

# Antitrust Enforcement in the Trump Administration

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Republican administrations historically have taken a less interventionist approach to antitrust enforcement than their Democratic counterparts, but many of President Donald Trump's policy positions have not tracked traditional Republican paradigms. During his campaign, for example, he vowed to challenge certain high-profile mergers in the telecommunications industry — including the 2011 acquisition of NBC Universal by Comcast, which was already approved by the relevant government authorities — and decried the “antitrust problems” of companies across the technology industry. Both statements raised concern among some Republicans that the Trump administration would press for aggressive investigation of companies perceived to have a dominant position in their respective markets or, at the very least, would be less predictable in antitrust enforcement decisions. Notwithstanding these widely publicized declarations, early indicators — such as the selection of Joshua Wright as head of President Trump's antitrust transition team and assurances by attorney general nominee Jeff Sessions in his confirmation hearing that there will be “no political influence” in enforcement of the antitrust laws — point to a more conservative approach to antitrust policy under President Trump. Indeed, it is fair to expect some tempering of the level of activity that characterized the Obama administration, particularly with respect to merger challenges.

In the coming months, President Trump will make several leadership appointments to the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC), the two federal agencies that share responsibility for antitrust enforcement. These appointments, for which no candidates have been announced, will be subject to the same Senate confirmation process that is required for Cabinet-level positions. With the nominations yet to come, one cannot predict with any certainty the direction that antitrust enforcement will take under President Trump, but his transition team provided important clues. A former Republican FTC commissioner, Wright developed a reputation as the commission's most conservative voice, staunchly advocating an “evidence-based” approach to antitrust policy and decision-making based on the relevant law and demonstrable economic evidence, which manifests in principled restraint in enforcement actions.

Wright emphasizes three methodological commitments that ought to apply in antitrust enforcement: (1) integrating economic analysis into all stages of enforcement decision-making, (2) drawing on empirical evidence to improve the decision-making process, and (3) minimizing the adverse costs and impacts of speculative enforcement decisions. In merger enforcement specifically, Wright argued that prevailing merger analysis improperly ignores the efficiencies resulting from transactions (including those “outside” the alleged market) and does so asymmetrically, often embracing “probabilistic prediction, estimation, presumption and simulation of anticompetitive effects on the one hand” but requiring “efficiencies to be *proven* on the other.”

Beyond his role in the presidential transition, some have speculated that Wright himself may be a candidate for assistant attorney general, and, if nominated and confirmed, would name key members of the Antitrust Division's senior leadership team. Others have suggested that Wright could reprise his role as FTC commissioner, likely taking on the role of chairman, where he could better influence FTC policy across antitrust, consumer protection and privacy issues. Regardless of whether Wright is appointed to a position in government, his influence over the Trump administration's nomination of senior antitrust officials to the DOJ and FTC is likely to leave its imprint on antitrust policy for the foreseeable future.

In terms of appointments, the changes will be most dramatic at the FTC, where President Trump will nominate at least three, and possibly four, commissioners within his

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first year in office — an unprecedented transformation in such a short period. The FTC is composed of five commissioners, no more than three of whom may be from the same political party. They are nominated by the president and serve seven-year terms. Due to vacancies, there are currently three sitting commissioners — two Democrats and a Republican. The existing chairwoman, Democrat Edith Ramirez, is serving under an expired term and recently announced her resignation effective February 10, 2017. President Trump’s responsibilities will include picking several candidates to bring the commission up to full strength and shifting the chairmanship to a Republican commissioner, either current Republican Commissioner Maureen K. Ohlhausen or a new appointee. The new chair, in turn, will hand-select candidates for key leadership positions, such as director of the Bureau of Competition and general counsel. Moreover, Democratic Commissioner Terrell McSweeney’s term expires on September 25, 2017, meaning the Trump administration will nominate a fourth commissioner during the latter part of 2017 (albeit likely a Democrat). However it unfolds, for the first time in nearly a decade, the commission will be led by a Republican majority and chairperson, increasing the likelihood that the overall antitrust enforcement climate in the U.S. will be less aggressive.

These changes will take time to run their course. The antitrust agencies typically are not the highest priority of a new president’s administration, and in past administrations the president has not completed his antitrust selections until several months into his presidency. Even assuming a smooth nomination process made possible by Republican control of the Senate, it may be several months before the new senior antitrust officials are in

place and executing their decision-making authority within the agencies. One aspect of the process that some have speculated could proceed more quickly would be the appointment of Commissioner Ohlhausen as the FTC’s acting chairwoman. The act of elevating a sitting commissioner to the chairmanship does not require Senate confirmation and could theoretically occur immediately, but whether this will happen ultimately depends on the end game that the new administration has in mind. In particular, if the new administration decides to shift the chair to one of its new nominees, it may defer any action until later or request that Commissioner Ohlhausen serve as chair on an acting basis, in which case she would be unlikely to select new senior enforcers.

Either way, the U.S. antitrust landscape is poised to undergo considerable transition. After a slow start, the Obama administration became very active on a number of fronts, with both the DOJ and FTC making aggressive moves to enforce the antitrust laws, particularly in their scrutiny of mergers. The levels of antitrust enforcement seen at the tail end of the Obama administration were consistent with President Barack Obama’s 2008 campaign promise to “reinvigorate antitrust enforcement, which is how we ensure that capitalism works for consumers.” Over time, we expect the Trump administration’s antitrust outcomes — even if laden with more evidence-based economics — in many respects to resemble those of past Republican administrations, with fewer challenges to merger activity overall, an implicit or express endorsement of “creative destruction” (even when it might lead to dominant market positions), and perhaps greater reliance on economic analysis for changes in policy and to reach enforcement decisions.