BATES WHITE
ECONOMIC CONSULTING

# 2024 HAL WHITE ANTITRUST CONFERENCE

## Summary of panel discussions

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On June 3, 2024, Bates White hosted its annual Hal White Antitrust Conference, bringing together distinguished antitrust practitioners, academics, and enforcers to hear two panels covering topics at the frontiers of antitrust enforcement. The first panel discussed nascent and potential competition, while the second focused on the Biden Administration's antitrust record. A summary of the discussions can be found below.[1]

# I. PANEL 1: NASCENT AND POTENTIAL COMPETITION: ISSUES AND CONSIDERATIONS

## I.A. Summary

The first panel discussed issues and considerations for mergers involving nascent and potential competition. The panelists included Stephen Mohr, Assistant Director of Mergers I at the Federal Trade Commission (FTC); Owen Kendler, Section Chief for Financial Services, Fintech, and Banking at the Department of Justice Antitrust Division (DOJ); Sara Razi, Partner and Global Co-Chair of the Antitrust and Trade Regulation Practice at Simpson Thatcher & Bartlett; Meghan Rissmiller, Partner at Freshfields Bruckhaus Derringer; and Nancy Rose, Professor at MIT and former Deputy Assistant Attorney General for Economic Analysis at the DOJ. The panel was moderated by Kevin Pflum, Partner at Bates White.

Concerns over harms to nascent and potential competition have been central to a number of recent cases, such as Meta's acquisition of Within, Sanofi's abandoned acquisition of Maze Therapeutics, and Adobe's abandoned acquisition of Figma. The panelists agreed that the new 2023 Merger Guidelines include a more thorough treatment of nascent and potential competition than the 2010 Guidelines. They offered their views on the circumstances under which acquisitions of nascent or potential competitors may be benign, procompetitive, or anticompetitive under the new Guidelines, as well as what types of evidence regulators and courts can use to assess risks of anticompetitive conduct.

## I.B. Potential and nascent competition in the Merger Guidelines

The panelists began by discussing what "potential" and "nascent" competition represent and the key differences between the two—namely that a "potential" competitor has not entered the market yet, while a "nascent" competitor is already in the market but has yet to mature into a significant competitor. The panelists then turned to how the 2023 Merger Guidelines expand treatment compared to the 2010 Guidelines. They also discussed what laws might apply to mergers involving potential and nascent competition, noting that mergers involving potential competitors are often challenged under Section 7 of the Clayton Act, while nascent competition cases—such as the FTC's challenge of Illumina's acquisition of Pacific Biosciences—may fall under Section 2 of the Sherman Act.

One panelist noted that the new Guidelines recognize a "sliding scale" whereby the acquisition of a potential competitor with a lower probability of entry would be more likely to raise concerns the more concentrated the industry is. However, one panelist felt that courts may not accept the sliding scale; nonetheless, she noted that most challenged mergers occur in highly concentrated markets anyway. Another panelist remarked that an acquisition by a monopolist would be treated with more skepticism under Section 2 and that without a sliding

[1] Views expressed by panelists represented their personal perspectives and not the views of any institutions. This summary does not attribute views to any individual panelist or other participants.

scale, there would be a discontinuous treatment of firms with market shares just below the threshold of what the agencies would consider as having monopoly power.

The panel then discussed why the new Guidelines treat the existence of potential competitors as rebuttal evidence in defense of a merger differently. For example, why might the agencies consider the acquisition of firm with a drug in phase I trials to be a substantial lessening of competition, but not consider the existence a firm with phase I trials as a mitigating factor for the merger of two actual competitors? One panelist noted that the Guidelines are consistent with the *Baker Hughes* burden-shifting framework.

## I.C. Potential harms and benefits of acquisitions involving potential and nascent competition

The panel turned to how the agencies might evaluate potential harms or pro-competitive benefits of a merger involving potential and nascent competitors. One panelist noted that small firms often lack resources to bring a product to market and that acquisitions may be their most straightforward path to market. Another noted that the agencies don't challenge most startup acquisitions and mostly focus on markets with few credible potential entrants.

The panel members then discussed what factors they might consider when evaluating an acquisition of a startup. One panelist noted that the agencies would consider whether the acquirer had considered entering the market independent of the acquisition, particularly if the acquirer had made concrete steps toward entry. Another panelist would have considered acquisition cost—namely, whether there was a defensible business justification for the purchase price. Finally, another panelist would have asked whether the acquisition was in fact the only feasible source of capital or whether there existed an alternative, less dominant firm that could have acquired the startup.

The panel noted that, in most cases, the evidence would be subjective documentary evidence and that it's often difficult for the agencies to convince a court to block a merger in the absence of "volcanically" hot documents.

## I.D. Market definition when there may not yet be a marketable product

The panel concluded with a discussion of factors to consider when defining a market in a merger challenge that involves potential or nascent competition. One panelist remarked that, provided at least one of the merging firms has a marketed product, one could conduct a hypothetical monopolist test as usual. But if potential competition cases involve two firms with no marketed products, one would have to rely on documents and testimony from industry participants.

Another panelist noted the 5th Circuit's decision in the Illumina-Grail matter, in which all market participants other than Grail only had in-development products, and Grail itself had yet to receive Food and Drug Administration approval. The 5th Circuit rejected Illumina's argument that the FTC should have been required to show hard metrics of elasticity—a requirement that would have all but barred challenges in markets for research and development where the products do not yet exist.

The panel also noted that mergers often implicate multiple theories of harm: the FTC's concern in Illumina-Grail was that Illumina would vertically foreclose Grail's competitors; in Sanofi-Maze, the FTC was concerned both with the loss of potential competition for treatments of Pompe disease and with the elimination of head-to-head competition in the research and development of new treatments for Pompe disease.

# II. PANEL 2: THE BIDEN ADMINISTRATION'S ANTITRUST RECORD IN REVIEW

## II.A. Summary

The second panel began with a discussion of the Biden Administration's antitrust agenda and enforcement record and concluded with panelists comparing the goals and intentions of the 2010 and 2023 Merger Guidelines. The panelists included Leemore Dafny, Bruce V. Rauner Professor of Business Administration at Harvard Business School, Professor of Public Policy at Harvard Kennedy School, and Partner at Bates White; Robert Lepore, former Section Chief of the DOJ and Partner in Willkie Farr's Antitrust & Competition practice; Aditi Mehta, DOJ Economics Director of Enforcement; William Stallings, former Chief of the DOJ Transportation, Energy, and Agriculture Section and Partner at Mayer Brown; and Christine Wilson, former commissioner of the FTC and Partner at Freshfields Bruckhaus Derringer. Randy Chugh, Principal at Bates White, moderated the panel.

Since his election, President Biden has emphasized a whole-of-government approach to antitrust, highlighting the notion that excessive market concentration threatens basic economic liberties; democratic accountability; and the welfare of workers, farmers, small businesses, startups, and consumers. He has exemplified this perspective through executive action, stating that federal government inaction has allowed industries to consolidate and prices to rise, with workers, farmers, small businesses, and consumers paying the price. Given their experience in antitrust enforcement across administrations and sectors, the panelists provided perspectives on how the Biden Administration's statements and actions compare to its predecessors.

## II.B. Biden's antitrust agenda

The discussion began with an overview of what sets the Biden antitrust agenda apart from its predecessors. Panelists opined that both the administrative capacity and appetite for litigation have increased. The Biden Administration has a goal of stopping harmful mergers even at the cost of stopping pro-competitive or competitively neutral mergers. After many years without significant monopolization litigation, the FTC and DOJ now have numerous Section 2 cases pending (though some of these began under the Trump Administration). The leaders of both agencies have been "relentless, ambitious, and proactive," and they have used a variety of tools, including rulemaking authority and Section 6(b) investigations, to pursue their goals.

The panelists also discussed what has not changed under the Biden Administration. They noted that the day-to-day work of the agencies and the principles they use to evaluate competition are much the same. While the agencies have scaled up their non-merger investigations, merger investigations continue to proceed at a similar pace as before. And while the attitude toward settlements has changed, mergers that are investigated today are also mergers that would have received agency attention under any previous administration.

One panelist expressed a concern that changes in antitrust enforcement under the Biden Administration include a dilution of the consumer welfare standard, which has long been the touchstone for all antitrust inquiries in the United States and a standard around which the agencies worked hard to develop an international consensus. Concerns included that the public interest standard emerging in place of the consumer welfare standard is more politicized and creates an environment where antitrust laws around the world can be turned to promote national champions and protect local markets.

## II.C. Biden's antitrust record

An increasing trend in merger investigations has been for the parties to preemptively propose a remedy and then attempt to litigate the fix. In Illumina-Grail, the 5th Circuit ruled that the remedy does not have to be considered in the government's initial evaluation, but it can be a part of the defendant's rebuttal. The panelists agreed that the agencies have grown skeptical of remedies after some notable failures in the past. While the principles used to evaluate remedies—primarily whether they restore the lost competitive intensity—are the same as before, the agencies are now less likely to accept remedies that may be insufficient or complicated. Panelists also noted that

the agencies have had difficulty in convincing judges and juries to be similarly skeptical of remedies, because many judges are disposed to favorably view settlements that end litigation.

The panel next turned to Biden's antitrust record in the healthcare and airline industries. Noting that healthcare is now 20% of the US economy, the panelists concurred that the Biden Administration has prioritized antitrust enforcement in healthcare. The FTC has pushed the boundaries, challenging consummated mergers, using its authority under Section 6(b) to launch multiple studies of industries, and using more novel theories of harm such as access to sensitive information in United-Change, vertical integration in Illumina-Grail, and so on. The DOJ has followed suit under Assistant Attorney General Jonathan Kanter, setting up a taskforce on collusion and competition that has taken a keen interest in healthcare. In the airline industry, the panelists' view was that the Biden Administration's actions are in line with prior administrations.

One panelist presented statistics on Biden's antitrust record and noted that a higher percentage of Hart-Scott-Rodino–reportable mergers were allowed to go through without a Second Request under the Biden Administration than under earlier administrations. The panelist added that the agencies have suffered more setbacks in court, especially in cases involving novel theories of harm, than they did under the Trump and Obama Administrations and have consequently influenced fewer mergers in total. Some other members of the panel demurred, highlighting that most merger actions are allowed to proceed unhindered under any administration and that statistics need to be analyzed further, controlling for context and the composition of industries that have seen the most M&A activity in the Biden era.

Another theme that the panel briefly explored was the recent trend of attempting to unwind consummated mergers, such as Facebook-Instagram or Google-Doubleclick. One of the panelists opined that business certainty was an important consideration and that consummated mergers should be challenged only if the merger did not receive thorough scrutiny at the time of the transaction—either because it was not reportable or because the merging parties were not forthcoming with all relevant information.

## II.D. 2023 Merger Guidelines

The panel concluded with a discussion of differences between the 2023 and 2010 Merger Guidelines and whether the two versions serve fundamentally different goals. Panelists noted that the 2023 Merger Guidelines are a faithful representation of the agencies' views on antitrust enforcement and that the new guidelines do not differ meaningfully from public pronouncements made by the agencies in recent years. One panelist noted that the new Merger Guidelines do not give the agencies any more power; they are only a tool for the agencies to clarify and communicate their perspectives. Another noted that while the old merger guidelines may have been viewed as more balanced, they were cited both for and against the government. The new guidelines have been written to be more explicitly supportive of the agencies. In addition, these guidelines do not represent exactly how the agencies pick which mergers to challenge.

The 2023 Merger Guidelines omitted a footnote from the previous version that left room for consideration of potential efficiencies generated by a merger. One panelist expressed a view that the government has long been biased against considering efficiencies in the merger process—that the agencies are willing to consider hypothetical harm from a merger, but rarely the hypothetical benefits. Another panelist acknowledged that the bar for proving efficiencies from mergers has always been high. If efficiencies are not going to prevent a substantial lessening of competition, then the agencies prioritize the risk to competitive processes and consumers in their evaluation.


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