

Antitrust enforcement in the Trump administration

(March 29, 2017) - Although the Trump administration has announced only one of its selections for top positions at the Antitrust Division of the U.S. Department of Justice ("DOJ") or the Federal Trade Commission ("FTC"), the election of President Donald J. Trump sets the stage for a potentially significant recalibration of federal antitrust enforcement by the U.S. agencies.

Republican administrations historically have taken a less interventionist approach to antitrust enforcement than their Democratic counterparts, and the Trump administration has an unprecedented opportunity to shape antitrust policy through several key appointments.

Still, many of President Donald Trump's policy positions have not tracked traditional Republican paradigms, and have veered instead towards a distinctive brand of economic populism.

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 reported selection of Joshua Wright as head of President Trump's antitrust transition team and assurances by Attorney General 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.

In the coming months, President Trump will make several permanent leadership appointments to the DOJ and the FTC, the two federal agencies that share responsibility for antitrust enforcement. These appointments will be subject to the same Senate confirmation process that is required for Cabinet-level positions.

One cannot predict with any certainty the direction that antitrust enforcement will take under President Trump, but his transition team and rumored candidates for top positions at DOJ and FTC have provided important clues.

For example, former Republican FTC commissioner Mr. Wright developed a reputation as the Commission's most conservative voice during his tenure, 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.

Beyond his role in the presidential transition, some have speculated that Wright could reprise his role as FTC commissioner, possibly taking on the role of chairman from Acting Chairwoman Maureen Ohlhausen, where he could better influence FTC policy across antitrust, consumer protection and privacy issues.

The president announced his intent March 27 to nominate one reputed contender for a top antitrust position: White House deputy counsel Makan Delrahim, a former Deputy Assistant Attorney General at the DOJ. Another rumored choice is David Higbee, a former Deputy Assistant Attorney General and Chief of Staff of the Antitrust Division. Both

served in their antitrust posts during the Bush administration, calling into question whether President Trump's more populist antitrust predispositions will fully materialize.

Mr. Delrahim, in particular, had been mentioned by Trump administration insiders as a heavy favorite to lead the DOJ's Antitrust Division as Assistant Attorney General. According to recent reports, he is expected to move to DOJ once he finishes his current advisory work on the nomination of Neil Gorsuch to the Supreme Court.

While some observers have speculated that Mr. Delrahim's nomination could mean "mergers are in trouble," his prior DOJ experience and ties to Attorney General Jeff Sessions may indicate that he subscribes to a more traditional Republican antitrust philosophy.

Utah Attorney General Sean Reyes, also a reported candidate for a top spot in antitrust, may be the most encouraging candidate for those who want to see more vigorous antitrust enforcement than expected from a Republican administration. Reyes went on record last year calling for the FTC to reopen its investigation into Google's search engine policies, and has been a focal point of antitrust litigation involving the contact lens industry.

In terms of appointments, the changes will be most dramatic at the FTC, where President Trump will nominate up to four commissioners within his 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 (though mid-term resignation is fairly common). Due to recent resignations, there are currently only two sitting commissioners — a Democrat and a Republican.

President Trump has already shifted the acting chairmanship to Republican Commissioner Maureen Ohlhausen, but his responsibilities will include picking three candidates to bring the Commission up to full strength and shifting the chair on a permanent basis. The new chair, either Ohlhausen or a new appointee, will in turn hand-select candidates for leadership positions within the FTC, 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 could 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, increasing uncertainty in the short term about the likely trajectory of antitrust enforcement. 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.

President Trump appears to be lagging behind this timeline: despite being in office for over two months, the Trump administration has announced only one choice for the DOJ and no choices for open seats on the FTC, as his early focus has been on immigration, health care and trade issues.

One aspect of the process that proceeded more rapidly was 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 Ms. Ohlhausen became Acting Chairwoman mere days after President Trump's inauguration.

Nevertheless, even assuming a smooth nomination process made possible by Republican control of the Senate, it may be several more months before the new senior antitrust officials are in place and executing their decision-making authority within the agencies.

No matter which candidates President Trump picks to lead antitrust enforcement, 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."

The current leadership gap leaves open the question of whether the new administration will be as active, but over time, we expect the Trump administration's antitrust outcomes in many respects to resemble those of past Republican administrations, with fewer challenges to merger activity overall, and perhaps greater reliance on economic analysis for changes in policy and to reach enforcement decisions.

An antitrust agenda fueled by more robust populism will face an uphill battle in the courts, and seems inconsistent with the administration's transition planning to date.

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