Antitrust Mergers and Regulatory Uncertainty

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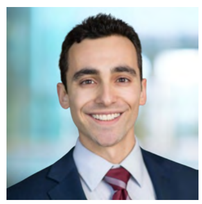
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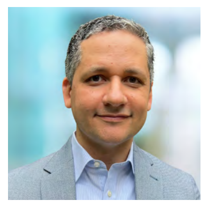
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Abstract

Estimating antitrust risk is fundamental to identifying, proposing, and pricing deals. A more informed understanding of what to expect when meeting with agency staff and leadership will help antitrust lawyers, economists, and other consultants anticipate the critical questions and potential paths that should be addressed regarding antitrust merger risk. This article uses practitioner surveys to understand whether and how the change in the Biden administration's antitrust agenda has affected merger review, investments, decision making, and counsel. The surveys also offer antitrust agencies an opportunity to think about the optimal design of the merger control system and various consequences of certain policy choices and institutional design changes. A quantitative online survey was conducted first, followed by qualitative discussions with practice group leadership across top antitrust law firms. Both studies were designed to identify whether respondents perceived any substantive shifts from prior administrations to the Biden administration, the impact of such shifts (if any) on merging parties, and any notable differences between the DOJ and FTC in enforcement and procedures. Our surveys indicate that practitioners have a more critical perception of the DOJ and FTC compared to prior administrations. Both agencies are perceived as less transparent and less fair in their interactions with merging parties. The enforcement process is seen as more demanding in terms of scope of data collected and is reported to take longer

to complete. The agencies have also departed from precedent as they increasingly scrutinize labor issues and vertical deals.

Antitrust is in a time of change, where new leaders of global enforcers, politicians, academics, and newcomers to the field have stated that the old approach to antitrust is misguided and in need of fundamental revision.[1] This goal of novel thinking is coupled with an express commitment to more aggressive merger enforcement. Assistant Attorney General for the Antitrust Division at the Department of Justice (DOJ) Jonathan Kanter explained, “Improvements to antitrust enforcement will not happen if the Antitrust Division is unwilling to challenge aggressively anticompetitive conduct and unlawful market consolidation. I am committed to bringing difficult cases, and as I have mentioned, the Antitrust Division is building a team of litigators that are ready for the challenge.”[2] Along similar lines, Lina Khan, Chair of the Federal Trade Commission (FTC), stated, “The [FTC] will not hesitate to identify and impose broad relief to protect Americans and deter illegal activity now and in the future.”[3] Such statements may not be surprising at a time when a line of empirical scholarship notes increasing consolidation in the U.S. economy (although how much of this consolidation generates competitive concerns remains an open empirical question).[4]

The recent commitment from U.S. enforcers to rethink the sufficiency of traditional tools *and* to aggressively pursue merger enforcement suggests that there should be substantial shifts in merger activity in the United States during the current administration relative to prior administrations. Fluctuations across administrations in terms of the extent of merger enforcement are somewhat expected but are not always borne out.[5] However, how much of these fluctuations are merely at the margins, how much is more rhetoric than reality, how much is antitrust specific and not due to other factors—such as the cost of financing or of merger waves—and how much antitrust enforcement impacts business decision making are important questions for academics, policy makers, and businesses. Further, given statements from the current U.S. enforcers, whether and how enforcement may fundamentally change are even more critical questions.

This article and the associated research were motivated by a desire to understand whether and how the change in the Biden administration’s antitrust agenda has affected merger review, investments, decision making, and counsel. Here we undertake a mixed methods empirical approach, employing both quantitative and qualitative methods of data collection and analysis.[6] A quantitative online survey was conducted in September 2022 with nearly one hundred industry practitioners—outside lawyers, in-house counsel, and antitrust consultants in economics, accounting, and public policy (collectively, Antitrust Practitioners)—fully completing the survey, and several more answering most but not all questions. This empirical survey was followed by qualitative discussions with practice group leadership across top mergers and acquisitions (M&A) antitrust law firms in October 2022. Both studies were designed to identify whether respondents perceived any substantive shifts from prior administrations to the Biden administration, the impact of such shifts (if any) on merging parties, and any notable differences between the DOJ and FTC in terms of enforcement and procedures.

A survey approach was undertaken to overcome the limited publicly available data and the general limitation of other empirical methods to measure regulatory uncertainty. That is, it may be difficult to formally model firm behavior for antitrust risk regarding investments because of endogeneity concerns and the relative recency of the current administration as of the date our data were collected. These concerns are discussed further below.

The results of this research will help antitrust and corporate M&A practitioners in their assessment of antitrust risk when evaluating a prospective merger and providing counsel to parties. Estimating antitrust risk is fundamental to identifying, proposing, and pricing deals. A more informed understanding of what to expect when meeting with agency staff and leadership will help Antitrust Practitioners anticipate the critical questions and potential paths that should be addressed regarding antitrust merger risk. The survey also offers antitrust agencies an opportunity to think about the optimal design of the merger control system and various consequences of certain policy choices and institutional design changes.

I. Background

A. U.S. Antitrust Institutions

There are two federal antitrust agencies in the United States, the DOJ and the FTC.[7] The DOJ is an executive agency,[8] while the FTC is an independent agency that addresses not only antitrust but also consumer protection and data protection.[9] Practically, the expectation is that this distinction of independence affords the FTC greater autonomy from presidential control.

Given their joint responsibility in assessing the potential competitive effects of proposed M&A, the DOJ and FTC have jointly published guidelines over the decades, with the latest Horizontal Merger Guidelines issued in 2010.[10] Despite these joint guidelines, there are some differences in jurisdiction between the two agencies, as well as some institutional dynamics that shape differences in agency enforcement behavior.[11] The two organizations largely focus on separate industries despite there being no prescribed division and no rule barring the organizations from reviewing the same issue, transaction, or company; at times, clearance battles as to which agency will handle a merger have emerged.[12] Merger control dynamics play out in a quasi-regulatory regime based on the Hart-Scott-Rodino Act (HSR), which sets the requirements and schedules for deal disclosure and the review process.[13]

Confronted by different regulatory agencies, the parties must navigate their differing processes and priorities, which may produce divergent outcomes. This divergence may impact whether businesses in particular industries undertake a merger, the risk-shifting contractual provisions in merger agreements, and interactions with agency staff and front office political appointees. This divergence may also impact the structure of the deal (what assets to acquire), whether to offer a “fix it first” remedy, and whether to offer concessions to a given agency regarding behavioral or structural fixes or to take a challenge to court.[14]

Examining deal, litigation, and divestiture outcomes may provide directional information on process divergence or underlying agency objectives, but there are endogeneity issues when analyzing cases litigated in court. Government enforcers may initiate judicial proceedings based upon various factors—such as deal size, staff availability, and the probability of winning—when, in other cases, those factors lead enforcers to settle or not even challenge the transaction. As such, firms respond to changes in these conditions, likely avoiding deals that are more likely to be litigated, settling for conditional approval, or abandoning transactions. Further, the type of discussions and the factors evaluated in discussions with the agencies may be different from what agencies and parties present before the courts.[15] Moreover, personal relationships and trust that repeat players have with the agencies may contribute to differences between litigated and non-litigated deals. Complicating matters further is the paucity of Supreme Court antitrust precedent, which has given merger guidelines significant weight in cases litigated before courts.[16] Generally, however, the relatively clear process, timing, and substance associated with enforcers' review of mergers, stemming from various presumptions in case law,[17] coupled with historical practices based on the merger guidelines and transparency, have allowed firms and their in-house and outside lawyers to reduce regulatory risk.[18]

B. Deal Timing and Process

Understanding the timeline of an agreement from notification (including the possibility of pull and refile) through to conclusion is an important part of managing the merger process. Timing issues go to deal financing, risk-shifting in merger contracts, and business planning. Timing-related risk creates deal uncertainty.[19] Deal uncertainty creates potential negative effects on issues such as research and development and investment,[20] as well as potential departures by the target's customers and key personnel.[21] Moreover, the lack of transparency as to timing and process may jeopardize financing.[22]

To help mitigate these risks, the agencies outlined five primary steps in their review of M&A. Transactions that exceed the annually updated threshold for deal value or market size, which, as of February 2023, was any transaction exceeding $111.4 million in value, require a premerger filing.[23] A premerger filing is followed by a thirty-day waiting period, during which the DOJ and FTC determine which agency will investigate the transaction and issue requests for non-public information. Over the preliminary review period, the investigating agency will determine whether to grant early termination, allow the parties to close the deal after the preliminary review period, or issue a Second Request for data and documents. If the agency issues a Second Request, the review period is extended another thirty days unless an extension is agreed upon by the parties of the transaction to avoid litigation. Following a Second Request, the investigating agency decides whether to approve the transaction, negotiate provisions or remedies to ensure competition, or sue to block the transaction in federal court.[24]

These steps are intended to balance the need for the agencies to have sufficient time to evaluate the potential antitrust risks from a deal with the need for transparency and greater certainty for the parties on timing and process. When the process is not clear and transparent, it becomes more difficult to properly assess risk and to make informed decisions. In 2014, as then-Chair of the FTC Edith Ramirez explained, transparency, as part of due process, is critical to successful antitrust enforcement:

> Procedural fairness . . . permit[s] legal representation for the parties under investigation, including allowing the participation of local and international counsel; notifying the parties of the legal and factual bases of an investigation and sharing the evidence on which the agency relies; facilitating direct and meaningful engagement between the parties and the investigative staff and decision-makers; and ensuring internal checks and balances on decision-making within the agency.[25]

Thus, transparency in process helps lead to better outcomes because of better information gathering to improve enforcement priorities and case pipeline for a better allocation of scarce agency resources.[26]

Transparency and process-oriented best practices are longstanding in antitrust. In 2002, the International Competition Network (ICN) proposed the Guiding Principles for Merger Review, which included transparency and procedural fairness.[27] In 2005, the ICN followed up with Recommended Practices for Merger Notification and Review Procedures.[28] Of note, the U.S. agencies are less transparent than in prior years as they no longer provide data to the Global Competition Review (GCR) for its annual ranking of antitrust agencies.[29] One purpose of this merger survey is to shed more light on transparency and procedural fairness, given that the agencies have become less rather than more transparent. This is perhaps even more surprising, given U.S. leadership under prior administrations on transparency and procedural fairness at the ICN.[30]

C. Current Enforcement Record

Antitrust merger enforcement trends change over the years. Overall, the agencies had a strong record for winning litigated mergers before the Biden administration: Of the twenty-one horizontal merger cases brought between August 2010 and July 2020, the agencies won seventeen.[31] As of early 2023, the Biden administration is on track to bring more merger challenges in court than in prior administrations.[32] However, the win-loss record based on court decisions (i.e., excluding abandoned deals) has been less favorable to the agencies than during prior administrations. In particular, in the single month of September 2022, the DOJ lost its challenges of the merger of *UnitedHealth* and *Change Healthcare* and the merger of *U.S. Sugar* and *Imperial Sugar*, while the FTC lost its challenge of the merger of *Illumina* and *Grail*, which is currently under appeal.[33] More recently, the FTC paused its challenge to the merger of *Meta* and *Within Unlimited* following a loss in court in February 2023.[34] Of course, some commentators criticize prior administrations as not being sufficiently aggressive when enforcing antitrust laws,[35] but the pending question is whether the agencies are efficient and effective in their current enforcement procedures. The implications of this question are highlighted in the recent resignations of the only two Republican commissioners at the FTC, one in August 2022 and the other in February 2023.[36] In explaining her resignation as commissioner in *The Wall Street Journal*, Christine Wilson cited the FTC's deviance from decades of bipartisan precedent, lack of transparency, due process concerns, and an abuse of merger review process.[37]

D. Current State of M&A in the United States

The United States is the largest market for M&A activity, with nearly 8,468 transactions accounting for $1.6 trillion in value in 2022.[38] According to the *Hart-Scott-Rodino Annual Reports*, activity that met the reporting requirements before the agencies was up from 1,637 in fiscal year ending September 2020 to 3,520 in fiscal year ending September 2021.[39] As the primary enforcement agencies in the United States, the FTC and DOJ must evaluate the potential antitrust risk of reported mergers, monitor merger remedies, and challenge those deals deemed to reduce competition. For fiscal year 2023, to fund these efforts, the FTC's general budget (which includes funding for activity outside of antitrust enforcement) is $430 million, and the DOJ's Antitrust Division budget is $225 million.[40] The outcomes for 2022 and 2023 are not yet known, but in 2021, the FTC challenged thirteen transactions and the DOJ challenged fifteen transactions of the roughly 3,520 transactions that met the agencies' reporting requirements.[41]

Under the current guidelines for horizontal mergers, there are transaction thresholds that trigger close review by the agencies. For example, the agencies generally scrutinize transactions that have more than a 200-point impact on the Herfindahl-Hirschman Index (HHI) in a highly concentrated market.[42] The agencies are less likely to challenge mergers where the acquired firm's market HHI is below 1800, the market share of the acquired firm is 5 percent or less, the market features low barriers to entry, and at least three comparable competitors are able to enter the acquired firm's market.[43]

Interest in revising the agencies' merger review guidelines—particularly the non-horizontal merger guidelines from 1984, which are widely considered to be out of date—was brewing before the Biden administration took over. In 2020, the DOJ and FTC jointly proposed revised vertical merger guidelines, but the FTC revoked its support in September 2021.[44] In mid-2021, as practitioners continued to await revised vertical merger guidelines, President Biden issued an executive order directing the DOJ, FTC, and other government agencies to focus on bolstering competition and protecting workers and consumers in the following industries: agriculture, information technology, prescription drugs and healthcare services, and telecommunications.[45] Since this executive order, the DOJ and FTC announced the vague goal of "fairness" in their enforcement efforts.[46] In November 2022, the FTC released a policy statement related to Section 5 of the FTC Act on unfair methods of competition, noting "that Section 5 reaches beyond the Sherman and Clayton Acts to encompass various types of unfair conduct that tend to negatively affect competitive conditions."[47] It remains to be seen what effects this policy may have on merger review, particularly given its lack of explicit enforcement principles.

Rather than clarifying the perspectives of the agencies or providing clarity to Antitrust Practitioners, the agencies' policy statements and the speeches by their leaders have increased risk and uncertainty. This uncertainty grows as the agencies begin the process of "modernizing" the merger guidelines.[48] Uncertainty and a lack of transparency are further exacerbated by changes in practice. The FTC and DOJ have suspended early termination grants, straining staff resources and prolonging the average duration of merger review.[49] The agencies have also recently deviated from prior practice in their willingness to accept remedies or settlements by the merging parties, with the DOJ publicly stating it is unwilling to accept consent decrees.[50] More recently, at the end of 2022, revised HSR filing fees were signed into law: The fees were reduced for smaller transactions and increased for large transactions, particularly those above $500 million.[51] Most notably, for transactions of $5 billion or more, the filing fees rose from $280,000 to $2.25 million.[52]

More recently, in July 2023, as this article was undergoing the editorial process, the DOJ and the FTC jointly released draft merger guidelines for public comment. The draft guidelines codify certain enforcement objectives that were previously indicated in public statements.[53] However, in some areas the draft guidelines lack coherent analytical standards,[54] or the guidelines decouple the law from meaningful economic analysis.[55] Overall, the draft guidelines mark a substantial departure from the consumer welfare–focused policies of the last thirty years.

Uncertainty has significant implications for the M&A market. In their analysis of M&A activity from 1985 to 2014, a team of scholars demonstrated that political and regulatory uncertainty have a large negative impact on the level of M&A activity.[56] Through our survey, we hope to provide further clarity on the regulatory environment so that practitioners can better advise their clients and facilitate productive M&A activity, and to aid the agencies in refining their own practices and procedures. Given the on-going development of updated guidelines and public statements signaling a potential move away from the consumer welfare standard, we have developed a study to assess the sentiment of Antitrust Practitioners regarding the current activities of the DOJ and the FTC.

II. Methodology

This article contributes to the existing literature related to antitrust regulation by providing novel insights into the effect of DOJ and FTC policies on practitioners' outlook toward M&A activity and antitrust risk. The article does so by developing a quantitative survey and a semi-structured qualitative interview guide to capture the experiences, strategies, and perspectives of a broad set of practitioners.

Our research targeted experienced Antitrust Practitioners in the United States who had participated in one or more merger reviews considered by either the DOJ or the FTC. Each respondent initially participated in a quantitative online survey. After completing the quantitative survey in September 2022, a subset of respondents participated in follow-up qualitative semi-structured interviews in October 2022. Each qualitative interview included more targeted questions as to the practitioner's experiences, strategies, and perspectives based on that practitioner's responses to the quantitative online survey. The open-ended nature of the qualitative interview allowed for the development of more detailed data and context, which complemented the categorical questions posed in the initial quantitative online survey. Neither of the two surveys were anonymous; however, the results are presented in the aggregate to preserve the anonymity of respondents.

Our study focused on whether practitioners perceived an increase in regulatory uncertainty and what effect, if any, that increased uncertainty has had on M&A in the United States. The analysis of the quantitative and qualitative data allows us to understand whether changing perceptions of the DOJ and FTC, as they relate to merger investigation and challenges, (1) alter the type of counsel lawyers have provided to their clients; (2) make parties and lawyers more reluctant to pursue certain mergers, including those transactions central to innovation, as well as entry and expansion in numerous industries; or (3) lead economists or other consultants to adjust their guidance or their analyses of potential mergers, even when there are clear economic findings of procompetitive outcomes. To put these results into context, the quantitative and qualitative surveys were conducted roughly one year after the appointment of Jonathan Kanter to Assistant Attorney General for the Antitrust Division at the DOJ on November 16, 2021, and of Lina Khan as Chair of the FTC on June 15, 2021.[57] As noted above, the *Executive Order on Promoting Competition in the American Economy* was released on July 9, 2021, also approximately one year prior to our surveys.[58]

This study contributes to existing knowledge in the area of policy impact on M&A activity and the findings provide insights that may help inform potential improvements to antitrust merger practice. While previous studies used survey data to explain whether the institutional structures of merger control were effective and to measure perceived aggressiveness of the DOJ under the Clinton and Bush administrations, this study goes beyond past work on prior administrations to provide insight into policy impacts on early-stage M&A activity, particular sectors, and practitioner behavior.[59]

We tested a number of hypotheses, including:

1. Regulatory uncertainty has altered the type of counsel lawyers have been providing to their clients;
2. Parties and lawyers are reluctant to invest the time and capital necessary to pursue certain mergers;
3. Such reluctance impacts innovation, as well as entry and expansion into numerous industries; and
4. The methodologies, tools, and theories applied by the agencies are likely to be correlated with the relevant industry, with select industries facing differential scrutiny and novel theories of competitive harm.

We plan to expand this work into a longitudinal study by re-issuing the survey annually. Collecting data on a yearly basis will allow us to continuously identify newly implemented changes in policy or enforcement and evaluate the reactions by Antitrust Practitioners to such changes.

A. Web-Based Quantitative Survey

Online surveys are used widely for market research by large corporations and for litigation.[60] Appropriately, the quantitative survey for this study was conducted online. The survey was designed in accordance with generally accepted principles of survey research.[61] Trained practitioners reviewed the survey to ensure facial validity of the questions and the appropriateness of their structure. As a result of that review, we modified questions and answers, and we removed a number of questions from the quantitative online survey. The more qualitative questions that were excluded from the online survey were explored in the semi-structured interviews.

Over a two-month period, Antitrust Practitioners in the United States participated in the quantitative online survey. A total of ninety-three respondents completed the survey, and several other respondents answered most but not all of the questions. The survey was programmed and hosted at www.surveymonkey.com. A link to enter the survey was posted on LinkedIn and targeted invitations were sent via e-mail to Antitrust Practitioners in September and October 2022. The quantitative survey consisted of up to thirty-eight questions related to respondents' experiences, strategies, and perspectives on M&A, plus five additional questions related to their backgrounds.[62]

B. Semi-Structured Interviews

After completing the quantitative online survey, we conducted qualitative interviews to obtain complementary data. We selected respondents to participate in follow-up interviews, which ranged from fifteen to thirty minutes per interview. We conducted the interviews between September and October 2022 of twenty-five law firm partners in Chambers-ranked firms who are involved in merger work before the agencies, as well as eleven in-house lawyers from across the country and across industry sectors.[63] Each interview started with a single broad question: whether the interviewee felt that there was a notable shift in uncertainty based on his or her own personal experience. We invited the respondents to elaborate on the sources of any perceived uncertainty, including, among others, (1) whether it was broad or more specific to certain industries and/or to one of the two agencies; (2) whether, and, if so, along what dimensions, their advice to their clients had changed; and (3) how their interactions with agency staff may have changed during the Biden administration. We posed follow-up questions to gather more details on each of the main themes of the quantitative survey.

III. Primary Results

While the U.S. agencies continue to be perceived as relevant and influential, the results of our research are consistent with public sentiment that the agencies of the Biden administration are causing uncertainty and are less efficient or effective than prior administrations. In particular, respondents expressed clear concern regarding the processes used by the FTC and the lack of transparency from the current staff and leadership.[64]

Our empirical results and qualitative interviews suggest there is some divergence in the confidence that practitioners have in the two agencies, with greater concern expressed about the FTC. Through our online survey and interviews, respondents indicated that, although historically the FTC had been perceived as independent and the DOJ had been perceived as somewhat susceptible to political interference,[65] the FTC is now perceived as politically influenced. The emphasis on "fairness" and the scrutiny of deals in the technology sector—as exemplified by high-profile lawsuits filed against Facebook and Google,[66] as well as strong rhetoric—have raised questions about the political independence of both of the agencies. Further, these investigations have been characterized by requests for information and data pertaining to workforce, data collection and privacy, and business strategy that are atypical of past investigations and scrutiny of businesses outside of the technology sector.

The survey and interviews also highlighted concerns about increased uncertainty in process, timing, and likely outcomes. Respondents generally see increasing uncertainty and risk due to the FTC's announced shift away from the consumer-welfare standard, the agencies' express focus on select industries regardless of identifiable antitrust risk, their failure to issue updated merger guidance,[67] and various statements by their leaders. Respondents report that the agencies have increased their scrutiny of deals compared to prior administrations, but in ways that are less predictable. Specifically, respondents reported that: (1) the Biden administration has asked parties to pull and refile on deals that prior administrations would have granted early termination; (2) the Biden administration has cleared deals that prior administrations would have more closely scrutinized or issued a Second Request; and (3) the Biden administration has not resolved challenges through negotiated divestitures like prior administrations.

Antitrust Practitioners generally expect a continually increasing degree of scrutiny in the near future. The Biden administration's proposed budget for fiscal year 2023 included additional funding for these agencies, including $88 million to the Antitrust Division of the DOJ and $139 to the FTC, reflecting "the Administration's commitment to vigorous marketplace competition through robust enforcement of antitrust law."[68] However, potential uncertainty faces the M&A market as the agencies begin rewriting the merger guidelines to address concerns with greater market concentration and perceived deficiencies in current enforcement methods. Under the current leadership, the scope of the new guidelines is expected to expand the definition of competitive concerns to workers and minority groups.[69] Moreover, any change in the leadership of these agencies across administrations creates uncertainty in enforcement outcomes even following such guidance. For instance, the current leadership at the DOJ publicly signaled a preference to fully approve or block a merger, rather than enforce and monitor remedies.[70] The DOJ's apparent rejection of remedies was criticized by former agency leaders under prior administrations.[71] At the same time, Antitrust Practitioners reported that the DOJ has made concessions privately in some cases, but the non-transparent nature of these remedies increases uncertainty in the M&A process.

Separate from the specific challenges arising from shifting leadership and reduced transparency from existing leadership, uncertainty also arises from changing macroeconomic and geopolitical conditions. Higher interest rates, in response to inflation, increase the cost of raising capital to facilitate M&A activity, while potential global conflict raises concerns for an economic downturn *and* for increased scrutiny of cross-border transactions.[72] Given these conflating factors, it will be challenging to isolate the effect of the regime change at the U.S. agencies. Thus, the results of our research provide important clarity on only some of the factors driving deal decision making. Below we describe our findings in greater detail.

A. Descriptive Findings of Quantitative Survey

Of the Antitrust Practitioners that participated in the online survey, 62 percent were lawyers (10 percent in-house counsel and 52 percent partners at law firms).[73] Over half of the respondents worked on five or more deals each year from 2019 through 2022.[74] Respondents were also asked about how many of their deals from that time period went to Second Request.[75] Of those respondents for whom the question was applicable, nearly half stated that one or two deals went to Second Request each year.

After screening respondents about their general level of M&A activity, the survey focused on current perceptions of the DOJ and FTC. Respondents were asked about their perceptions of efficiency and effectiveness of current merger enforcement by each of the DOJ and FTC.[76] Among the respondents to which the questions were applicable, 35 percent perceived current merger enforcement by the DOJ to be efficiency-degrading, harming competition, and reducing innovation; the figure was 66 percent for the FTC. Respondents were also asked whether they noticed a divergence between the DOJ and FTC regarding mergers on which they worked.[77] Of those that answered, about 48 percent indicated that they had seen a divergence in review. When asked about the cause of that observed divergence, 35 percent of respondents mentioned process—specifically the additional steps needed to have staff and the front office make a decision.[78] Others indicated that the perceived divergence was in relation to the speed of review (25 percent of respondents), and others indicated that the divergence was in relation to the stringency and depth of the analysis undertaken in the review (25 percent of respondents).

The next set of questions explored whether and, if so, how guidance was provided by the agencies. More specifically, we asked whether the DOJ addressed traditional non-price effects in deals within the last two years and, if so, whether the DOJ provided guidance on the methodology used to address such effects.[79] Of those who responded, 60 percent stated that, for deals in the past two years, the DOJ had addressed traditional non-price effects. However, 78 percent of respondents who answered the follow-up question stated that the DOJ either rarely provided guidance on its methodology (25 percent of respondents) or provided no guidance thereon (53 percent of respondents). Similar questions addressed the FTC.[80] Of those who responded, 82 percent stated that the FTC addressed traditional non-price effects in their deals over the prior two years. However, 79 percent of respondents that answered the follow-up question perceived the FTC as either rarely providing guidance on its methodology (22 percent of respondents) or providing no guidance thereon (57 percent of respondents).

An additional source of uncertainty may arise if there is less consideration for efficiency gains by the DOJ and FTC. Accordingly, respondents were asked whether the DOJ or FTC had changed its consideration of efficiency gains compared to two years ago.[81] For the respondents that answered, 48 percent perceived that the DOJ's consideration of efficiency gains was reduced or eliminated, and the figure was 58 percent for the FTC. Two questions sought to identify factors raised by the DOJ and FTC in deals within the last two years.[82] Among respondents that answered, 23 percent indicated "Labor / impact on jobs" as a key factor raised by the DOJ, and the figure was 21 percent for the FTC.

The next part of the survey examined the perceived aggressiveness of the DOJ and FTC on vertical, diagonal, and adjacent (non-horizontal) mergers. Among respondents who were asked about vertical mergers,[83] 48 percent perceived the DOJ as more aggressive than two years ago, and the figure was 68 percent for the FTC. Of those asked, 39 percent of respondents perceived the DOJ as more aggressive than two years ago on diagonal or adjacent mergers, and the figure was 56 percent for the FTC.[84]

Finally, the empirical survey examined whether the manner in which respondents have counseled clients, as well as the time and internal costs associated with mergers, has changed in the past two years. We sought to gauge whether lawyers altered their behavior, as uncertainty with the agencies may have impacted the type of counsel that they provided to their clients.[85] Of those who responded, 48 percent indicated that the manner in which they counseled clients changed considerably relative to two years ago. Follow-up questions addressed whether there had been increased agency scrutiny in the past two years, and for those that answered yes, whether such increased scrutiny impacted the time spent on—and internal costs associated with—mergers.[86] Among respondents asked, 85 percent indicated that they perceived increased agency scrutiny in the last two years, and, of those who perceived increased scrutiny, 89 percent stated that such scrutiny increased the time expended by the client and its advisors, as well as other internal costs related to the merger. Notably, the counsel provided by economists and empirical consultants does not appear to have changed. Of that group, only 8 percent indicated that the guidance they provided to clients changed considerably, and no one indicated that guidance had changed completely relative to two years ago.

B. Findings of Qualitative Interviews

The qualitative semi-structured interviews were guided by the general request that respondents share any comments or observations that were insufficiently addressed or difficult to convey through the online survey. Specific topics that guided the discussions included any increased uncertainty in merger review, the industries or sectors affected by any such uncertainty, agency resources, changes to client counseling, and how specific actions by the DOJ or FTC affected or were expected to affect potential mergers. The results of these interviews are summarized below.

1) Antitrust Agencies Have Redirected Their Focus to Certain Industries

Practitioners generally observed a divergence between the agencies' rhetoric and action in terms of industry focus. Somewhat surprisingly, practitioners indicated that the industries that currently draw the most political attention—such as technology, agriculture, pharmaceuticals, and healthcare—are not necessarily the centerpiece of actual merger enforcement. Despite strong statements and high-profile antitrust investigations, it is generally recognized that there is no substantive change in industry focus relative to the recent past, particularly by the DOJ. While certain companies—such as "Big Tech" and the major pharmaceutical corporations—are viewed as susceptible to scrutiny for any deal, regardless of merits, respondents did not indicate that other industries were more or less targeted by the agencies. Instead, practitioners observed an increasing focus on transactions with vertical market combinations and potential implications for labor. Some respondents indicated that the FTC is being particularly critical of private equity deals, investigating transactions that have no clear competitive concerns and failing to articulate the antitrust risk. Agency scrutiny in such private equity is a departure from historical norms and existing merger guidelines.

2) There Is a Greater Degree of Regulatory Uncertainty

A consistent theme in the interviews is an observation that the agencies have veered from prior processes and typical transparency and openness in discussions with merging parties. Antitrust Practitioners reported a lack of communication from agency staff until very late in the process, the initiation or termination of Second Requests without a clear explanation, and the refusal or inability to explain theories of harm motivating an agency's investigation. Many respondents perceived a greater degree of uncertainty regarding the deals that the agencies will scrutinize and the expected outcomes for those deals. Practitioners perceived a difference between the front office and the back office regarding enforcement priorities and whether to challenge transactions. Some respondents suspected that agency leaders are pressuring the staff to issue Second Requests.

Additionally, agencies have departed from historical precedent in their processes. Current suspension of grants of early termination have slowed investigations, creating uncertainty in terms of timing deal closures. Moreover, respondents reported that the DOJ is willing to scrutinize deals that have been cleared by the FTC and *vice versa*. This is a major departure from historical norms.

3) The Increase in Regulatory Uncertainty Affects How Practitioners Advise Their Clients

The aforementioned increase in regulatory uncertainty has influenced how practitioners advise their clients. In general, practitioners expect transactions to be costlier and take longer to close than in the past.[87] Advisors are also preparing their clients to litigate from the onset of a transaction, to expect a Second Request, and to prepare for no remedy or settlement offers by the agencies, even if similar transactions would have passed with less scrutiny in the past. Respondents stated that parties are internalizing regulatory risks when determining whether to pursue a deal and how to structure it, granting greater consideration to bidders that minimize agency scrutiny.

Because of the DOJ's stated unwillingness to accept consent decrees, outside lawyers are advising their clients to "fix" their deals before filing by, for example, divesting certain portions of their business. Outside counsel expressed concern that this practice by the DOJ harms the agency's ability to follow up and ensure that the remedies taken by the merging parties effectively address any antitrust concerns.

4) Changes in Antitrust Enforcement Have Reduced M&A Activity

Among respondents, perceptions are mixed in terms of how reported uncertainty has impacted actual deal flow. Some practitioners observed that companies are more concerned about exposure and more deals are falling apart, while other practitioners said companies are not abandoning deals just because of the agencies' current investigative practices and rhetoric. Regardless of their perspective on aggregate deal flow, practitioners agreed that deals at the margin of intense scrutiny are not being pursued by companies in the current regulatory environment. Our interviews suggest, however, that some companies are pursuing more deals because agency staff are preoccupied with high-profile and arduous cases, and investors are putting less blame on CEOs for failed deals, given the increasingly public rhetoric of the DOJ and FTC.

Moreover, because of the FTC's reinstatement of prior approval provisions in merger orders, announced in October 2021,[88] prospective merging parties are less willing to undertake aggressive deals. This reduction in M&A activity stems from these parties' fear of having to obtain approval before closing "*any* future transaction affecting each relevant market"[89] for which the FTC alleged an antitrust violation. Any reduction in M&A activity particularly applies to firms that fuel growth by acquisitions.

5) The DOJ and FTC Are Viewed Differently by Practitioners

The structure of the DOJ, as an executive department with leadership appointed by the President, informs its historical characterization as being more political than the FTC.[90] However, multiple respondents suggested that this difference in degree of politicization has diminished or even reversed, with the FTC now being perceived as increasingly political. While perceptions of agency leadership differ by respondent experience, practitioners who have worked before the FTC during the current administration were particularly critical of the early actions undertaken by current FTC leadership. In particular, practitioners criticized FTC leadership for overruling staff economist guidance on transactions without meaningful explanation and for relying upon less experienced advisors to determine outcomes. Practitioners also described interactions with FTC staff during which the staff was apologetic, as it struggled to answer questions regarding theories of harm motivating further investigation. This behavior is perceived as having created an environment of low morale and greater turnover at the FTC relative to historical levels. These perceptions corroborate the decreasing satisfaction among FTC staff reported by the U.S. Office of Personnel Management.[91] One interviewee indicated that more recent actions by the FTC suggest that there is room for optimism and that there seemed to be greater stability among staff.

The DOJ is viewed as more consistent and stable in terms of staffing and degree of continuity between front and back offices and over time. Practitioners also view the DOJ as less guarded in what is communicated to parties and more transparent when expressing concerns about a deal. However, respondents criticized the decision of DOJ leadership to refuse remedies in public interactions with companies. Notably, respondents suggested that the DOJ is willing to make concessions that fall short of a full challenge to a transaction; however, the agency has refrained from openly discussing what is acceptable, further raising uncertainty around dealmaking through an investigation.

In general, respondents viewed both agencies as increasingly "adversarial" and less "fair" in their handling of investigations. Practitioners reported fewer ordinary course document requests despite parties' expectations and willingness to provide such information. Some respondents observed fewer requests for customer contact information that would allow the agencies to gauge concerns of the marketplace impacted by a potential deal—a once routine process. Additionally, practitioners report more frequent large-scale, burdensome data requests in general, and, of particular concern among advisors, for deals that would traditionally not raise scrutiny.

6) Strategic Gaming

Some Antitrust Practitioners, both those who represent third parties and those who represent merging parties, indicated that the agencies seem more susceptible to "strategic gaming" than two years ago. As part of strategic gaming, third parties seek to kill deals, increase the likelihood of regulatory review, or increase the regulators' scrutiny.[92] Respondents could not verify strategic gaming by third-party competitors or whether the agencies now view third-party complaints more sympathetically, but the respondents who addressed the issue believe that the agencies are more receptive of third-party complaints.

7) Missing Potentially Anticompetitive Deals

Many of the practitioners expressed that the agencies, particularly the FTC, are missing deals that have potential anticompetitive concerns. Respondents indicated that the FTC is focused on certain industries and not others, and that there are capacity constraints at the FTC based on the FTC's current agenda. A number of these practitioners mentioned that deals that should have gotten a Second Request did not. Consequently, some practitioners were advising their clients to pursue *more* deals because the FTC is not closely examining certain types of deals.

IV. Sampling Bias Poses Potential Limitations to the Surveys

Sampling bias occurs when some members of a population are systemically more likely to be selected for, or to respond to, surveys than others. The quantitative and qualitative surveys described in this article measure opinions of individuals who participated in one or more recent merger reviews considered by either the FTC or DOJ. As mentioned earlier, this research targeted Antitrust Practitioners through LinkedIn and invited their participation in the survey via email. The data may be biased by over-sampling attorneys at large law firms or attorneys in particular industries based on LinkedIn connections, although attorneys at large law firms are more likely to be involved in merger-related work before the antitrust agencies, particularly those individuals who work on deals that require more careful consideration starting at the Second Request phase. Even though attorneys at large law firms tend to defend the merging parties, many such attorneys represent third parties in mergers. Some of these third parties, particularly competitors, have interests contrary to the merging parties and may seek to scuttle the proposed merger or to help the government extract concessions from the merging parties.

Additionally, the online survey suggests that 64 percent of respondents were Democrats and only eight percent were Republicans.[93] The relationship between public and private rights constitutes an integral component of antitrust design, and Republicans and Democrats often have differing belief systems around these rights. The data may be subject to sampling bias along the political dimension by an over-sampling of Democrats. However, 24 percent of respondents did not answer the question intended to identify the respondent's political affiliation.

V. Conclusion

Our surveys indicate that approximately one year after the appointment of new agency leadership, practitioners had a more critical perception of the FTC and DOJ compared to prior administrations. Both agencies are perceived as less transparent, less fair, and more combative in their interactions with merging parties. The enforcement process is seen as more demanding in terms of scope of data collected and is reported to take longer to complete. The agencies have also departed from precedent as they increasingly scrutinize labor issues and vertical deals.

Practitioners are particularly critical in their views of the FTC. The agency's leadership is perceived as less effective in terms of communicating concerns, maintaining staff morale, and grounding decisions in economic expertise. Indeed, the majority of respondents see current FTC enforcement as efficiency degrading.

The impact of these changes in enforcement and associated increase in uncertainty appears to differ by practice area. Despite facing non-traditional, price-agnostic considerations from the FTC and DOJ, economists reported using the same methods in their advocacy. On the other hand, legal counsel reported adapting to the changing environment by anticipating greater antitrust scrutiny at the time of deal initiation and advising their clients to expect higher costs and longer timelines.

Interestingly, practitioners do not expect these changes in enforcement and the associated increase in regulatory uncertainty to hinder overall deal flow. While many practitioners agree that companies at the margin of intense antitrust scrutiny may be pursuing fewer deals, companies are generally not deterred from pursuing and completing transactions. As the FTC and DOJ continue to focus their attention on resource-intensive enforcement of a few high-profile technology and pharmaceutical companies, practitioners see more deals escaping scrutiny. As data become available, additional research is required to evaluate the extent to which expectations of the degree of M&A and enforcement activities match reality.

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Endnotes

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9. *See* William E. Kovacic & Marc Winerman, The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness, 100 IOWA L. REV. 2085 (2015); FTC Policy Work on Privacy and Data Security, FED. TRADE COMMISSION, https://www.ftc.gov/news-events/topics/protecting-consumer-privacy-security/ftc-policy-work (last visited July 24, 2023).
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efficiencies claims. During this time period in a government merger investigation, counsel attempt to convince the agency staff not to oppose the merger for a variety of case-specific reasons, including efficiencies claims made by the acquiring party. Should issues develop, the discussions that occur between the outside lawyers and the agency staff and management take on greater importance, as do staff discussions with the buyer's businesspeople and discussions between economists and lawyers. These different negotiations make up the bulk of the practice of efficiency discussions and better represent the reality of efficiencies practice at the agencies."); Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 814 (2006) ("[I]n the years since the first merger guidelines were issued, courts have decided decreasing percentages of merger cases. . . . The Supreme Court issued a number of critical merger decisions in the 1960s, and several more important decisions in the 1970s, but has issued no additional rulings in the subsequent decades.").

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51. Consolidated Appropriations Act, Pub. L. No. 117-328, Div. GG (2022) ("Merger Filing Fee Modernization Act of 2022").

52. *Id.*

53. For example, the eleventh guideline states that the agencies will examine whether mergers among competing buyers will lessen competition for workers or impact wages. *See* 2023 DRAFT MERGER GUIDELINES, *supra* note 10, at 25–27.

54. For example, the third guideline states several factors that will be considered when determining whether a merger could increase the risk of coordination. However, there is no proposed method to determine the likelihood that remaining firms will coordinate post-merger. *Id.* at 9–11.

55. For example, the agencies' draft guidelines presume a merger will substantially lessen competition if the merging parties will have a greater than 30 percent market share and increase the HHI by more than 100 even if the smaller party has a negligible market share independently. *Id.* at 7. Additionally, foreclosure is presumed in vertical mergers when a merging party controls more than 50 percent of the market for an input supplied to the downstream industry with no consideration made for whether foreclosure is economically sensible. *Id.* at 17–18.

56. *See* Bonaime et al., *supra* note 20, at 531–33.

57. *Meet the Assistant Attorney General*, U.S. DEP'T JUST., https://www.justice.gov/atr/staff-profile/meet-assistant-attorney-general (last updated June 15, 2023); *Lina M. Khan Sworn in as Chair of the FTC*, FED. TRADE COMMISSION (June 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/06/lina-m-khan-sworn-chair-ftc.

58. Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 14, 2023).

59. Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 235 (Robert Pitofsky ed., 2007); Malcolm B. Coate, *Bush, Clinton, Bush: Twenty Years of Merger Enforcement at the Federal Trade Commission*, ANTITRUST CHRON. 1 (Sept. 2009); John D. Harkrider, *Antitrust Enforcement During the Bush Administration—An Economic Estimation*, 22 ANTITRUST 43 (2008); Sokol, *supra* note 5.

60. *See* Shari Seidman Diamond, *Reference Guide on Survey Research*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 359, 406–09 (3d ed. 2011).

61. FED. JUD. CTR., MANUAL FOR COMPLEX LITIGATION § 11.493, at 102–04 (4th ed. 2004).

62. We intend to update the survey annually, with questions adjusted to reflect evolving realities, such as the new merger guidelines. We also intend to increase the pool of survey participants. While we reached out to practice group heads at the AMLAW 100 law firms, as well as firms listed in the GCR 100, the universe of in-house counsel is more difficult to identify and penetrate. In the coming years, our outreach will focus on increasing participation by in-house counsel, potentially in partnership with industry associations.

63. *USA USA-Nationwide: Corporate/M&A: The Elite*, CHAMBERS & PARTNERS (2023), https://chambers.com/legal-rankings/corporate-ma-the-elite-usa-nationwide-5:1437:12788:1; *see also Global Elite Rankings: Mergers*, GLOB. COMPETITION REV. (Dec. 10, 2021), https://globalcompetitionreview.com/survey/gcr-100/22nd-edition/article/global-elite-rankings-mergers.

64. Based upon other studies, the morale among FTC staff appears to be sinking, which may reduce the agency's ability to recruit and retain top talent. Cat Zakrzewski, *Sinking FTC Workplace Rankings Threaten Chair Lina Khan's Agenda*, WASH. POST (July 13, 2022, 12:05 AM). For example, the 2022 *Federal Employee Viewpoint Survey* reveals that only about 62 percent of agency employees are "very satisfied" or "satisfied" with the organization, which is down from about 89 percent in 2020. U.S. OFF. OF PERS. MGMT., FEDERAL EMPLOYEE VIEWPOINT SURVEY: REPORT BY AGENCY 181 (2022) [hereinafter 2022 OPM SURVEY], https://www.opm.gov/fevs/reports/data-reports/data-reports/report-by-agency/2022/2022-agency-report.pdf ("(Q70): Considering everything, how satisfied are you with your organization?"); U.S. OFF. OF PERS. MGMT., FEDERAL EMPLOYEE

VIEWPOINT SURVEY: REPORT BY AGENCY 92 (2020) [hereinafter 2020 OPM SURVEY], https://www.opm.gov/fevs/reports/data-reports/data-reports/report-by-agency/2020/2020-agency-report.pdf ("(Q38): Considering everything, how satisfied are you with your organization?"). The drop in satisfaction may be related to leadership, as the survey results indicate that only about 44 percent of FTC employees have a "high level of respect" for senior leadership, as compared to about 83 percent in 2020. 2022 OPM SURVEY, *supra*, at 156 ("(Q60): I have a high level of respect for my organization's senior leaders."); 2020 OPM SURVEY, *supra*, at 73 ("(Q31): I have a high level of respect for my organization's senior leaders."). This is also supported by the finding that only about 49 percent of employees at the FTC believe that senior leaders maintain "high standards of honesty and integrity," which is down from about 87 percent in 2020. 2022 OPM SURVEY, *supra*, at 148 ("(Q56): My organization's senior leaders maintain high standards of honesty and integrity."); 2020 OPM SURVEY, *supra*, at 65 ("(Q27): My organization's senior leaders maintain high standards of honesty and integrity.").

65. *United States Department of Justice*, GLOB. COMPETITION REV. (Sept. 13, 2021), https://globalcompetitionreview.com/survey/rating-enforcement/2021/article/united-states-department-of-justice.

66. *United States Federal Trade Commission*, GLOB. COMPETITION REV. (Sept. 13, 2021), https://globalcompetitionreview.com/survey/rating-enforcement/2021/article/united-states-federal-trade-commission.

67. As mentioned above, in July 2023, as this article was undergoing the editorial process, the DOJ and the FTC released draft merger guidelines. *See* 2023 DRAFT MERGER GUIDELINES, *supra* note 10.

68. OFF. OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2023 16 (2022).

69. *See* 2023 DRAFT MERGER GUIDELINES, *supra* note 10, at 4 ("Guideline 11: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers . . . .").

70. Ben Remaly, *DOJ Reiterates Distaste for Merger Settlements*, GLOB. COMPETITION REV. (Sept. 13, 2022).

71. *Id.*

72. John Reiss, *M&A Roars into 2022 on Momentum of a Record-Shattering Year*, in WHITE & CASE: RECORD BREAKER: US M&A 2021 1 (2022), https://www.whitecase.com/sites/default/files/2022-02/white-case-record-breaker-us-ma-2021-web-v17.pdf; Farhad Jalinous et al., *Cross-Border Deals Face Increased CFIUS Scrutiny*, in WHITE & CASE: RECORD BREAKER: US M&A 2021 21 (2022), https://www.whitecase.com/sites/default/files/2022-02/white-case-record-breaker-us-ma-2021-web-v17.pdf.

73. Q2 asked "Which of the following, if any, best describes your occupation?"

74. Q4A asked "In 2019, approximately how many deals have you worked on in total?"; Q5A asked "In 2020, approximately how many deals have you worked on in total?"; Q6A asked "In 2021, approximately how many deals have you worked on in total?"; and Q7A asked "In 2022, approximately how many deals have you worked on in total?"

75. Q4C asked "In 2019, approximately how many deals have you worked on that have gone to second request?"; Q5C asked "In 2020, approximately how many deals have you worked on that have gone to second request?"; Q6C asked "In 2021, approximately how many deals have you worked on that have gone to second request?"; and Q7C asked "In 2022, approximately how many deals have you worked on that have gone to second request?"

76. Q10 asked "What is your perception of the current merger enforcement by the DOJ?"; and Q11 asked "What is your perception of the current merger enforcement by the FTC?"

77. Q12 asked "Over the past two years, have you or have you not observed a divergence between the FTC and DOJ on mergers you have worked on that have been reviewed by the agencies?"

78. Q13 asked "You just mentioned you have observed a divergence between the DOJ and the FTC. What was the cause of the divergence in the review? Please select all that apply."

79. Q14 asked "On the deals you have personally worked on in the last two years, has the DOJ addressed traditional non-price effects?"; and Q15 asked "Did the DOJ provide guidance on its methodology to address the traditional non-price effects?"

80. Q19 asked "On the deals you have personally worked on in the last two years, has the FTC addressed traditional non-price effects?"; and Q20 asked "Did the FTC provide guidance on its methodology to address the traditional non-price effects?"

81. Q16 asked "In your view, has the DOJ's consideration of efficiency gains changed compared to two years ago?"; and Q21 asked "In your view, has the FTC's consideration of efficiency gains changed compared to two years ago?"

82. Q17 asked "On the deals you have personally worked on in the last two years, which of the following factors, if any, has the DOJ raised?"; and Q22 asked "On the deals you have personally worked on in the last two years, which of the following factors, if any, has the FTC raised?"

83. Q24 asked "On vertical mergers you have worked on, the DOJ is … ."; and Q28 asked "On vertical mergers you have worked on, the FTC is … ."

84. Q25 asked "On 'diagonal' or 'adjacent' (non-horizontal) mergers you have worked on, the DOJ is … ."; and Q29 asked "On 'diagonal' or 'adjacent' (non-horizontal) mergers you have worked on, the FTC is … ."

85. Q32 asked "How, if at all, has the manner in which you have counseled your clients changed relative to two years ago?"

86. Q34 asked "Based on your personal experience, has there been increased agency scrutiny over the last two years relative to previously?"; and Q35 asked "Because of the increased agency scrutiny you noted, has the time spent on lawyer hours, internal client hours, economic expert hours, and other internal costs to a merger changed over the last two years?"

87. *See supra* notes 82–83 and accompanying text (addressing the results of the online survey).

88. *Statement of the Commission on the Use of Prior Approval Provisions in Merger Orders*, FED. TRADE COMMISSION (Oct. 25, 2021), https://www.ftc.gov/legal-library/browse/statement-commission-use-prior-approval-provisions-merger-orders.

89. *FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers*, FED. TRADE COMMISSION (Oct. 25, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive-mergers.

90. *See* Kovacic & Winerman, *supra* note 9, at 2087 ("[I]n the original FTC Act, Congress provided that the agency's commissioners would have fixed, seven-year terms and that a commissioner could be removed during his or her term only for cause. . . . The FTC's degree of insulation from direct political control supplied an influential model of institutional design and contributed to the acceptance of a norm, evident in modern commentary about competition law, that public enforcement agencies should be politically independent.").

91. *See supra* note 64.

92. *See* D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. CAL. L. REV. 689 (2012).

93. Q43 asked "Who did you vote for (or would have voted for) in the last US presidential election?," which was intended to identify the respondent's political party. Given the complexity surrounding the 2020 U.S. presidential election, survey participants may have been unwilling to reveal that they voted for the Republican candidate. Furthermore, individuals do not always vote in line with their political affiliation, so there may be a higher proportion of Republican respondents represented in this survey than reflected in the data.

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