Trump's First 100 Days: Antitrust

Analysis of New Administration
12.09.2024

President-elect Trump will act quickly to replace Federal Trade Commission Chair Lina Khan and roll back certain Biden-era antitrust initiatives. The new administration is likely to bring a more favorable merger review environment for transacting parties, though not necessarily a laissez-faire approach.

AT A GLANCE

- The technology sector is likely to see continued antitrust pressures while other industries, like oil and gas, will likely face less scrutiny.
- Implementation of new Hart-Scott-Rodino guidelines will be delayed. It is also possible, if not likely, that the DOJ and FTC will rescind the new merger guidelines issued in December 2023 to focus more on traditional economic analysis and less on more abstract concepts about competition.
- The FTC will cease to be a prolific rule maker, concentrating instead on individual enforcement actions, and decrease its focus on labor issues.

While it is hard to predict exactly what any administration will make its top priorities, antitrust will likely remain a hot topic. The technology sector is likely to see continued antitrust pressures while other industries, like oil and gas, will likely face less scrutiny as priorities shift under Trump.

Antitrust enforcement at the federal level is mainly driven by the Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC). The FTC is governed by a five-person commission, and the term of current Chair Lina Khan expired in September. Although Kahn will likely be replaced as chair soon after the new administration begins, she will serve as a commissioner until a new commissioner is nominated and confirmed. A new commissioner could be confirmed by spring 2025, changing the balance of the FTC to three Republicans and two Democrats.

The individuals that are chosen to lead the DOJ Antitrust Division and the FTC will affect what changes are to come from those agencies. Trump has nominated Gail Slater to lead the Antitrust Division, though no nominees have been announced for the FTC. But many changes are likely to take place, regardless of leadership changes on the horizon.

MERGER REVIEW

The new administration is likely to bring a more favorable merger review environment for transacting parties, though not necessarily a laissez-faire approach. Biden-era rules that are not rescinded will be reinterpreted, and there will be less focus on labor than there has been the past four years. Remedies that were disfavored or unavailable under the Biden administration, such as behavioral remedies, contractual remedies and divestitures are likely under the new administration. Republican Commissioner Melissa Holyoak recently confirmed that, in her view, all merger remedies "should be on the table."

That said, while merger review is likely to be less cumbersome than under the Biden administration, that does not mean that merger policy will be completely business-friendly. Under the previous Trump administration, the DOJ and FTC challenged several deals with novel theories of harm, and those theories are unlikely to disappear. The previous Trump administration also challenged vertical mergers that may have not been seen as problematic in years past, and vertical issues are also likely to remain a focus for at least some industries in the new administration.

The DOJ and FTC enacted new merger guidelines in December 2023. At least one of the current FTC Commissioners has criticized the new guidelines, which were implemented before her confirmation. It is possible, if not likely, that the DOJ and FTC will rescind the new merger guidelines and issue new guidelines that focus more on traditional economic analysis.

Even if the new guidelines remain in place, enforcement of the guidelines that depart from traditional economic analysis is less likely under the new administration. Guideline 2, which stipulates that mergers can violate the law when the eliminate substantial competition between firms regardless of market share, will be particularly susceptible to being sidelined.

Likewise, focus on labor competition is expected to decrease substantially. The new Hart-Scott-Rodino rules, which passed in October 2024 with bipartisan support from Commissioners, do not include initially-proposed requirements to provide detailed employee information.

Because new HSR rules will not have gone into effect by January 20, 2025, their implementation will likely be delayed for 60 days while the new administration reviews them. As the two Republican Commissioners signed off on the new HSR rules, they probably will not be rescinded. The FTC, however, might pare back some of the more burdensome aspects of the new HSR rules.

Other predictions

- With the new administration focused more on traditional economic analysis, Second Requests are likely to become more targeted and take less time to come to conclusion.
- The FTC is likely to cut its reliance on "prior approval" provisions in consent decrees so that parties need not gain prior approval of the FTC to conduct a transaction, but only notify the FTC of the transaction.
- The focus on private equity in merger review under the Biden administration will likely decrease under the new administration.
- While the antitrust regulators will still enforce Section 8 of the Clayton Act prohibiting interlocking directorates, the heightened focus on the issue that has occurred over the last several years is likely to wane.

CONDUCT ENFORCEMENT

Over the past 4 years, the FTC has been a prolific rule maker, instituting such rules as the Non-Compete Rule and the "Click to Cancel" Rule. With a 3-2 Republican majority at the FTC, the agency is likely to concentrate less on rulemaking and more on individual enforcement actions.

Conduct enforcement is unlikely to decrease, though the specific issues that become top priorities may change. There appears to be bi-partisan support for antitrust enforcement against companies in the technology sector, particularly the "Big Four" (Google, Meta, Apple, and Amazon). Several of the current enforcement actions against these companies started under the previous Trump administration, and enforcement in this area is likely to continue, as evidenced by the nomination of Slater, a "Big Tech" critic. However, requested remedies may change. The theories that are used in the technology cases will not necessarily be confined to the technology industry, and there is a portion of the Republican party that is concerned about concentration overall. Companies should remain alert for monopolization issues regardless of industry.

Regulators under the new administration are also likely to institute investigations into technology companies' use of market power to influence speech on their platforms. Holyoak recently stated that she believes these types of investigations are warranted. Investigations into ESG programs and DEI programs —under either antitrust theories (collaboration among competitors) or consumer protection theories— are also likely.

Other predictions

- The Biden-era focus on information exchange/benchmarking is unlikely to fall by the wayside, though the industries and companies targeted may change.

Trump's First 100 Days: Antitrust

- The FTC will continue to collaborate with state attorneys general on enforcement action but will likely scale back collaboration with international competition agencies.
- The focus on competition in healthcare markets is unlikely to decrease substantially under the new administration, especially as Trump considers what to do with the ACA after failing to repeal it during his first term.

This article is part of a broader analysis examining the anticipated challenges and opportunities created by an administration change. Attorneys from several different practice areas contributed to this series of article across multiple legal areas.

RELATED CAPABILITIES

Antitrust

Business Litigation

Corporate Finance

Health Care & Insurance

Intellectual Property & Technology

Mergers & Acquisitions

Securities

Transportation