

Year Two of Trump Antitrust Merger Enforcement: What to Expect in 2018

Contacts

Steven C. Sunshine

Partner / Washington, D.C.
202.371.7860
steve.sunshine@skadden.com

David P. Wales

Partner / Washington, D.C.
202.371.7190
david.wales@skadden.com

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

Four Times Square
New York, NY 10036
212.735.3000

1440 New York Avenue, N.W.
Washington, D.C. 20005
202.371.7000

On April 4, 2018, Skadden hosted a webinar titled “Year Two of Trump Antitrust Merger Enforcement: What to Expect in 2018.” The Skadden panelists were antitrust/competition global head **Steven C. Sunshine** and antitrust/competition partner **David P. Wales**. Below are some key takeaways from the presentation.

Overview

Though antitrust enforcers took an aggressive stance during the final years of the Obama administration, enforcers during the Trump administration have thus far surprised many by demonstrating an even more aggressive position than their predecessors, an approach not typically seen in Republican administrations. Under the leadership of then-Assistant Attorney General (AAG) for the Antitrust Division of the Department of Justice (DOJ) Bill Baer (and to a lesser degree, Chairman Edith Ramirez at the Federal Trade Commission (FTC)), the Obama administration marked perhaps the most aggressive period of antitrust enforcement since the 1960s. Both the DOJ and FTC pushed the envelope on competitive concerns and challenged a record number of mergers. The transition from a Democratic to a Republican administration — similar to what we saw during the Clinton-Bush transition in 2001 — normally would see less aggressive antitrust enforcement. Republican administrations typically place more emphasis on economic evidence, are more receptive to pro-competitive rationales, allow increased flexibility in the process and seek to ease the procedural burdens during investigations. Consistent with less aggressive enforcement, one also would expect to see limited vertical merger enforcement in a Republican administration. However, both the Democratic and Republican campaign platforms had populist themes during the 2016 presidential election, including an increased emphasis on antitrust enforcement. President Donald Trump also appears to have appointed more pro-enforcement leadership at the DOJ. The result to date has been a higher level of enforcement and less predictability.

Trump Administration

Leadership

The Trump administration has put in place new leadership at the DOJ and has nominated five commissioners to the FTC who are expected to be approved in the next few months.

The Antitrust Division of the DOJ is led by AAG Makan Delrahim, who previously served in the DOJ during the George W. Bush administration. Following the 2016 election and prior to being confirmed as AAG, Mr. Delrahim served on the presidential transition

Key Takeaways

Year Two of Trump Antitrust Merger Enforcement: What to Expect in 2018

team and as deputy White House counsel. His principal deputy is Andrew Finch, who previously worked for Mr. Delrahim at the DOJ and served as his chief delegate on several major matters at the beginning of the administration. Other deputy assistant attorneys general include Donald Kempf and Bernard Nigro. Both previously advised on antitrust law in private practice, and Mr. Nigro was deputy director for the FTC's Bureau of Competition during the early years of the Bush administration.

There are currently five pending commissioner nominations to the FTC. Following their expected confirmations, the FTC will have three Republican members — Joseph Simons, Christine Wilson and Noah Phillips — and two Democratic members — Rohit Chopra and Rebecca Slaughter. It is expected that the Senate will confirm all five commissioners at the same time, following the committee hearing on the final nominee, Ms. Slaughter, who currently serves as chief counsel to Senate Minority Leader Chuck Schumer. Of the three Republican members, both Mr. Simons and Ms. Wilson previously worked at the FTC and have extensive experience in antitrust law. The Republican nominees are expected to be moderate and bring enforcement actions, similar to the current FTC under Chair Maureen Ohlhausen. Mr. Simons, who is nominated to replace Ms. Ohlhausen as chair, took a fairly moderate stance on enforcement during his previous tenure at the FTC, and he remarked during his recent confirmation process that the FTC should examine whether its merger enforcement had been too permissive in the past and take corrective actions should that be the case. Additionally, Bruce Hoffman is the acting director of the Competition Bureau and is expected to be selected as director by Mr. Simons. Mr. Hoffman is an experienced antitrust lawyer who has been known to support more moderate antitrust enforcement and the use of sophisticated economic analysis in both merger and conduct matters.

Merger Enforcement

Mr. Delrahim and his DOJ team often have criticized previous antitrust merger enforcement as being too regulated and at times ineffective, resulting in the DOJ's increased scrutiny of merger remedies and strong preference for structural, rather than behavioral, remedies. In fact, the DOJ leadership has stated that some deals may need to be blocked altogether, rather than implement a behavioral remedy as part of a consent decree. In addition, the Trump DOJ has taken the position that more scrutiny should be applied to structural fixes, including ensuring that the divestiture includes a complete and independent business, and that the agency thoroughly vet the buyer. Accordingly, merging parties will need to factor in this higher level of scrutiny, both during deal negotiation and post-signing efforts to get the deal approved.

The DOJ also has mandated several changes to the standard merger consent decree. First, the DOJ is now insisting that merging parties agree to a lower evidentiary standard for proving civil contempt for violation of consent decrees — from clear and convincing to a preponderance of the evidence. Second, the parties also must agree to pay the DOJ's attorneys' fees when a violation occurs. Third, the DOJ will have the power to extend or shorten decree terms based on the parties' behavior. The DOJ leadership has explained that these modifications are designed to force parties to comply and avoid costly litigation.

One of the most visible actions by the Trump DOJ was its challenge to the AT&T-Time Warner deal that is currently being litigated in federal court. Historically, neither Republican nor Democratic administrations have blocked vertical deals or demanded structural fixes, but instead approved these transactions with certain conduct remedies, as demonstrated in the Obama enforcers' challenge to the 2011 NBC-Comcast deal. The traditional thinking has been that even though conduct remedies may be harder to enforce, they are preferred because they allow the substantial pro-competitive efficiencies from the deal to otherwise be realized. Some have speculated that the challenge to this vertical deal by the Trump enforcers was based more on politics than antitrust theory, and AT&T-Time Warner should be viewed as a "one-off." Even if that is the case, parties to a vertical deal should anticipate close scrutiny by the current antitrust enforcers and consider more robust remedies to get the deal done.

Non-Merger Enforcement

The new DOJ leadership also has outlined a few of its non-merger enforcement goals. Mr. Delrahim and his team have stated that they intend to follow the prior administration's aggressive policy of prosecuting certain employee no-poach agreements as criminal, rather than civil, violations. These are agreements between competitors to not solicit or hire each other's employees without any legitimate basis. Moreover, without much explanation, the DOJ leadership has stated that *Illinois Brick* — which has been the law of the land for over 40 years, holding that indirect purchasers do not have standing to sue for antitrust violations — should be overturned. As with merger consent decrees, the DOJ has included, for the first time, a lower evidentiary standard for proving civil contempt for decree violations in a conduct matter. This will have significant implications for conduct cases, where the decree provisions are often more vague than in merger decrees. Parties should be able to use the lower standard to push the DOJ for clearer conduct requirements.