

Insights

BIDEN ADMINISTRATION FILES TWO NEW LAWSUITS AIMED AT EXCLUSIONARY CONDUCT AND INFORMATION EXCHANGES

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This week's filings by the Federal Trade Commission ("FTC") against Amazon.com, Inc. ("Amazon") and the Department of Justice Antitrust Division ("DOJ") against Agri Stats, Inc. ("Agri Stats") exemplify the agencies' broad focus and use of the antitrust laws.

In prior decades the agencies focused on horizontal agreements and combinations (e.g., price fixing, mergers to monopoly, etc.) wherein the harms to consumers and the US markets were obvious (e.g., price fixing leading to higher prices or merger to monopoly reducing market competition). Businesses counseled their employees to avoid such violations, and the federal courts successfully adjudicated transgressions brought by both the federal agencies and private litigants.

With these two lawsuits, the Biden administration tests the antitrust laws' application to purported harms arising out of exclusionary conduct and information sharing, two areas of the law where the harms are not only less clear but can also be co-mingled with consumer benefit. This evolution of the agencies' antitrust focus is less than surprising given both heads of the FTC and DOJ have advocated for a reinvigoration of the antitrust laws—and FTC Commissioner Lina Khan rocketed to fame with her 2017 article *Amazon's Antitrust Paradox*. This shifting focus created an exciting week for the antitrust bar with the filing of two lawsuits by the federal agencies.

FTC, et al. v. Amazon: On Tuesday, September 26, the FTC, alongside 17 states, filed suit against Amazon in the Western District of Washington, alleging that the "dominant" Amazon:

- Amassed market power in both the online superstore market and the market for online marketplace services;
- Created an artificial price floor by requiring its sellers to offer the lowest possible price on Amazon.com and effectively prohibiting its sellers from offering their goods at a lower price elsewhere; and
- Forced sellers to participate in Amazon's fulfillment service if the sellers wanted to also participate in Amazon's Prime program.

DOJ v. Agri Stats: On Thursday, September 28, the DOJ filed [suit against Agri Stats](#) in the District of Minnesota, alleging that Agri Stats:

- Facilitated the exchange of competitively sensitive information between participants in the broiler chicken, pork, and turkey markets through both direct counseling and detailed written reports;
- Failed to successfully anonymize its detailed written reports, which including forward-looking forecasts; and
- Encouraged meat processors receiving the company's reports to raise prices and reduce supply.

Whether either of these two complaints finds traction with the federal courts remains to be seen, but the federal agencies' willingness to focus federal resources on conduct outside the horizontal sphere is a loud and clear affirmative.

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