

NSR Tech Policy Quick Hit: Initial thoughts on the Amazon-One Medical deal

By [Matt Perault](#) | July 25, 2022

What happened: Last week, Amazon [announced](#) its intent to acquire One Medical for \$3.9 billion (\$18 per share). The stock was trading at roughly \$10 before the acquisition was announced, and closed at just over \$17 on Friday. One Medical is a subscription-based primary care provider. It provides “in-person, digital, and virtual care services.”

The reaction: Senators Amy Klobuchar and [Elizabeth Warren](#) have already expressed skepticism about the deal. Sen. Klobuchar sent a [letter](#) to the FTC requesting that it “thoroughly investigate” the deal. She claimed that “Amazon has a history of engaging in business practices that raise serious anticompetitive concerns” and argued that the transaction “raises questions about potential anticompetitive effects related to the pharmacy services business Amazon already owns and about preferencing vendors who offer other services through Amazon.” She also argued that it “could result in the accumulation of highly sensitive personal health data in the hands of an already data-intensive company.” In addition, she cited Amazon’s acquisition history: 118 acquisitions over a 25-year period.

Analysis of regulatory review of the deal

Why the FTC might challenge the deal

1. As we have noted repeatedly ([LINK](#)), FTC Lina Khan is likely looking for a signature antitrust case that will enable her to make her mark on antitrust policy. She may already be considering the possibility that her tenure could end after the 2024 elections, and given how long antitrust enforcement can take, she may want to initiate a landmark case sooner rather than later.
2. She has not challenged prior deals, such as Amazon’s [acquisition](#) of MGM. But that deal closed before Democrats had a majority at the Commission. Now, with a third Democrat [confirmed](#), she may be more

likely to challenge a deal.

3. An Amazon acquisition may be particularly ripe for a challenge by a Khan-led FTC, given her focus on Amazon in her academic work.
4. Before her tenure at the FTC, she advocated for regulators to challenge Amazon's acquisition of Whole Foods. That case has some similarities to this one: Amazon does not yet have a significant presence in health care, just as it did not have a significant presence in the grocery market before it acquired Whole Foods. The deal may expand Amazon's power beyond the online world, just as Khan argued that acquiring Whole Foods would enable Amazon "to extend its online dominance into physical retail...and to use physical stores to entrench its power online." She may argue that growing its presence in health care is similar or even potentially more problematic, given the sensitive nature of health care and health data.
5. It's also possible that other companies in the health care industry will advocate in favor of a challenge by the FTC, and their advocacy may provide more political momentum for a challenge. Although current antitrust jurisprudence counsels against overweighting competitors' concerns, competitors have been successful in putting a spotlight on the competitive practices of Big Tech, and a significant acquisition by Amazon in health care is likely to spur a response by incumbents in the industry.
6. The substance of a challenge may be of particular interest to Chair Khan and others in the Biden Administration. She already announced a new approach to merger policy in partnership with the Justice Department's antitrust chief, Jonathan Kanter, and nascent competition – whether enforcers should be more active in seeking to prevent acquisitions in new markets and/or of potential competitors – is one area they are focusing on.^[1] They are also focused on "data aggregation," an aspect of the deal that Senator Klobuchar has already drawn attention to.

Why it might not

7. On the other hand, the acquisition is smaller than other recent deals. Amazon-MGM's \$8.5 billion was not challenged. The FTC's view of Microsoft's deal for Activision, a much larger deal at \$68.7 billion, remains unknown.
8. It remains difficult to challenge these types of deals under current antitrust doctrine. The FTC would need

to show that the effect of the deal “may be substantially to lessen competition, or to tend to create a monopoly,” which is particularly difficult when the acquisition is of a company in a different product market. Amazon will make the case that the deal will increase competition in the health care sector and that its ability to invest in new areas of care – like virtual health care – will benefit users, and in particular, lower prices for medical treatments and drugs.

9. There would be a significant risk that a court would reject the challenge. We can think of a variety of antitrust cases and deals that Amazon can cite to favor approval but no cases on point that would clearly support blocking the deal, unless one were to resurrect elements of the “conglomerate” theory of antitrust.

Our way-too-early forecast

10. We think it is likely the FTC will issue a second request to enable it to signal that it has conducted a thorough investigation of the deal.
11. Regardless of what the FTC decides, its action in this case will be an important marker of the Biden Administration’s legacy on antitrust policy. If they do not challenge it, that decision will indicate the difficulty of carving out a new path in antitrust policy. If they do, it will showcase their interest in exploring new theories of antitrust policy that apply to the information economy, including nascent competition and data aggregation. Preparing a case would also open the door to new analysis about data and long-term competition, since it would require extensive economic analysis about these features of the deal.
12. If the FTC challenges the deal, it could end up becoming what Lina Khan has been seeking but has not yet found: a defining case on the information economy and antitrust.

[1] In an interview [Khan gave in January](#) on her philosophy about antitrust, she was asked about the timing of actions and answered by citing the case in the 1990’s against Microsoft and then said “whenever you see potential moments of transition, that’s when enforcers need to be especially vigilant because that’s when incumbents often panic and realize that to stay relevant, to stay dominant, they may have to engage in tactics

that ultimately end up being illegal.... Congress wanted enforcers not just to act when the third and fourth companies are merging or the first and second, but actually in the incipiency, when you start to see trends towards concentration, that those can also be important moments for enforcers to jump in.”

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