Unit 1A: TransDigm/Takata: Institutional Background

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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)

Clayton Act § 7

- The incipiency standard
  - *The law*: Beginning in 1957 with the Supreme Court's decision in *duPont/GM*, courts consistently have interpreted the "may be" and "tend to" language in the anticompetitive effects test to—
    - Require proof only of a *reasonable probability* that the proscribed anticompetitive effect will occur as a result of the challenged acquisition
    - Not require proof that an actual anticompetitive effect will result from the merger

> Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any other corporation. The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended.[1]

  - Section 7 tests all mergers—horizontal, vertical , and conglomerate—under the same reasonable probability standard[2]

[1] United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 589 (1957); *accord* Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962); United States v. Penn-Olin Chem. Co., 378 U.S. 158, 173 (1964); United States v. Cont'l Can Co., 378 U.S. 441, 444 (1964); United States v. Von's Grocery Co., 384 U.S. 270, 272 (1966); FTC v. Procter & Gamble Co., 386 U.S. 568, 576-77 (1967); Ford Motor Co. v. United States, 405 U.S. 562, 567 n.4 (1972); United States v. Falstaff Brewing Corp., 410 U.S. 526, 531 (1973); United States v. Marine Bancorporation, Inc., 418 U.S. 602, 616, 640-41 (1974);

[2] *Procter & Gamble*, 386 U.S. at 577 ("All mergers are within the reach of § 7, and all must be tested by the same standard, whether they are classified as horizontal, vertical, conglomerate.").

Clayton Act § 7

- The incipiency standard
  - The practice
    - In practice, courts do not employ any nuanced view of a "reasonable probability," although they give lip service to the term
    - Rather, they appear to ask whether it is more likely than not that a challenged merger will have an anticompetitive effect
  - The critics
    - Critics argue that this is tantamount to requiring proof of an actual anticompetitive effect
      - That is, it is the same standard for proving that the merger will have an anticompetitive effect under the preponderance of the evidence standard
    - To critics, this is too high a standard: Proof of a "reasonably probability" should recognize violations when the mergers presents an appreciable risk of an anticompetitive effect, even if the merger is not more likely to be anticompetitive
      - Strictly interpreted as a matter of mathematics, the proper standard is whether the preponderance of the evidence shows that the merger has a reasonable probability of having an anticompetitive effect
        - If the preponderance of the evidence requires a greater than 50% probability that the proposition is true and the reasonable probability standard requires a greater than 50% probability that an anticompetitive effect will occur, then the proper standard would be that the merger has a greater than 25% chance of producing an anticompetitive effect.
    - The problem for courts
      - Courts apply a preponderance of the evidence standard in everyday practice
      - It is unclear how—or even if—courts would deal with a probability threshold less than 50%

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 one 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 with 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 first Trump administration, the federal enforcement agencies began 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 district court tried the FTC's claim in 2025 and entered judgment for Meta, finding that the FTC failed to prove current monopoly power in its alleged market. The FTC's appeal is pending.

[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 Acts, 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
  - During the Biden administration, there was a effort by the FTC to extend the reach of Section 5 beyond that of Section 7, especially in “nascent competition”
  - The Biden FTC, however, created no new judicial precedent in extending Section 5, and the Trump 2.0 FTC appears unlikely to continue to pursue this initiative.
- Application to merger agreements
  - FTC merger challenges almost always allege two violations:
    - A Clayton Act § 7 violation if the transaction is consummated
    - An 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 of the merger agreement 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 Consumer Welfare Standard and Section 7 Anticompetitive Effects

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] These 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.

Anticompetitive effects

- *Distinction*: Downstream and upstream markets
  - Downstream markets
    - *Definition*: Sellers merge and customers sustain any anticompetitive harm
    - Almost all horizontal merger challenges historically have alleged anticompetitive harm in downstream markets
    - Consequently, almost all case law to date addresses downstream markets
  - Upstream markets
    - *Definition*: Buyers merge and suppliers sustain any anticompetitive harm
    - Very few horizontal merger challenges have alleged anticompetitive harm in an upstream market[1]
    - Consequently, the case law is almost nonexistent for upstream markets
      - The tests for anticompetitive effects from horizontal mergers in upstream markets are unsettled
    - Upstream markets are a focus of the Biden antitrust enforcers
      - Especially concerned that mergers can anticompetitively affect labor markets
      - But they have been having trouble finding cases to bring notwithstanding aggressive investigations

[1] A notable recent example is United States v. Bertelsmann SE & Co. KGaA, 646 F.Supp.3d 1 (D.D.C. 2022), where the DOJ successfully challenged the acquisition of Simon & Schuster by Penguin Random House on the grounds that the transaction would anticompetitively harm authors in the market for publishing rights by lowering the price paid to authors of anticipated top-selling books. Surprisingly, the defense offered no credible theory of how the merger would benefit readers.

Anticompetitive effects in downstream markets

- *Modern view under the consumer welfare standard*:[1] Transaction threatens—with a reasonable probability—to hurt some *identifiable* set of customers in the (downstream) market through:
  - Increased prices
  - Reduced market output
  - Reduced product or service quality
  - Reduced rate of technological innovation or product improvement
  - (Maybe) reduced product diversity[2]

These are called *anticompetitive effects*

A firm that has the power to produce or strengthen an anticompetitive effect is said to have *market power*

- Forward-looking analysis
  - Compares the postmerger outcomes with and without the deal
  - Can view potential competitors today as future competitors tomorrow

[1] The modern view dates from the late 1980s or early 1990s, after the agencies and the courts had assimilated the 1982 DOJ Merger Guidelines.
[2] The idea that reduced product diversity may be a cognizable customer harm was formally introduced in the 2010 DOJ/FTC Horizontal Merger Guidelines. A reduction in product diversity is typically accompanied by a reduction in costs, so the balance of whether a reduction in product diversity is anticompetitive or procompetitive can often be difficult to determine and hence is rarely a driver in merger antitrust decision making.

Anticompetitive effects in downstream markets

- Nonprice dimensions of possible anticompetitive effect
  - Historically, there have not been challenges on nonprice dimensions (quality, rate of technological innovation, or product diversity) when there is no alleged price effect
    - Economic theory is not well-developed in predicting—
      - The consequences of transaction for nonprice market variables, *or*
      - The implications of changes in nonprice market variables for consumer welfare
    - *But* adverse effect on other dimensions is frequently mentioned in modern complaints that also allege an anticompetitive price effect
  - *The practice*: Agencies require strong direct evidence to proceed on a theory other than a price increase: Most likely will require—
    1. An "admission against interest" by the acquiring company or other compelling evidence that:
       - The merging companies compete significantly in product quality, innovation, or other nonprice dimension,
       - This competition in this dimension is costly and is materially reducing profits, *and*
       - A benefit of the transaction will be to eliminate this competition and increase profits by saving costs
    2. Evidence that other companies will not replace the nonprice competition lost due to the merger; *and*
    3. Evidence that customers will be significantly harmed by the loss of this nonprice competition
  - *Note*: Nonprice competition, especially innovation competition, is an important consideration in Europe

Anticompetitive effects in upstream markets

- Antitrust merger challenges in upstream markets
  - Merger antitrust cases have been rare in upstream markets, where the concern is that the merging parties as buyers will act anticompetitively with respect to suppliers
    - One reason (perhaps) for the lack of upstream merger antitrust cases is that an anticompetitive upstream merger is frequently anticompetitive in the downstream market
    - The Biden administration enforcement officials believed that mergers are often anticompetitive in upstream markets (especially in labor markets) even when there is no corresponding anticompetitive effect in the downstream market

Anticompetitive effects in upstream markets

- Administration policy
  - A major initiative of the Biden administration is to bring cases where the mergers threatens to harm suppliers, especially workers
    - But the agencies are having difficulties in finding cases to bring despite aggressive investigations
  - The Trump 2.0 agencies continue to recognize upstream merger harm as cognizable under Section 7
    - The Trump DOJ carried forward and settled the Biden-era UnitedHealth/Amedisys challenge, which alleged both downstream service-market harms and upstream harms in local nurse-labor markets[1]
      - The settlement expressly sought to remedy both sets of claims through structural divestitures designed to preserve at least two independent competitors—and therefore at least two competing employers—in the affected local markets[2]
      - The decree did not impose a separate labor-specific remedy; it relied on restoring independent provider businesses, together with their personnel, to restore competition for nurses as well as patients
    - But neither agency to date appears to have initiated a merger challenge that includes an upstream claim or challenged a merger solely on an upstream theory

[1] *See* Complaint ¶¶ 67–70, United States v. UnitedHealth Grp. Inc., No. 1:24-cv-03267-JKB (D. Md. filed Nov. 12, 2024) (alleging that the transaction would substantially lessen competition in hundreds of local labor markets for home-health and hospice nurses).
2 See *Final Judgment*, *United States v. UnitedHealth Group Inc.*, No. 1:24-cv-03267-JKB (D. Md. Dec. 9, 2025) (ECF No. 249) (modified by ECF No. 252).

The consumer welfare standard in practice

- Some operational implications
  - When applying the consumer welfare standard, the courts and the agencies have focused on whether customers are worse off with the merger than without it
    - In upstream markets, consider harm to suppliers
  - *Downstream effects*: 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
  - *Upstream effects*: If the merger—
    - Reduces input prices with little or no customer benefits, the agencies are likely to regard the merger as anticompetitive
    - Reduces input prices but passes on the savings to downstream customers, the agencies are unlikely to challenge
      - *Exception*: The supplier harms greatly outweigh the customer benefits

The consumer welfare standard in practice

- The Biden administration
  - The Biden antitrust agencies believed that the consumer welfare standard is too narrow
    - Focuses too much on the effect of mergers on prices and output to the exclusion of other effects
    - Ignores the effect of mergers on suppliers (especially labor)
    - Employs too high a standard of proof of harm to consumers
  - The Biden agencies' challenges in court, however, did not pushed materially beyond the consumer welfare standard as traditionally understood

The consumer welfare standard in practice

- The Trump 2.0 administration
  - Appears generally comfortable with the consumer welfare standard (expanded to include labor) as an overall guiding principle, but unlikely to apply it rigorously
  - But—
    - Appears to adopt a more "populist" approach that emphasizes the protection of the "common man" or average American from harms caused by large business enterprises
    - Has an explicit focus on discrimination and bias against "conservative views," especially by social media firms
    - Will be responsive to the direction of the President, Vice President, and perhaps other senior administration officials
      - NB: The AAG can also be overruled by the Attorney General, the Deputy Attorney General, and the Associate Attorney General (to whom the AAG is a direct report)[1]
    - Also likely to be influenced by the administration's "America First" policies, although it is unclear what implications this will have to antitrust enforcement policy

[1] See the next slide.

The consumer welfare standard in practice

- The Trump 2.0 administration
  - HPE/Juniper: A recent example of political influence
    - In January 2025, the Antitrust Division sued to block Hewlett Packard Enterprise's $14 billion acquisition of Juniper Networks, alleging the deal would harm competition in enterprise-grade WLAN solutions by combining the second and third largest firms in the market[1]
    - AAG Slater and the Division staff opposed a settlement proffered by the merging parties, presumably because the proposal did not require the divestiture of one of the overlapping businesses and instead provided for the licensing of certain software code to enable a third-party license to enter the business
    - In response, HPE hired prominent lobbyists with close ties to the Trump administration, including Mike Davis and Arthur Schwartz, to advocate for the deal
      - Slater reportedly asked companies to deal directly with the Justice Department and not hire consultants to lobby senior Trump administration officials outside the Justice Department, which created additional tensions within the Trump administration
    - Afterward, Acting Associate Attorney General Chad Mizelle overruled Slater and approved the settlement
      - The proposed consent decree filed with the court was signed by Mizelle and several other DOJ front office political appointees; Slater was the only official from the Antitrust Division to sign
      - It was highly unusual—and widely noted—that no other Antitrust Division attorneys joined her in signing the papers
      - Shortly thereafter, two of Slater's top deputies, Principal Deputy AAG Roger Alford and Deputy AAG Bill Rinner, were placed on administrative leave, reportedly because of their refusal to support the settlement and their efforts to preserve the Antitrust Division's independence in the face of pressure from political appointees.

[1] For the settlement and major litigation papers, see here.

The consumer welfare standard in practice

- Concluding thoughts
  - When analyzing changes in antitrust enforcement policy, disaggregate the analysis into two questions:
    - *Scope*: Will the new administration expand or contract the types of conduct subject to antitrust laws?
    - *Standards*: Will the new administration attempt to make the legal standards that govern conduct subject to the antitrust laws more strict or more lenient?

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
  - The merger guidelines are the principal vehicle through which the DOJ and FTC have announced how they interpret and ostensibly will apply the substantive Section 7 standards
  - 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 40 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 precedent 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 called 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 declined 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 (with a few notable exceptions)[2]

[1] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (Aug. 19, 2010)..
[2] *See* Carl Shapiro & Howard Shelanski, *Judicial Response to the 2010 Horizontal Merger Guidelines*, 58 Rev. Econ. Org. 51 (2021).

Merger Guidelines

- History (con't)
  - 2020 DOJ/FTC Vertical Merger Guidelines[1]
    - *June 2020*: Released during 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)
    - *September 2021*: Withdrawn by the FTC—but not the DOJ—15 months later, eight months into the Biden administration[2]
      - Withdrew because the FTC majority believed the guidelines were too defendant-friendly and included "unsound economic theories," particularly their treatment of efficiencies (especially elimination of double marginalization) as improperly "contravening the Clayton Act" by recognizing them "as a defense to an unlawful merger"
    - *December 2023*: The DOJ and FTC issued revised merger guidelines that cover vertical as well as horizontal mergers[3]

[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).
[3] U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines (Dec. 18, 2023) ("2023 MG").
[4] Press Release, Fed. Trade Comm'n, FTC Chairman Andrew N. Ferguson Announces that the FTC and DOJ's Joint 2023 Merger Guidelines Are in Effect (Feb. 18. 2025).

Merger Guidelines

- History (con't)
  - 2023 Merger Guidelines[1]
    - Addresses all types of mergers—horizontal, vertical, and conglomerate
    - Dramatically expands the domain of mergers that the agencies believe are anticompetitive compared to merger guidelines issued since 1982
      - Seeks to resurrect long-discarded theories and tests of anticompetitive harm from the 1950s and 1960s
    - Horizontal mergers: Differences from 2010 Horizontal Merger Guidelines—
      - Lowers the thresholds for a prima facie presumption of illegality based on market shares.
      - Resurrects a long-disregarded presumption of illegality based on "dominant" market position (>30% share)
      - Emphasizes structural effects over consumer welfare effects
      - Expresses strong skepticism that mergers could ever have procompetitive benefits
      - Recognizes harm to rivals and harm to labor as cognizable anticompetitive effects
    - Vertical mergers
      - Finds vertical mergers have significant potential to harm competition
      - Expands competitive harms to include disadvantaging rivals and increasing bargaining leverage
      - Highly skeptical of the procompetitive benefits that have justified most vertical mergers in the last 40 years
    - Conglomerate
      - Revives entrenchment—a theory of anticompetitive harm not seen since in modern U.S. antitrust law
      - Suggests entrenchment by dominant firms through acquisitions may also violate Sherman Act § 2

[1] U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines (Dec. 18, 2023) ("2023 MG").

Merger Guidelines

- History (con't)
  - 2023 Merger Guidelines in the Trump administration
    - Within one month of President Trump's inauguration, administration antitrust officials announced that they will follow the 2023 Merger Guidelines
      - *February 2025*: FTC Chairman Andrew N. Ferguson announced that the Trump FTC will continue to follow the 2023 Merger Guidelines[1]
      - *February 2025*: Gail Slater, nominated to head the Antitrust Division, stated that she will continue to follow the 2023 Merger Guidelines if confirmed[2]
    - Business community reaction
      - This embrace of the 2023 Merger Guidelines surprised the business community, which thought that the Trump administration would back away from the aggressive approach adopted by the Biden administration in the 2023 Merger Guidelines
      - Some were especially surprised that the Trump antitrust officials thought that "much of what is in the current merger guidelines simply restates longstanding law"[3] since the 2023 guidelines—
        - repeatedly relied on cases decided in the 1950s and 1960s that modern courts have not followed, and
        - were devoid of the economic analysis that informed the 1982, 1992, and 2010 guidelines
      - Ferguson said he would consider amendments "[i]f experience teaches that revisions are appropriate," but gave no indication that he was considering any revisions[4]—Too date, no efforts to revise

[1] Fed. Trade Comm'n, Memorandum from FTC Chairman Andrew N. Ferguson to the FTC Staff re Merger Guidelines (Feb. 18. 2025).
[2] Senate Judiciary Comm., Hearing on "Nominations": Written Questions for Abigail Slater from Sen. Peter Welch, Responses to Questions 2 & 3 (Feb. 12, 2025). On March 11, 2025, the U.S. Senate confirmed Slater as the Assistant Attorney General for the U.S. Department of Justice Antitrust Division.
[3] *Id*.
[4] FTC Press Release, *supra* note 1, at 2.

Merger Guidelines

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

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, but the DOJ criminally prosecutes only "hardcore" antitrust violations (i.e., horizontal price fixing, horizontal market divisions, some horizontal group boycotts)
       - The DOJ has never pursued mergers 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—so far unsuccessful—to give the FTC authority to seek disgorgement

[1] AMG Capital Mgmt., LLC v. FTC, No. 19-508, 141 S. Ct. 1341 (U.S. Apr. 22, 2021).

Relief not currently available: Civil penalties

- No civil penalties for substantive merger violations
  - 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
   - DOJ, FTC, states, and private plaintiffs
3. FTC administrative adjudications
   - Evidentiary hearing before an administrative law judge (essentially acting as a magistrate judge), followed by Commission final decision
   - Under the 2026 Ferguson policy, the FTC has discontinued its historical practice of using administrative adjudication to decide merger cases on the merits and instead will seek permanent injunctive relief in federal district court under FTC Act § 13(b).[1]
4. Agency resolutions (consent decrees)
   a. DOJ: Consent decree entered as a final judgment by a federal district court
   b. FTC: Administrative consent order entered by the Commission

[1] We will examine this policy change in more detail in Class 4.

Summary

	Forum	Criminal[1]	Injunctive Relief	Damages
DOJ	Federal court	Sherman Act §§ 1-2 (under federal law)	Sherman Act § 4 Clayton Act § 15	Clayton Act § 4A
FTC	Federal court or administrative FTC court[2]		Clayton Act § 11 FTC Act §§ 5, 13	
State AGs[3]	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

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

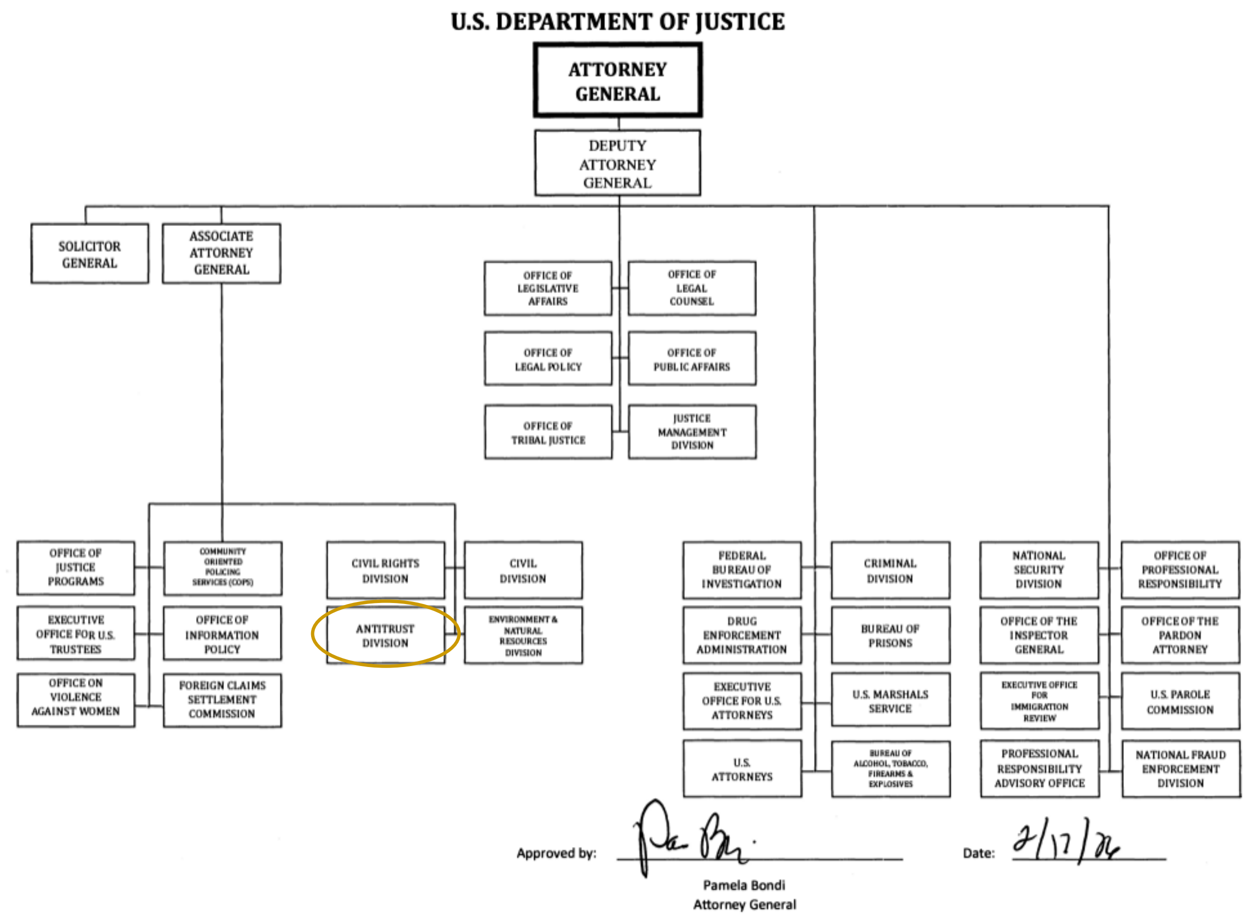
2 In the Trump 2.0 administration, the FTC has announced it will bring it litigations in federal district court, rejecting the prior consistent historical practice of litigating the merits in an FTC adjudicative proceeding. We will discuss this in more detail in Class 4.

3 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

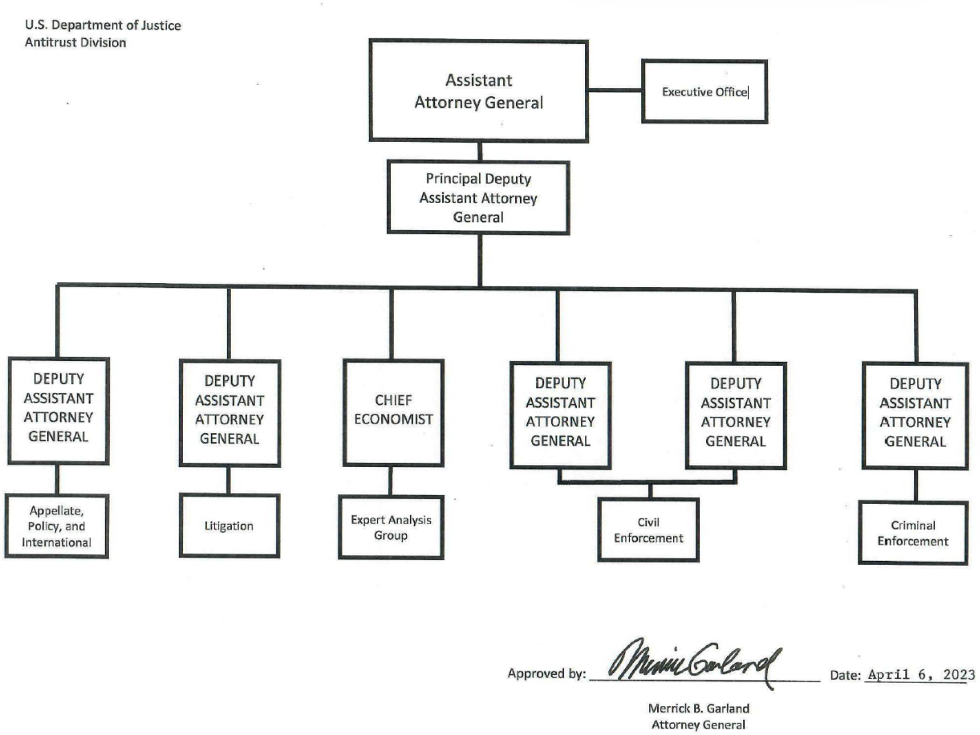
United States Department of Justice

- Overall



United States Department of Justice

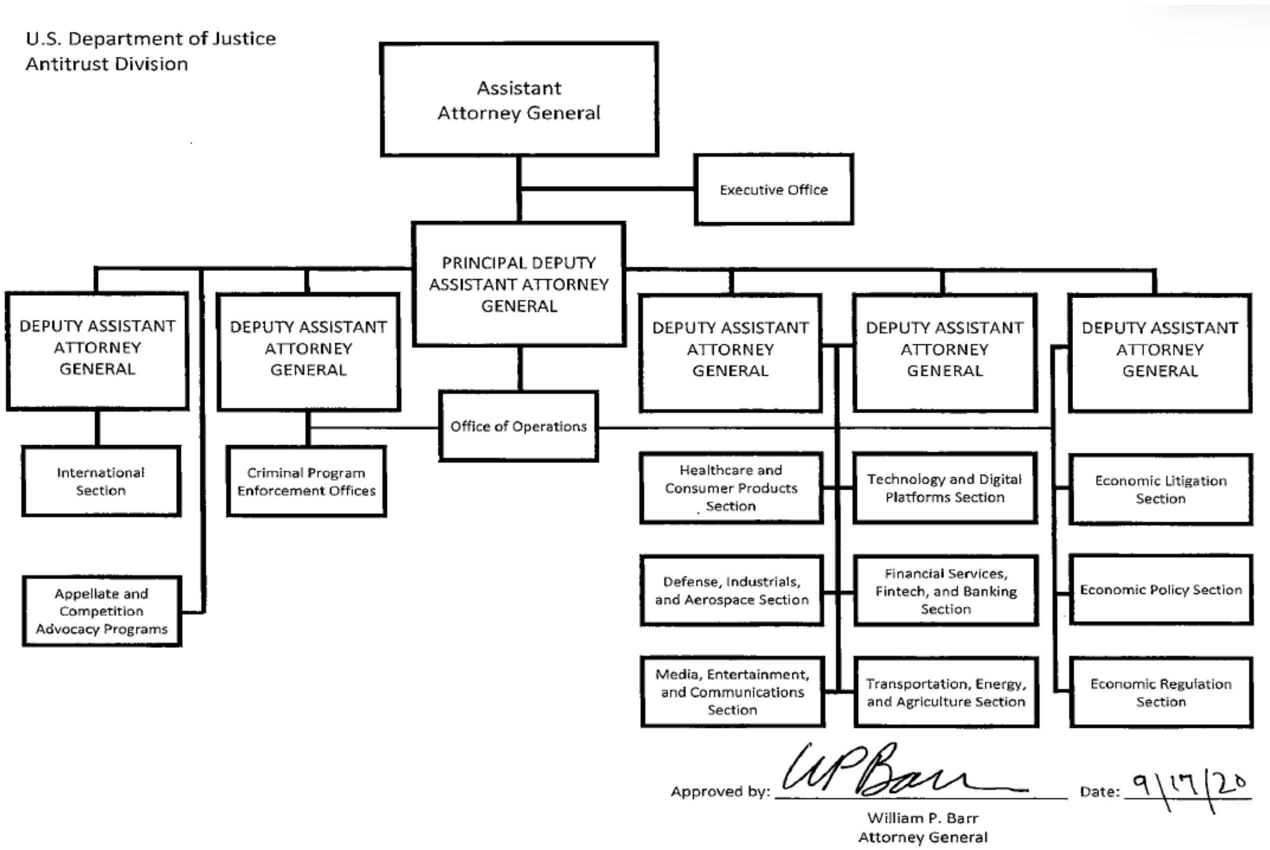
- Antitrust Division
  - Current ATD org chart



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

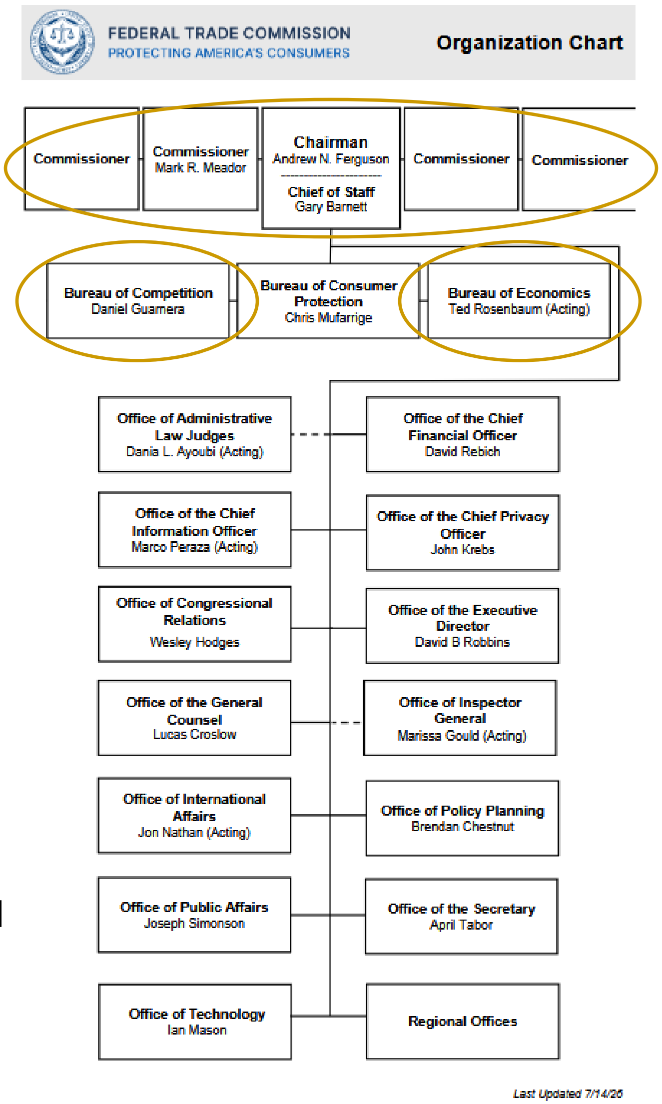
D. Adam Candeub
Assistant Attorney General
(nominated)

- Nominated (July 21, 2026)
- General Counsel, Federal Communications Commission (2025–present)
- Professor of Law, Michigan State University College of Law (2004–2020; 2021–2025)
- Vice President and Deputy General Counsel, Roku, Inc. (2022–2024)
- Deputy Associate Attorney General, U.S. Department of Justice (2020–2021)
- Acting Assistant Secretary and Deputy Assistant Secretary, National Telecommunications and Information Administration, U.S. Department of Commerce (2020)
- Attorney-Advisor, FCC Common Carrier Bureau and Media Bureau (2000–2004)
- Litigation Associate, Jones Day (1998–2000)
- Corporate Associate, Cleary Gottlieb Steen & Hamilton (1996–1998)
- Law Clerk to Chief Judge J. Clifford Wallace, U.S. Court of Appeals for the Ninth Circuit (1995–1996)
- J.D., magna cum laude, University of Pennsylvania Law School (1995)
- B.A., magna cum laude, Yale University (1990)

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 members 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

- Five commissioners

Andrew N. Ferguson, Chairman (Republican appointment)
Former Solicitor General of Virginia
Former Chief Counsel to Senate Republican Leader Mitch McConnell
Sworn in April 2, 2024
Designated Chairman January 20, 2025
Term expires September 26, 2030

Mark R. Meador, Commissioner (Republican appointment)
Visiting fellow, Heritage Foundation Tech Policy Center
Former Deputy Chief Counsel for Antitrust and Competition Policy to Senator Mike Lee (R-Utah)
Sworn in April 16, 2025
Term expires September 26, 2031

Three commissioner vacancies since November 17, 2025
No nominations announced or rumored

Federal Trade Commission

- Firing of the Democrat-appointed commissioners
  - On March 18, 2025, President Trump abruptly dismissed Democratic FTC Commissioners Rebecca Kelly Slaughter and Alvaro M. Bedoya, despite neither having completed their seven-year terms[1]
    - Under the FTC Act[2] and the Supreme Court's 1935 decision in *Humphrey's Executor,*[3] FTC commissioners may only be removed "for inefficiency, neglect of duty, or malfeasance"—none of which were cited by Trump in any public announcement or news report
    - FTC Chair Andrew Ferguson defended the president's authority to remove commissioners without cause, invoking the unitary executive theory of presidential power under Article II of the Constitution:

> President Donald J. Trump is the head of the executive branch and is vested with all of the executive power in our government. I have no doubts about his constitutional authority to remove Commissioners, which is necessary to ensure democratic accountability for our government.[4]

[1] There is no public presidential document (such as an executive order or proclamation) removing Slaughter and Bedoya. The action was presumably carried out by a nonpublic presidential notice.
[2] FTC Act § 1, 15 U.S.C. § 41 ("Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.").
[3] Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).
[4] Andrew N. Ferguson, Chairman, Fed. Trade Comm'n, Statement on Former Commissioners Slaughter and Bedoya (Mar. 19, 2025).

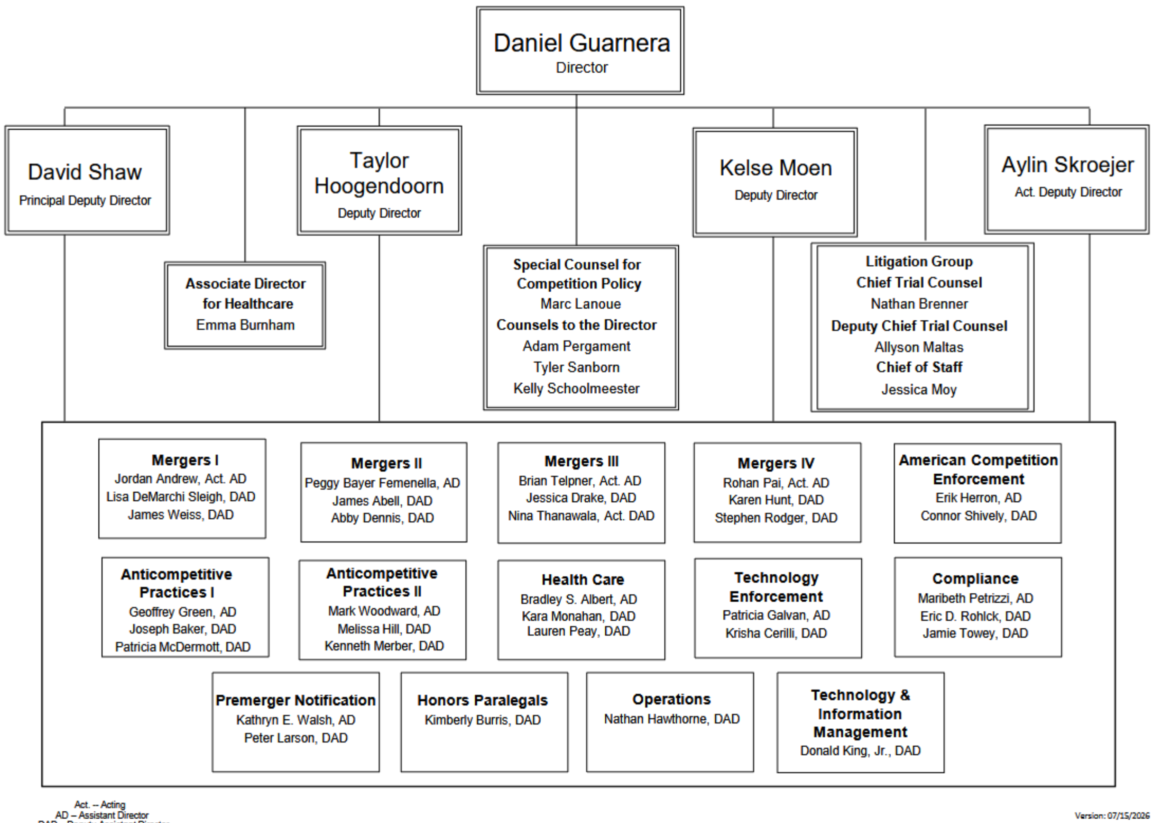
Federal Trade Commission

- Firing of the Democrat-appointed commissioners (con't)
  - In response, Slaughter and Bedoya immediately filed a lawsuit in the U.S. District Court for the District of Columbia, seeking a declaratory judgment that the firings were unlawful and injunction against Defendants Ferguson, Holyoak, and Executive Director David B. Robbins, ordering that they treat plaintiffs as FTC Commissioners[1]
    - Neither Slaughter nor Bedoya resigned from the Commission, and both maintained that they continued to be FTC commissioners
    - On June 9, 2025, Bedoya formally resigned, citing financial hardship and the need to earn income
      - Bedoya could not accept another job as long as he maintained he continued as an FTC commissioner.
  - Supreme Court upholds firing[2]
    - On June 29, 2026, the Supreme Court reversed, 6–3, in Held that the FTC Act's limitation permitting removal of commissioners only for "inefficiency, neglect of duty, or malfeasance in office" violates Article II's separation of powers
      - The FTC exercises substantial executive power through rulemaking, investigation, enforcement, administrative adjudication, and federal-court litigation
      - Officers exercising executive power must remain subject to the President's supervision and removal
      - Accordingly, the President may remove FTC commissioners at will, without establishing one of the statutory grounds for removal

[1] Complaint for Declaratory and Injunctive Relief, Slaughter v. Trump, No. 1:25-cv-00909 (D.D.C. filed Mar. 27, 2025). The most important filings in the case may be found here.
[2] Trump v. Slaughter, No. 25-332, 2026 WL 1855612 (U.S. June 29, 2026). The major filings are here.

Federal Trade Commission

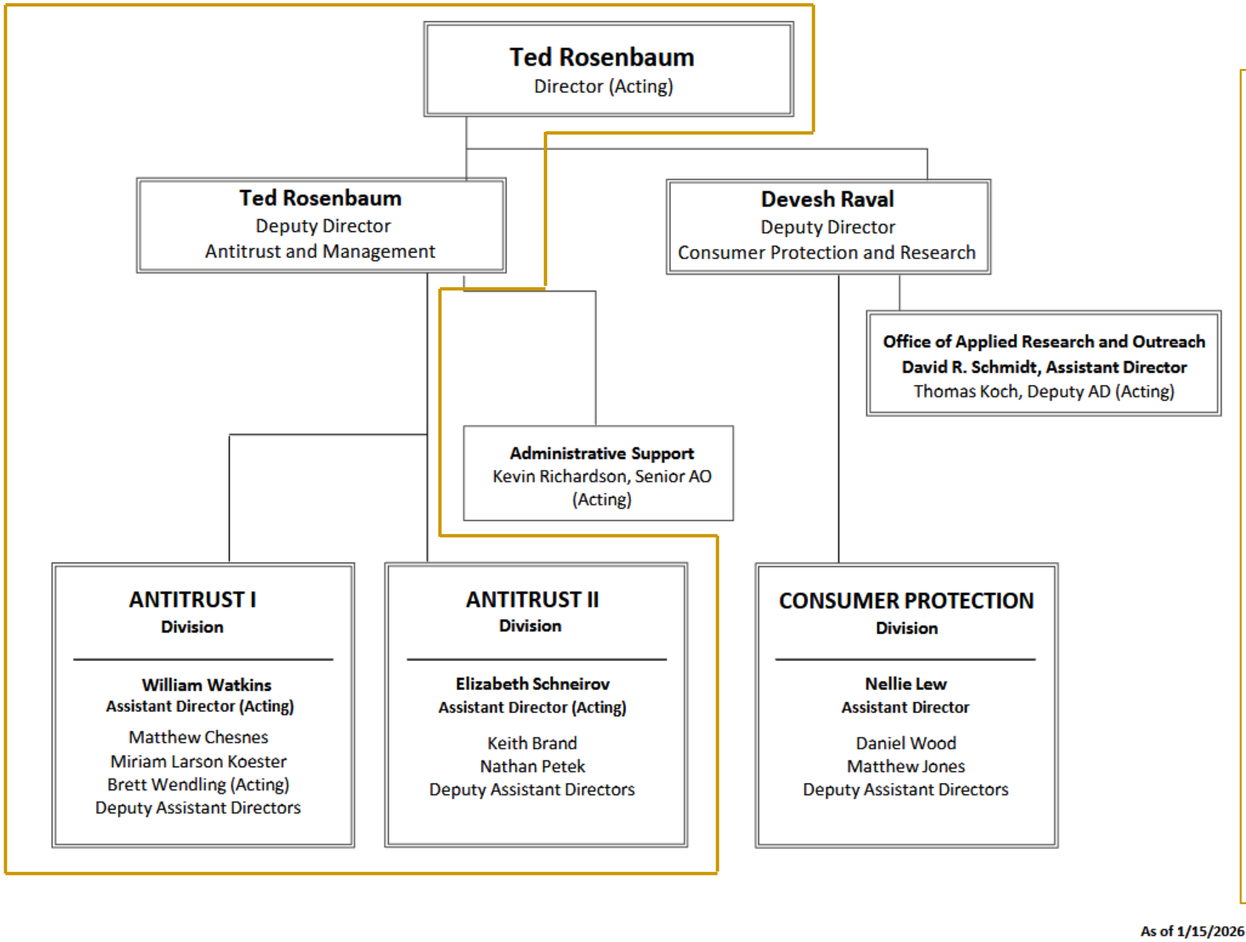
- Bureau of Competition



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

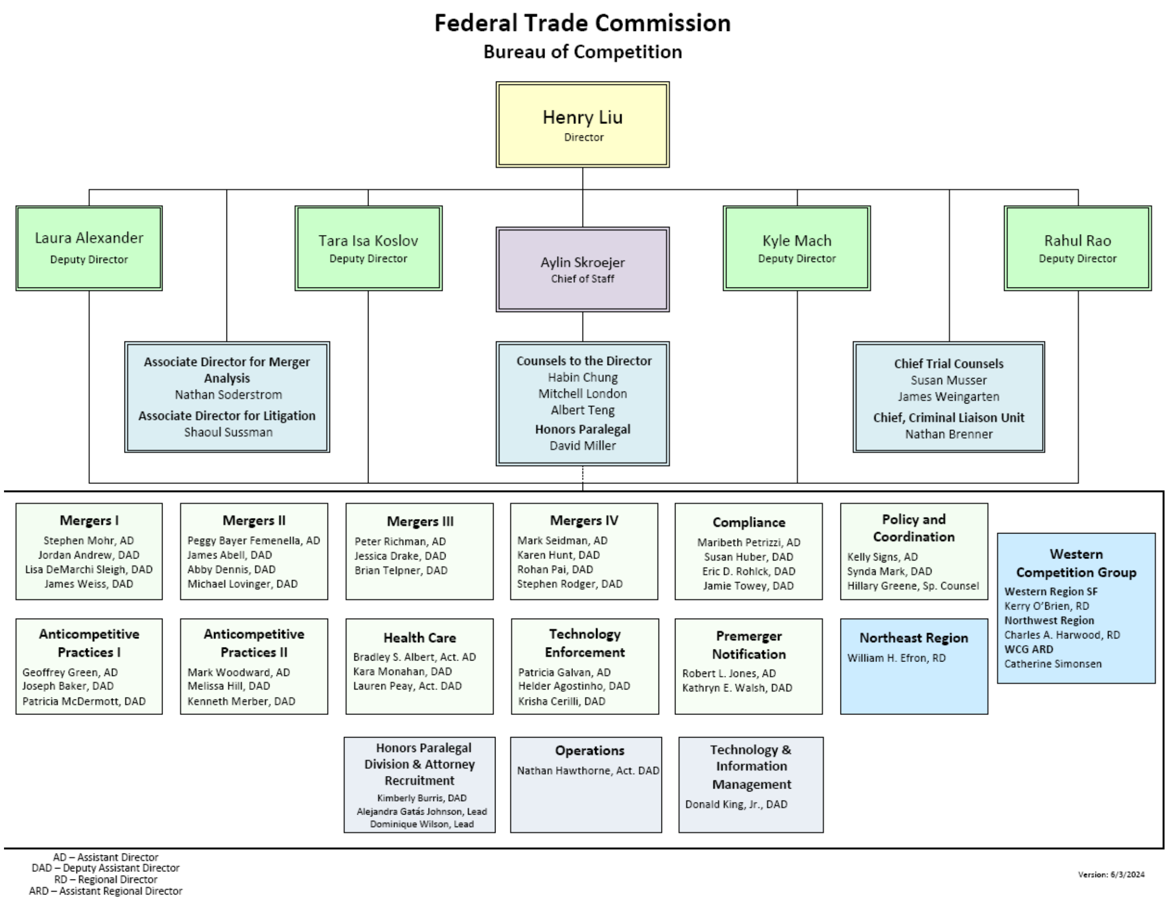


Notes:

1. The Bureau of Economics (BE) is 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.

Federal Trade Commission

- Bureau of Competition



Notes:

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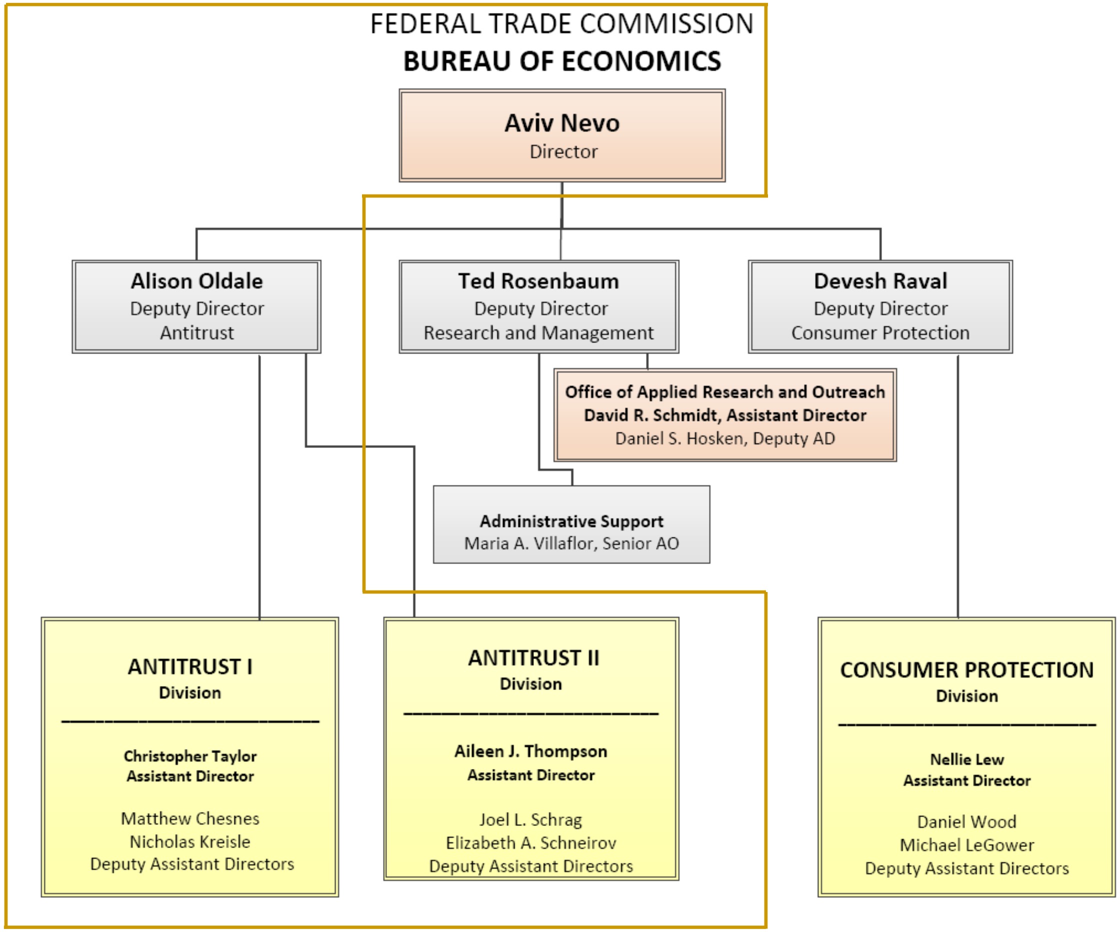
Federal Trade Commission

- Bureau of Economics



Involved in antitrust investigations

As of 10/22/2023

Notes:

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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 2025, the threshold for prima facie reportability is $126.4 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