



Antitrust M&A Outlook for 2023

The Biden Administration delivered on its promise of aggressive merger enforcement in 2022 despite its initially poor record in court.

The Federal Trade Commission was most active, challenging 15 deals (five in healthcare and life sciences, three in energy-related markets and two high-tech). The U.S. Justice Department sought to block four deals. While the year saw several noteworthy vertical merger challenges focused on attempted acquisitions of alleged critical inputs, the majority of challenges continued focus on horizontal mergers of competitors.

- 19 Challenges Initiated in 2022
- 9 Transactions Restructured
- 7 Deals Abandoned
- 3 Challenges Pending in Court or Administrative Hearing

FTC appeared more amenable to settle with divestitures than DOJ. Notwithstanding FTC Chair Lina Khan’s warning that the FTC will focus its “resources on litigating, rather than on settling,” the FTC settled nine of the 15 merger challenges it initiated last year, including with divestitures to private equity buyers despite anti-private equity rhetoric. Settlements came with a price, however; in each case, the FTC required “prior approval” provisions, granting the FTC significant control in any future deals affecting the same market, even if that deal would not otherwise be reportable. (DOJ settled none of its four challenges.)

Mixed Record of Litigation Success for Regulators. DOJ lost two of three merger challenges in 2022. It prevailed in its challenge to Penguin Random House’s deal to buy Simon & Schuster, which would have reduced the number of big book publishers from five to four. The case was noteworthy in part for its focus on the consolidation of buyer power. But DOJ lost on its challenges to the mergers of U.S. Sugar/Imperial Sugar and United/Change Health (a merger of vertically-related parties).



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In *Imperial Sugar*, DOJ failed to convince the court on market definition and on the parties' ability to charge anticompetitive price in a highly regulated sugar industry. In *Change Health*, the court was skeptical of DOJ's allegation that United would misuse competitively sensitive claims data of health plan rivals and satisfied that United's divestiture of Change's ClaimsXten unit to a private equity buyer would satisfactorily resolve horizontal concerns. DOJ is appealing both decisions. DOJ was also unsuccessful in its bid to block the merger of Booz Allen Hamilton and EverWatch, choosing to dismiss its lawsuit after failing to secure a preliminary injunction once the court rejected the DOJ's alleged single-transaction market definition.

The FTC lost its Part 3 administrative challenge to the Illumina/GRAIL merger (which had been filed in 2021). The Agency alleged that the merger would reduce innovation competition in early-detection cancer testing because Illumina is the only viable supplier of next-gen sequence instruments required by Grail and any rivals to run such tests. The administrative judge disagreed with the FTC, noting both that Grail has no rivals on the horizon and that Illumina had offered to guarantee access and price tom sequencing customers. Staff appealed to the Commission, which is expected to rule soon, leaving the parties to appeal to a federal court if necessary. In the meantime, The European Union is seeking to unwind the transaction.

FTC Expands "Unfair Methods of Competition" in Policy Letter. The FTC released a policy letter regarding its Section 5 authority to address "unfair methods of competition." Notably, the FTC suggested it may challenge M&A conduct that has the "tendency to ripen" into antitrust violations, such as serial merger activity in which no single merger independently violates the antitrust laws.

HSR Filing Fee Changes. Congress passed the omnibus spending bill just before the close of 2022 that among other things updates the HSR Filing Fees (see below). Changes are expected to go into effect in 2023 but are not yet posted to the FTC's website.

Filing Fee Requirements for HSR-Reportable Mergers in Omnibus Spending Bill

Size of Transaction	Filing Fee
Less than \$161.5M	\$30,000
Between \$161.5M - \$500M	\$100,000
Between \$500M - \$1B	\$250,000
Between \$1B - \$2B	\$400,000
Between \$2B - \$5B	\$800,000
\$5B and greater	\$2.25 million



What to Expect in 2023

Revised Merger Guidelines. Draft revised joint FTC and DOJ Merger Guidelines are expected to be published for public comment in the first quarter of 2023. *See* [interview](#) with RGH Chair Rick Rule and DOJ Antitrust Division AAG Jonathan Kanter.

We expect these guidelines to be substantially different from prior recent guidelines and to be focused more on expanding the circumstances in which transactions may be investigated and challenged than on providing regulatory certainty. For example, rather than focusing on the effects of consolidation resulting from mergers of competing firms, revised guidelines will likely address a range of potential competitive harms resulting from horizontal, vertical, and conglomerate mergers and the elimination of nascent competition. The guidelines may also resurrect decades-old structural presumptions, without providing reliable safe harbors. We expect less openness to arguments about merger efficiencies (particularly with respect to vertical mergers) and (perhaps) greater explication of how the agencies assess effects on labor markets.

Deals to Watch in 2023:

- **Microsoft/Activision.** In its administrative complaint, the FTC has argued that the deal would harm competition by enabling Microsoft to foreclose rivals from popular Activision game titles (like *Call of Duty*). Microsoft has committed to continue to make popular titles available to rival game platforms and argues both that it has no incentive to restrict access to games and that the transaction ultimately will make mobile gaming more competitive. Trial before the FTC’s administrative court is scheduled to begin on August 2, 2023. The UK and European competition authorities are also considering challenges to the deal, with a decision from the European Commission expected by March 23, 2023.
- **Meta/Within.** The FTC alleges that Meta’s acquisition would harm innovation competition for VR and fitness-VR apps by allowing Meta to buy rather than build its own fitness-VR app to compete with Within. Meta already sells a widely used VR headset, operates a VR app store, and owns several VR apps. The FTC challenged the merger with a Part 3 Complaint and also filed for a temporary restraining order and preliminary injunction to block the deal in the U.S. District Court for the Northern District of California. In December, the parties completed a seven-day evidentiary hearing before the district court, while an ALJ will oversee an evidentiary hearing in the Part 3 proceeding on January 19, 2023.
- **ASSA ABLOY/Spectrum.** According to DOJ, this merger between two horizontal competitors would give ASSA ABLOY a near monopoly in premium mechanical door hardware, nearly half the market for smart locks, and nearly half the market for residential door hardware. Trial is scheduled to begin on April 17, 2023, in the U.S. District Court for the District of Columbia.
- **Amazon/OneMedical & Amazon/iRobot.** The FTC has reportedly issued second requests in each of these matters, which is notable given that there is little-to-no market overlap between Amazon and the target companies in their respective markets.

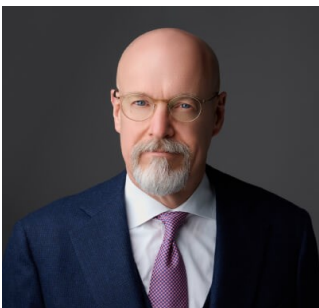


Key Takeaways for Getting the Deal Done in 2023

Avoid Surprise through Early Regulatory Assessment by Experienced Counsel. Expanded theories of harm and the lack of reliable safe harbors make it particularly advisable to consult early with experienced antitrust counsel. In addition, companies should consider addressing in diligence non-compete, interlocking directorate and other issues that might hold up merger review.

Manage for Regulatory Risk. Regulatory risk management should anticipate longer review times, agency willingness to litigate rather than settle and agency insistence on long-term prior approval terms that could substantially restrict future transactions.

Consider “fixes” and be Prepared for Litigation Where Appropriate. Ultimately, the agencies can be compelled to prove a case in court, and courts have proven to be receptive to evidence and arguments rejected by the agencies and to effective deal restructuring that resolves competitive concerns. Where there is a substantial risk of challenge, it pays to be prepared to litigate and/or address the allegations of competitive harm structurally where practicable.



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Rule Garza Howley are well positioned to help you navigate the uncertainties of antitrust enforcement in 2023 and beyond. RGH brings a depth of antitrust knowledge and experience working with government regulators to help your team understand the risks involved with any deal.