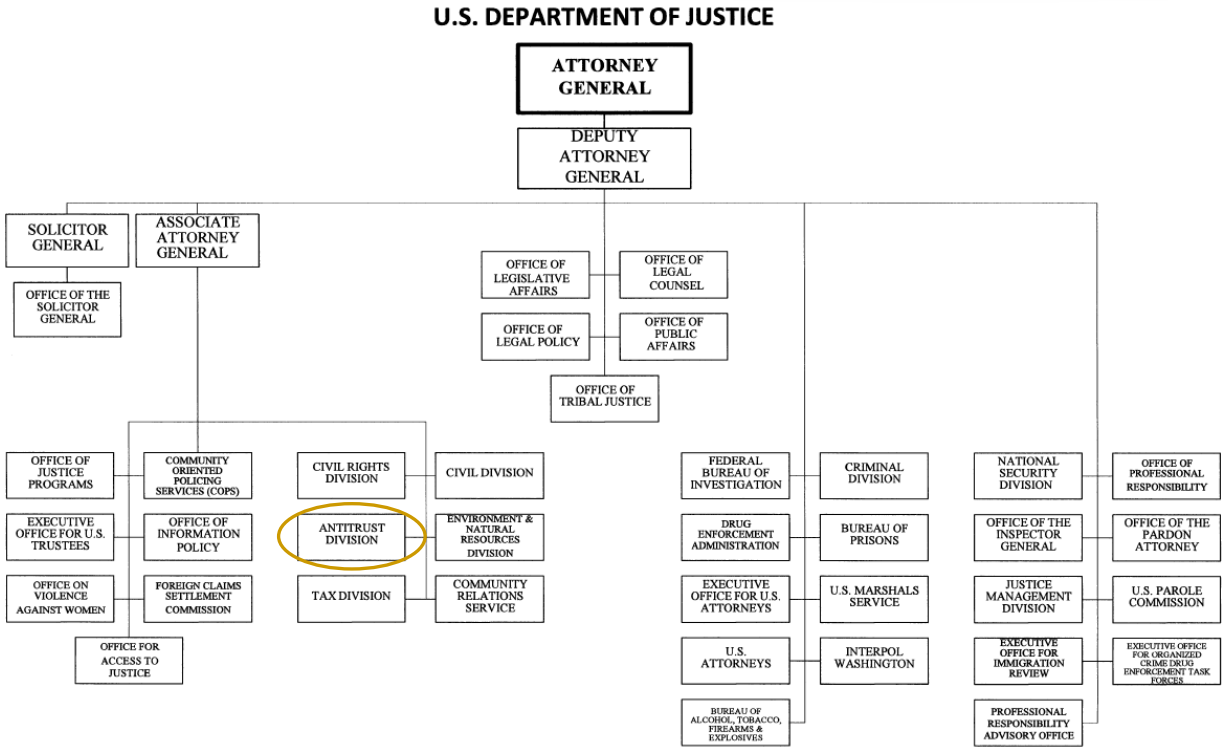
* As a matter of prosecutorial discretion, not used in merger antitrust enforcement

** States are considered "private persons" under Clayton Act § 16. States also can bring state antitrust claims (but not federal antitrust claims) in state court.

Government Organization

United States Department of Justice

- Overall

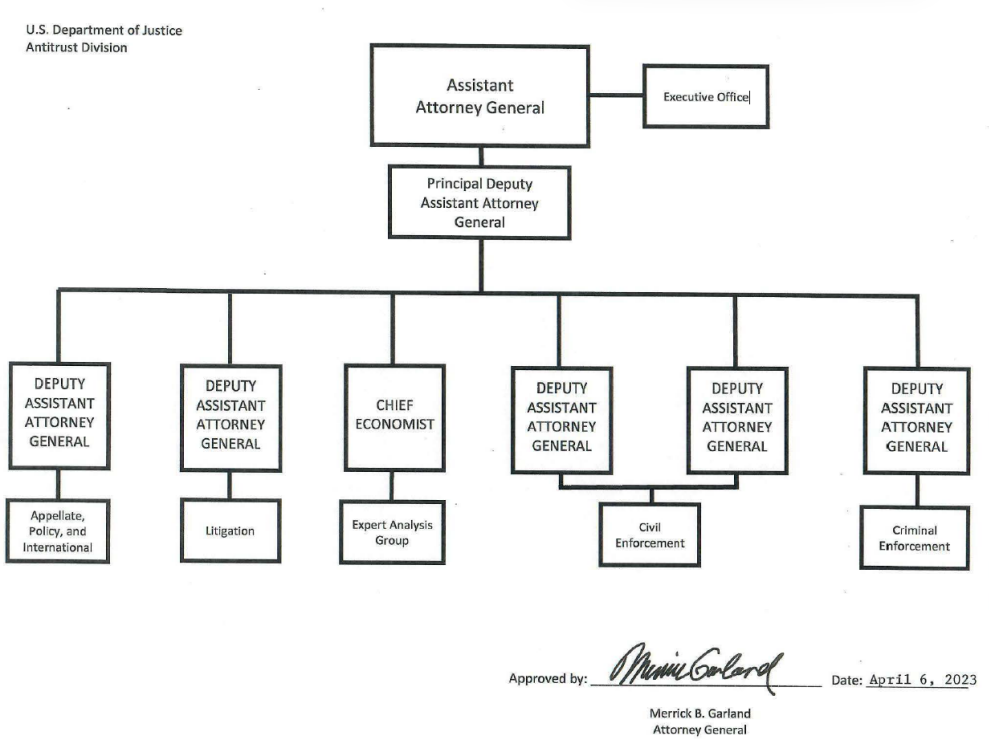


Approved by: _____ Date: 10·28·21

MERRICK B. GARLAND
Attorney General

United States Department of Justice

- Antitrust Division
  - Current ATD org chart

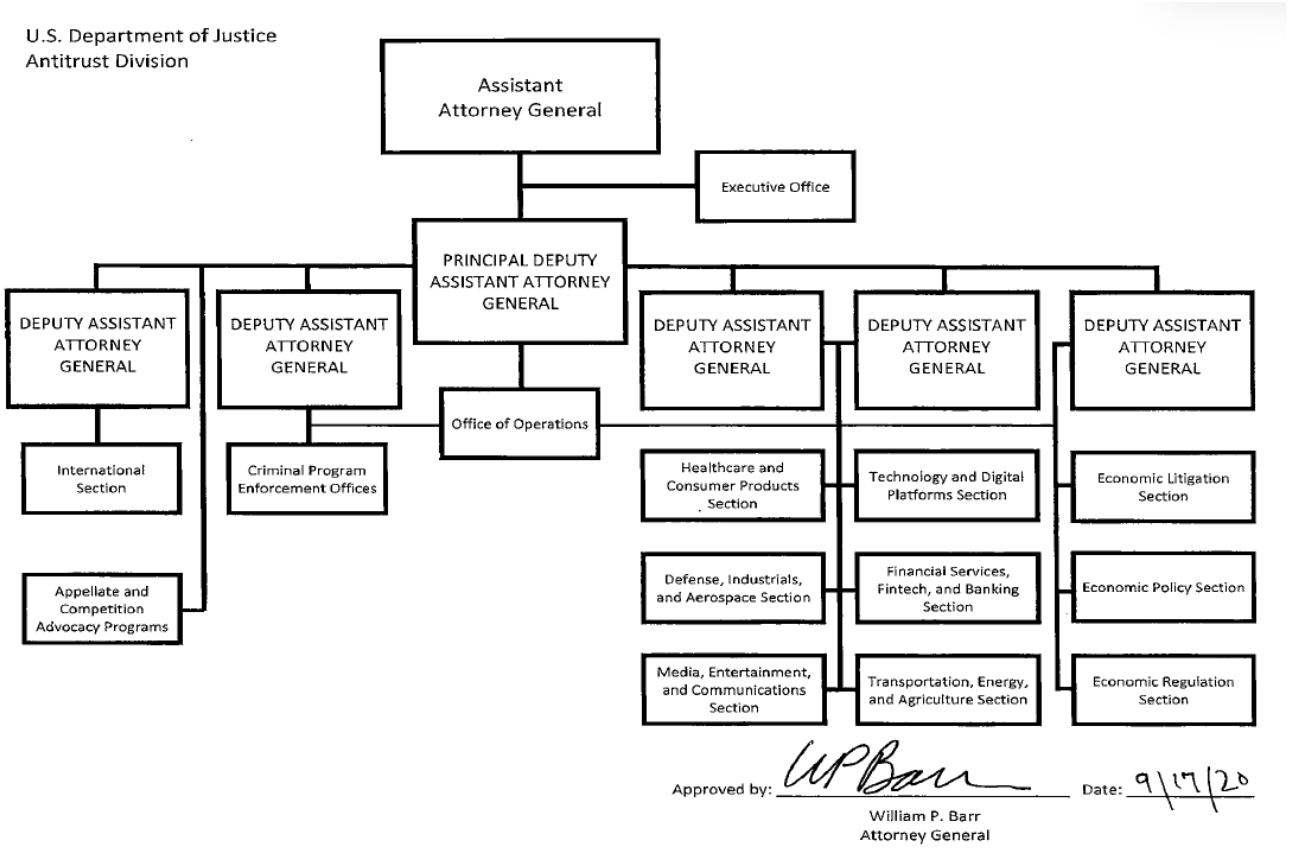


Notes:

1. The ATD has a hierarchical structure.
2. The Assistant Attorney General (AAG) has "complaint authority" to file a complaint without seeking the approval of anyone else. No one else in the Division has complaint authority. As a result, the AAG is the ultimate and sole decision-maker on legal challenges brought by the ATD.
3. The AAG is nominated by the President and subject to confirmation by the Senate. No one else in the ATD requires Senate confirmation.
4. The AAG serves at the pleasure of the President and the Attorney General and may be removed by them without cause.

United States Department of Justice

- Antitrust Division
  - This older ATD org chart provides more detail of the sections under the various deputy assistant attorneys general



United States Department of Justice

- Antitrust Division

BRIEFING ROOM

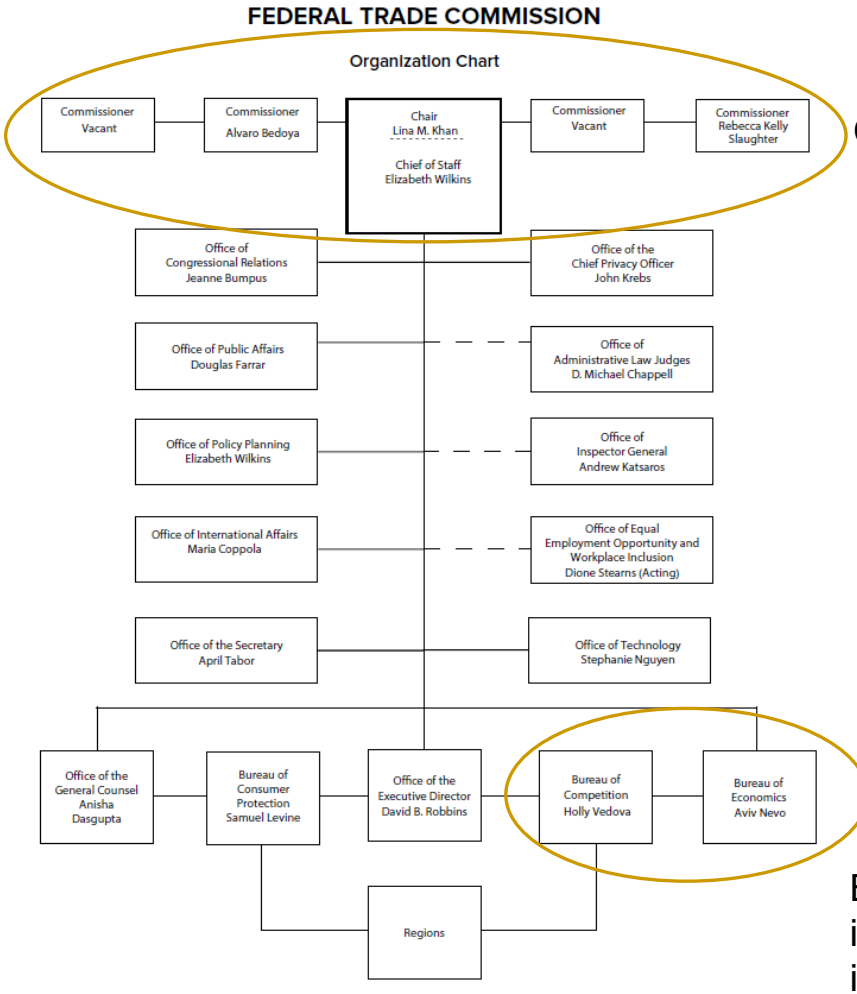
President Biden Announces Jonathan Kanter for Assistant Attorney General for Antitrust

JULY 20, 2021 • STATEMENTS AND RELEASES

- Confirmed November 16, 2021
- Nominated July 20, 2021
- Founding Partner, Kanter Law Group (2020 – 2021)
- Partner, Paul, Weiss, Rifkind, Wharton & Garrison LLP (2016-2020)
- Partner, Cadwalader, Wickersham & Taft LLP (2007 – 2016)
- Associate, Fried Frank (2000 – 2007)
- Attorney, Federal Trade Commission (1998 – 2000)
- J.D. 1998, Washington University in St. Louis School of Law

Federal Trade Commission

- Overall



Commissioners

Bureaus involved in antitrust investigations

Notes:

1. The FTC has a "collegial" structure, that is, the Commission cannot take enforcement action unless a majority of the Commissioners vote to do so. No single person can make an enforcement decision for the FTC.
2. The FTC Act provides for five Commissioners. Each Commissioner serves for a term of seven years (or fills out the remaining term of his or her predecessor). By law, no more than three Commissioners can be a member of the same political party.
3. Each Commissioner is nominated by the President and subject to confirmation by the Senate. No one else in the FTC is subject to Senate confirmation.
4. The President appoints the chairman of the Commission, who is responsible for chairing Commission meetings and for administering the staff of the FTC.
5. The FTC is an "independent agency," so that Commissioners do not serve at the pleasure of the President and can only be removed for cause.

Federal Trade Commission

- Three commissioners—Two vacancies with intent to nominate announced

Serving commissioners

Lina Khan, Chair (Democrat appointment)
Academic and former Hill staffer
Sworn in June 15, 2021
Term expires September 26, 2024

Rebecca Slaughter, Commissioner (Democrat appointment)
Hill staffer
Sworn in May 2, 2018
Term expires September 26, 2022

Alvaro Bedoya, Commissioner (Democratic appointment)
Academic—Director, Center on Privacy & Technology (Georgetown University Law Center)
Former Hill staffer
Sworn in May 16, 2022
Term expires September 26, 2026

Intent to nominate announced

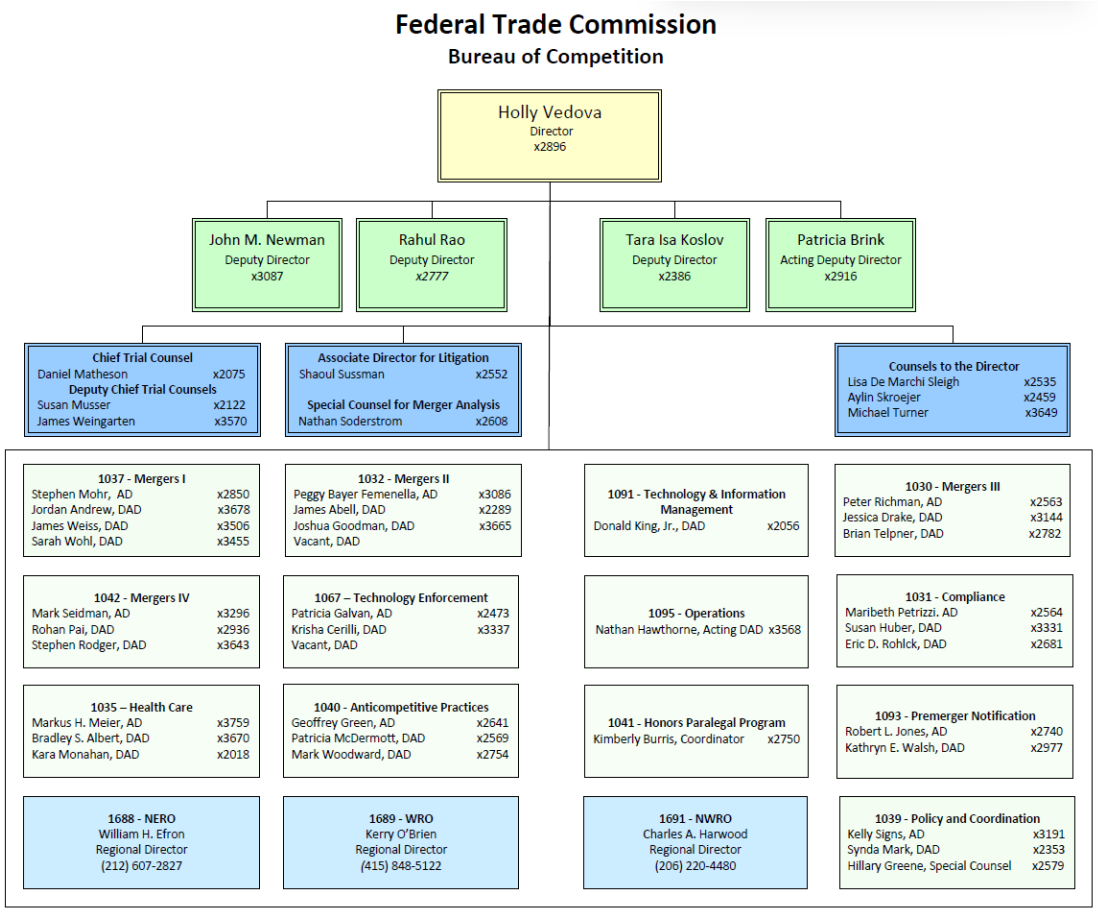
Andrew N. Ferguson (Republican to be nominated)
Solicitor General of the Commonwealth of Virginia and former Hill staffer
Intent to nominate announced July 3, 2023
Unknown who he will replace

Melissa Holyoak (Republican to be nominated)
Solicitor General of Utah
Intent to nominate announced July 3, 2023
Unknown who he will replace

Vacant terms expires on September 26, 2023, and September 26, 2025

Federal Trade Commission

- Bureau of Competition



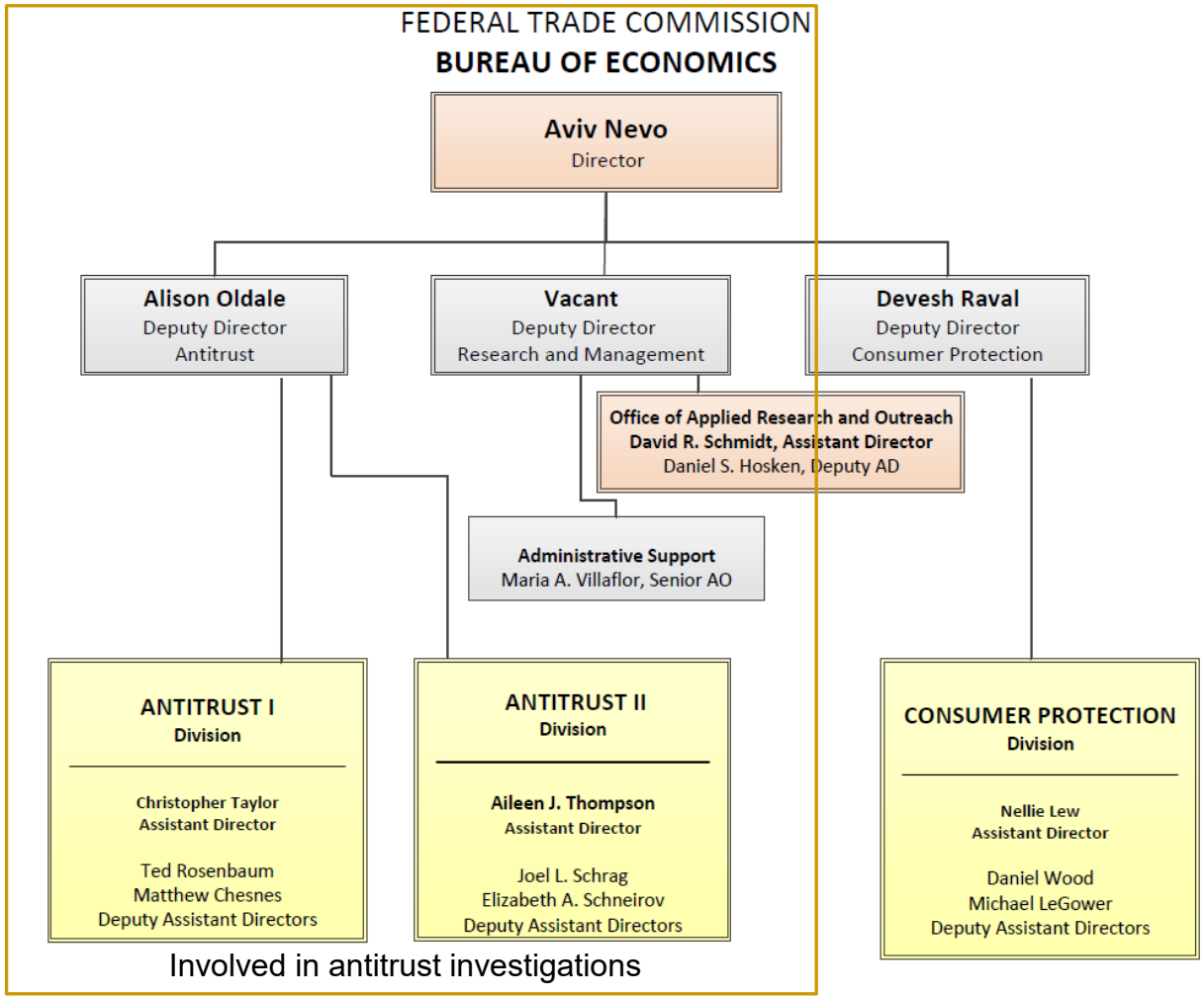
Version: 1/23/2023

Notes:

1. The Bureau of Competition (BC) is the competition legal arm of the FTC and conducts antitrust investigations and legal challenges.
2. BC has a hierarchical structure.
3. The Director of the Bureau of Competition is appointed by the Commission and is the Commission's chief antitrust enforcement staff official.
4. The BC Director makes recommendations to the Commission on enforcement actions. As a matter of practice, the recommendations of other BC officials also go to the Commission.

Federal Trade Commission

- Bureau of Economics



Notes:

1. The Bureau of Economics (BE) the economics arm of the FTC and participates in investigations conducted by BC.
2. BE has a hierarchical structure.
3. The Director of the Bureau of Economics is appointed by the Commission and is the Commission's chief economics staff official.
4. The BE Director makes recommendations to the Commission on antitrust enforcement actions. As a matter of practice, the recommendations of other BE officials also go to the Commission.

HSR Merger Review Process

Hart-Scott-Rodino Act[1]

- Enacted in 1976 and implemented in 1978
  - Designed to alert DOJ/FTC to pending transactions to permit them to investigate—and, if necessary, challenge—a transaction prior to closing
  - *Idea*: Much more effective and efficient to block or fix an anticompetitive deal prior to closing than to try to remediate it after closing
- Applies to large mergers, acquisitions and joint ventures
  - In 2022, the threshold for prima facie reportability is $101.0 million
- Imposes reporting and waiting period requirements
  1. Each transacting party must file a premerger notification report with both DOJ and FTC
  2. The parties must wait a statutorily prescribed period after filing before they can consummate their transaction
     - The (initial) waiting period for most types of transactions is 30 calendar days
- Authorizes investigating agency to obtain additional information and documents from reporting parties through a "second request"
  - Also suspends the waiting period for most transactions for 30 days after all parties have responded to their respective second requests

[1] Clayton Act § 7A, 15 U.S.C. § 18a.

Hart-Scott-Rodino Act

- Not jurisdictional: DOJ and FTC can review and challenge transactions that—
  - Fall below reporting thresholds
  - Are exempt from HSR reporting requirements
  - Were "cleared" in an HSR merger review
    - No immunity attaches to a transaction that has successfully completed an HSR merger review
    - The DOJ/FTC are not estopped from challenging a transaction after the waiting period has expired even if the agency reviewed the transaction and "cleared" it without enforcement action
- Administration
  - The FTC Premerger Notification Office (PNO) is responsible for the procedural administration of the premerger notification program under the HSR Act
  - There is a "clearance process" to allocate HSR filings to the DOJ and FTC for substantive review
  - Once a filing has been "cleared" to an agency for review, the filing is sent to the appropriate investigating section for review, investigation, and possible challenge

Overview of HSR merger review process