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U.S. Antitrust Agency Merger Roundup & Commentary: FTC Reverses Routine Use of Prior Approval Requirements in Merger Settlements, Trump Antitrust Leadership Continues Departure from Antitrust Merger Policies of Previous Administration

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The June 2025 Quorum summarized recent actions by the Federal Trade Commission ("Commission" or "FTC") and Department of Justice's Antitrust Division ("DOJ") indicating the Trump Administration's rejection of the anti-merger policies of the Biden administration. *Trump Administration Reverses the Biden Administration's Anti-Merger Policy* (Quorum, June 2025). Over the past month, both antitrust agencies advanced changes from the previous administration's merger policy by:

- Recognizing that the use of "prior approval" requirements are "an extraordinary remedy in merger orders," the FTC has abandoned the Biden Administration's routine use of "prior approval" requirements in merger settlements. *Persons or entities subject to merger consent orders that include a requirement for FTC approval before closing future transactions should strongly consider petitioning for modification or rescission of such clauses.*

- Continuing to accept remedies in lieu of litigation, including the FTC's acceptance of a behavioral commitment to address competition concerns associated with a horizontal merger. *The willingness of the agencies to accept conduct remedies in horizontal merger transactions remains low, but the Commission has now accepted four since August 2023. This record may make courts less skeptical of conduct remedies when parties "litigate the fix."*

- Accepting a "weakened competitor" and efficiency defense in closing an investigation into a significant acquisition.

- Rejecting a "portfolio" theory of harm in closing a significant merger investigation, while the European Commission accepts it in the same transaction.

The Trump Administration Has Reversed the Biden FTC's Routine Use of Prior Approval Requirements in Merger Settlements

The Biden Administration FTC rescinded the FTC's 1995 Policy Statement on the Use of Prior Approval and Prior Notice Provisions in consent orders that resolve merger investigations. The 1995 Policy Statement indicated that the Commission "[would] no longer require prior approval of certain future acquisitions in [Commission orders entered in merger cases] as a routine matter" and recognized that such requirements can be "unduly burdensome." 60 FR 39745-46 (Aug. 3, 1995). In its October 2021 replacement for the 1995 Policy, the Commission indicated it would "routinely requir[e] merging parties subject to a Commission order to obtain prior approval from the FTC before closing *any* future transaction." *See* Statement of the Commission on the Use of Prior Approval Provisions in Merger Orders.

After the adoption of the 2021 Policy Statement, the Commission did, in fact, routinely incorporate prior approval requirements in its merger consent orders. *See*, *e.g.*, Amgen/Horizon (Dec. 2023); Intercontinental Exchange/Black Knight (Nov. 2023); Tractor Supply/Orschein Farm and Home (Dec. 2022); and EnCap/EP Energy (Sept. 2022). Transactions challenged under less conventional theories of harm – such as Chevron/Hess (restricting appointment of certain individuals to the acquiring company's board of directors) and Quantum/EQT (challenging an acquisition of a minority interest in EQT and requiring prior approval of only additional acquisitions of EQT voting securities or interests otherwise exempt under the HSR Act) – did not contain broad prior approval requirements.

Although the Commission has not rescinded the 2021 Policy Statement, the Trump Administration no longer adheres to it. None of the FTC's three proposed consent orders initiated during the Trump Administration – Alimentation Couche-Tard/Giant Eagle, Omnicom/Interpublic (both discussed below) and Synopsys/ANSYS (discussed in Quorum, June 2025) – include a prior approval provision, although the proposed orders in Alimentation Couche-Tard and Synopsys/ANSYS prohibit the acquiring firm from re-acquiring the assets divested as a condition of FTC clearance of the transaction, for the ten year term of the order.

The Commission also recently approved a modification of the *prior approval* clause in the EnCap/EP Energy settlement, adopting a *prior notice* provision in its place. In doing so, it recognized that "[a] prior-approval requirement is an extraordinary remedy because it reverses the ordinary operation of the antitrust laws." Order Reopening and Modifying Decision and Order, EnCap/EP Energy (Jul. 2025). (A petition to reopen an existing Commission Order or Final Judgment must make a showing of changed conditions of law or fact. A petitioner can meet this burden if it can show that the continued application of the offending provision is inequitable or harmful to competition. The agencies may also reopen and modify an order when it is in the public interest. A party seeking modification may be able to show that the public interest can be met through a prior notice provision.)

Similarly, none of the three proposed merger settlements the Trump Antitrust Division has entered into – Safran/RTX, HPE/Juniper (both discussed below) and Keysite Technologies/Spirent Communications (discussed in Quorum, June 2025) – include prior approval provisions. (The DOJ rarely included prior approval requirements prior to the Biden Administration, and the Biden Administration's expansive use of a "fix-it-first" approach to merger relief avoided the use of merger settlements almost entirely.)

That neither the FTC nor DOJ have adopted a prior approval clause in merger settlements during the Trump Administration suggests neither agency finds them a necessary requirement for antitrust clearance of a transaction nor to investigate future transactions not subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Act. The agencies may also be open to rescinding or modifying prior approval requirements in existing merger settlements.

Consistent with the FTC's change in policy, companies subject to a prior approval requirement for future transactions should strongly consider seeking rescission or modification of the requirement.

FTC and DOJ Continue to Settle Most Merger Matters, Rejecting Biden Administration's Preference for Litigation or Abandonment of Transactions

As discussed in the June 2025 Quorum, the Biden Administration substantially decreased the use of settlements to clear transactions that raised competitive concerns, preferring to either restructure transactions without merger settlements or sue to block those they believed especially anti-competitive. The Trump Administration has returned to the modern practice of accepting settlements that address competitive concerns arising from the transaction but that otherwise allow the transaction to close.

- In early July, the DOJ accepted a settlement addressing its competitive concerns with **Hewlett Packard Enterprise's** ("HPE") proposed $14 billion acquisition of **Juniper Networks**. In January, the Antitrust Division filed suit to block the transaction, alleging harm in the market for enterprise-grade wireless local area network ("WLAN") solutions. To address the DOJ's concerns in lieu of continuing the litigation, DOJ has required HPE to divest the assets of its "campus and branch" WLAN business and to license, via an auction, the source code for Juniper's competing WLAN business. The settlement requires court approval.

- In late June, the FTC accepted for public comment an Order settling its investigation into **Alimentation Couche-Tard's** proposed $1.57 billion acquisition of 270 retail fuel assets from **Giant Eagle** by requiring the divestiture of 35 retail fuel stations in Indiana, Ohio, and Pennsylvania. (The proposed Order is subject to final Commission approval.) As is customary in transactions involving retail assets, the Commission required the parties to enter into an Order to Maintain Assets prior to their divestiture. The Commission's Order also requires ACT to give thirty-days' *notice* prior to acquiring certain gas stations where such acquisitions would not be subject to the reporting and waiting period requirements of the HSR Act, and prohibited ACT from acquiring any of divested gas stations for a period of ten years. The *prior notice* provision contrasts with the *prior approval* provision imposed by the Biden FTC in similar wholesale or retail gasoline transactions, and, more generally, in most all merger consider orders, as discussed above. *See*, *e.g*., ARKO / GPM Petroleum (Aug. 2022) (prior approval required for the acquisition of a retail fuel business in a defined location); Buckeye Partners/Magellan Midstream (Aug. 2022) (prior approval required for Buckeye's acquisition of any terminal of bulk light petroleum products within a certain defined area); Global Partners/Richard Wiehl (Dec. 2021) (prior approval required for Global Partner's acquisition of any interest in any retail fuel business).

- In mid-June, the DOJ accepted a settlement addressing its competitive concerns with **Safran S.A.'s** proposed $1.8 billion acquisition of **RTX Corporation.** To clear the transaction, DOJ required the divestiture of Safran's North American trimmable horizontal stabilizer actuators ("THSAs") business and its Canada-based electronic control units business. According to DOJ's complaint (filed at the same time as the proposed settlement), Safran and RTX were two of a very few firms "that have demonstrated expertise in designing and producing THSAs for large aircraft." The parties agreed that the district court may appoint a monitor to oversee compliance with the merging parties' divestiture obligation, and that the assets to be divested would be held separate pending their divestiture. Safran may not reacquire the divested assets without DOJ approval. The United Kingdom's Competition and Markets Authority ("CMA") raised similar concerns, and accepted the same divestiture as sufficient to address those concerns. A few months prior to both the DOJ and CMA, the European Commission approved the transaction subject to the same divestiture.

Use of A Conduct Commitment to Resolve a Horizontal Merger Challenge

The FTC recently accepted for public comment an Order settling concerns arising from the proposed $13.5 Billion acquisition of **Interpublic Group** ("IPG") by **Omnicom Group**. The Commission alleged that the combination of two of the six largest firms offering media buying services could lead to an increased likelihood of coordination or collusion in the market for "media buying services."

To address the FTC's concerns, Omnicom is required to cease and desist from participation in any existing or future agreement or understanding with respect to media buying services that:

- directed (or would, in the future, direct) advertising spending based on political or ideological viewpoints of a publisher, or of the content that the publisher publishes and places advertising alongside of;

- requires the parties to such an agreement to refuse any advertisers' request to direct advertising spend, where that refusal is based on political or ideological viewpoints or political content; and,

- requires the parties to such an agreement to decline to deal with advertisers, where that refusal to deal is based on political or ideological viewpoints of the advertiser.

Omnicom is also prohibited from directing advertisers' placements based on so-called exclusion lists differentiating media publishers by political or ideological viewpoints.

Non-structural relief, sometimes referred to as conduct or behavioral relief, in horizontal transactions raising competitive concerns is rare (excluding licensing of intellectual property, which is a form of structural relief). In his statement accompanying the settlement of the Alimentation Couche-Tard/Giant Eagle matter, FTC Commissioner Mark Meador emphasized that the agency strongly prefers structural relief in merger matters. Chairman Ferguson made the same point in his statement accompanying settlement of the Synopsys/ANSYS matter; the statement recognized that, because of the difficulty of monitoring compliance, behavioral remedies were disfavored. Commissioner Melissa Holyoak agrees with her colleagues strong preference for structural relief, laying out key principles for divestitures in a June speech. Notwithstanding this strong preference, non-structural relief has routinely, but not always, been accepted as sufficient relief in vertical mergers that raise competitive concerns and is sometimes accepted as sufficient relief in acquisitions or holdings of a partial interest in competing firms. *See*, *e.g*., Staples/Essendant (2019) (consent order requiring firewall between Staples business-to-business office supply products business and Essendant's wholesale office supply products business); TC Group/Carlyle/Riverstone Holdings (2007) (consent order requiring partial ownership interest to be held as a passive investor, imposing restrictions on board rights and access to certain confidential business information).

In accepting non-structural relief in the Omnicom/IPG horizontal merger, Chairman Ferguson explained his departure from the Commission's preference for structural remedies by indicating he believed that Omnicom's compliance with the proposed remedy could be monitored effectively. However, there appears to be very little that materially differentiates this matter from other horizontal mergers that raise coordination concerns, and if the differentiating factor is that the Commission will apply increased compliance requirements and oversight to such relief, this approach can apply to most any horizontal merger that raises competitive concerns, especially mergers involving undifferentiated products.

Notwithstanding the Commission's (and DOJ's) preference for structural relief, since August 2023 the Commission has accepted non-structural relief in four significant horizontal mergers, including the **Omnicom/IPG** matter. In December 2023, the Commission accepted a conduct remedy in settling its challenge to the **Amgen/Horizon** transaction. That settlement prohibited Amgen from conditioning any price concession or payment for an Amgen product on the purchase of products of the acquired entity, or any acts that would exclude or disadvantage a product that competed with a product of the acquired entity. In January 2025, the Commission accepted, as final, a conduct remedy in its challenge to the Exxon/Pioneer transaction and its challenge to the Chevron/Hess transaction. In both matters the acquiring firm was prohibited from nominating, designating, or appointing certain officers of the acquired company to its board. (These settlements were criticized by Commissioner (now Chairman) Ferguson and Commissioner Holyoak.) The Commission's 2007 settlement of the consummated Evanston Northwestern/Highland Park Hospital transaction is also significant. There, the combined entity was required to establish two separate and independent managed care organization contract negotiating teams instead of what might otherwise have been a standard divestiture of the merged firms assets sufficient to re-establish an independent competitor.

The acceptance of a conduct "fix" to remedy horizontal mergers may hurt the FTC in future merger litigation where merging parties regularly "litigate-the-fix." If concerns about post-merger market power or coordination can be addressed by conduct remedies and enhanced compliance audits, under what conditions are structural remedies actually necessary to protect competition? Courts may be more willing to accept non-structural remedies as sufficient relief in litigated horizontal merger matter as the FTC increases their use in settlements.

DOJ Accepts Weakened Competitor Defense & Recognizes Pro-competitive Efficiencies in Closing T-Mobile/UScellular Merger Investigation

The DOJ recently closed its investigation of **T-Mobile's** proposed $4.4 billion acquisition of **UScellular**, notwithstanding what appears to be significant initial competitive concerns. Although the transaction eliminated another "local or regional" firm that "understood the unmet needs of... Heartland Families or Farmtown Frugals" by offering something other than the "one size fits all" approach of the Big Three national firms, the DOJ's investigation showed that "UScellular simply could not keep up with the escalating cost of capital improvements in technology required to compete vigorously" absent the merger. Although UScellular was not a "failing firm" – a defense to an otherwise anticompetitive merger – it was, on a going forward basis, unlikely to be a strong competitive force. The DOJ recognized too that the integration of the two networks would create consumer benefits: UScellular customers might receive faster data speeds, and T-Mobile customers would obtain broader coverage in rural areas. Consistent with past closing statements of both antitrust agencies, observers were cautioned to recognize that enforcement decisions "are made on a case-by-case basis," but **the DOJ's recognition of the weakened competitor defense and procompetitive effect of efficiencies from the merger is a return to the balanced antitrust merger policy that preceded the Biden Administration.**

FTC Rejects Portfolio Theory of Harm in Mars/Kellanova Merger Investigation While European Commission Announces an Intention to Pursue Concerns Based on Post-Merger Bundling Concerns

The FTC closed its nearly one year investigation of **Mars Inc.'s** proposed $36 billion acquisition of **Kellanova,** notwithstanding that the transaction continues to be reviewed in other jurisdictions. In 2024, the House of Representatives Committee on Oversight and Accountability found that the Biden Administration was coordinating its merger reviews with competition agencies in other jurisdictions, allegedly working with non-U.S. competition agencies to block deals that did not raise significant competitive concerns in the United States. The Trump Administration has rejected this approach. In announcing the closing of the agency's investigation, the FTC's Director of the Bureau of Competition stated that "[the FTC's] job is to determine whether there is a violation of American law that [it] can prove in court. And once we've concluded there is not, our job it to get out of the way." Here, after what the Bureau Director described as a thorough, extensive and intensive investigation, the FTC did just that.

On the same day the FTC announced the closing of its investigation, the European Commission opened an "in-depth investigation" into the proposed acquisition, primarily concerned that the transaction could increase Mars' negotiating power with retailers in the European Economic Area, a so-called "portfolio" theory of harm. (A portfolio theory of harm focuses on the competitive harm that may arise from a merger creating or enhancing the ability and incentive of the combined firm to bundle or tie complementary products; while this can be procompetitive, it is sometimes feared this may also have the effect of excluding a single-product firm from the relevant market.)

The FTC rejected the portfolio theory of harm in **Mars/Kellanova.** The current administration's rejection of this theory of harm is consistent with modern U.S. antitrust merger practice prior to the previous administration. In 2023, the FTC alleged a portfolio theory of harm in the **Amgen/Horizon** transaction; the FTC's concerns were addressed by a settlement prohibiting the combined entity from conditioning the sales of one product on a customer's purchase of another product (a non-structural remedy). But, prior to that instance, U.S. antitrust agencies had for four decades been skeptical that such theories support a merger challenge. For example, the FTC rejected a portfolio theory of harm in its investigation of and requirement of divestitures in the 2009 **Pfizer/Wyeth** transaction and in the 2001 **GE/Honeywell** transaction. Its rejection in **Mars/Kellanova** is consistent with the antitrust merger policies of the first Trump Administration, which did not pursue such theories of harm in its merger challenges and recognized that product bundles and ties could create efficiencies for suppliers and cost-savings and other efficiencies for customers. The previous administration's adoption of this theory of harm in **Amgen/Horizon** was an outlier among recent U.S. administrations.

The FTC's rejection and the EC's consideration of this theory of harm in the **Mars/Kellanova** investigations reflects a long-standing divergence with the European Commission. In 2001, the DOJ rejected the application of a portfolio theory of harm in its review and clearance of the proposed **GE/Honeywell** transaction, but the European Commission accepted it. The U.S. antitrust agencies did not identify competitive concerns with the **Microsoft/LinkedIn** transaction (2016) but the European Commission did allege anticompetitive effects, including with respect to a portfolio/bundling theory of harm. Similarly, the U.S. antitrust agencies did not identify competitive concerns with the proposed **Qualcomm/NXP (2017/18)** transaction, but the European Commission did, in part on the basis of a portfolio/bundling theory of harm. (The Qualcomm/NXP transaction was abandoned because of antitrust concerns identified by China's competition agency.) As a general matter, the European Commission's Non-Horizontal Merger Guidelines (2008) are much more accepting of such theories of harm than the Department of Justice and Federal Trade Commission Merger Guidelines (2023), and, over time, a greater percentage of the European Commission's merger challenges have included a portfolio theory of harm.

Multi-jurisdictional mergers will often be evaluated under a similar but different legal regime and analytic framework in different jurisdictions, and divergent results should be planned for and, in some instances, expected, especially as the current administration prioritizes an America-First antitrust policy.

Conclusion

Notwithstanding early perceptions that the second Trump Administration would not deviate significantly from the antitrust enforcement policies of the Biden Administration, the current FTC and Antitrust Division leadership are adopting a balanced approach to merger enforcement almost wholly consistent with the approach of every president from the administration of George H. W. Bush through the first administration of Donald J. Trump.

The anti-merger position of the previous administration has been substantially revised and reversed.