Skadden

# Transition From Trump to Biden May Bring Less Change to Antitrust Enforcement Than Expected

Conventional wisdom is that Republican administrations tend to enforce the U.S. antitrust laws somewhat less rigorously than Democratic administrations. That wisdom was contradicted in several ways by the Trump administration: Over the past four years, the Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC) applied novel theories to increase scrutiny of vertical mergers or acquisitions of potential or nascent competitors, particularly in the technology sector. In doing so, they paved the way for continued aggressive enforcement by the Biden administration.

Contributing Partners

**Tara L. Reinhart** / Washington, D.C.

**David P. Wales** / Washington, D.C.

BIDEN

This article is from Skadden's ***2021 Insights***.



One Manhattan West
New York, NY 10001
212.735.3000

During the Trump years, the Antitrust Division was more aggressive with vertical mergers than past Republican administrations and even sought, but failed, to block AT&T's acquisition of Time Warner. The FTC created a Technology Task Force in February 2019 to investigate potential conduct cases and to review consummated mergers, particularly acquisitions by large, high-tech platforms of startups in adjacent spaces. The FTC created the task force amid growing criticism that the enforcers had been too lenient in reviewing past deals. Soon after, the FTC opened investigations into conduct and prior acquisitions by Google, Amazon, Facebook, Apple and Microsoft, many of which had been cleared by the FTC. The task force became a permanent Technology Enforcement Division, and the FTC sued Facebook in December 2020, alleging a practice of killer acquisitions — buying a nascent competitor or a potential competitor to kill it. The Antitrust Division, meanwhile, sued Google in October 2020, alleging unlawful monopolization of the market for internet search and search advertising — allegations that regulators in Europe made years ago and that the FTC seemingly declined to make during the Obama administration.

Both agencies have sued to block acquisitions on the killer acquisition theory. In March 2018, the FTC challenged the merger of CDK Global and Auto/Mate, alleging that Auto/Mate was an innovative firm whose future competitive significance was belied by its small presence in the market. The companies abandoned the merger rather than litigate. In December 2019, the FTC challenged Illumina Inc.'s acquisition of Pacific Biosciences of California, Inc., a biotech innovator that the FTC alleged was a potential future competitor of Illumina. The FTC not only sued under Section 7 of the Clayton Act, the statute enacted in 1950 specifically to challenge mergers, but also under Section 2 of the Sherman Act, alleging a never-tried theory that the acquisition was the improper act of an alleged monopolist. The companies abandoned the deal after the complaint was filed.

In August 2019, the DOJ tried, but failed, to block the merger of Sabre Corp. and Farelogix in *United States v. Sabre*, where the Antitrust Division argued the killer acquisition theory. More recently, in November 2020, the DOJ sued Visa Inc. to block its acquisition of Plaid Inc. The parties recently abandoned the deal, but the complaint acknowledged that the payments platform and the information technology software developer are not currently competitors. The complaint had alleged that Visa did the deal to prevent Plaid from becoming a competitor. The DOJ sued under both Section 7 of the Clayton Act and Section 2 of the Sherman Act, similar to the FTC's approach in

*Illumina*. The same theory echoes throughout the FTC's challenge to Facebook's consummated acquisitions of Instagram and WhatsApp brought under Section 2 of the Sherman Act.

In addition to increased enforcement activity by the FTC and DOJ, Congress has shown bipartisan interest in targeting technology platforms through antitrust. In a 450-page report published in October 2020 following an investigation into digital markets, the Democratic majority on the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law called for legislation to break up large technology firms, overturn court decisions it perceived as barring plaintiffs from prevailing in antitrust suits, and classify certain mergers as presumptively unlawful. The subcommittee called out "dominant" technology firms for this special treatment, recommending that they be required to prove that any transaction, even a vertical merger, is necessary to serve the public interest and that the benefits from the deal could not alternatively be achieved through organic growth. Several members of the Republican minority signed a companion report that, among other things, similarly recommended shifting the burden of proof to favor the plaintiff. The Biden administration's Antitrust Division and FTC are expected to continue to challenge technology deals under novel theories to accomplish through the courts what the subcommittee has recommended. With Democrats controlling the House and the Senate, legislative action is not out of the question, but a statute codifying the subcommittee's recommendation would diverge from decades of legal precedent, which makes it unlikely.

The approach to enforcement by the two current Democratic FTC commissioners perhaps gives the best glimpse into the next four years. Since they were sworn in on May 2, 2018, Commissioners Rebecca Kelly Slaughter and Rohit Chopra have consistently called on the commission to increase its scrutiny of vertical mergers. In dissenting statements, both criticized the June 2020 updated Vertical Merger Guidelines jointly published by the Antitrust Division and the FTC. The guidelines, which had not been updated since 1984, summarize the types of competitive harm the agencies consider when evaluating vertical mergers and describe the types of pro-competitive benefits that lead the agencies to conclude that vertical mergers should not be blocked. The 2020 updates did not break meaningfully from the agencies' historical approach, and the two Democratic commissioners made clear they would have done so. Commissioner Slaughter sought to "disavow the false assertion that vertical mergers are almost always procompetitive," arguing that the guidelines are "inexplicably mute on the well-known and well-supported fact that the potential anticompetitive harms from raising rivals' costs and foreclosure are also 'distinct considerations' in vertical-merger analysis." In his dissent, Commissioner Chopra argued that lax vertical enforcement had stifled competition by creating incentives for startup firms to be purchased by dominant market participants rather than compete to supplant them.

Commissioners Slaughter and Chopra previously dissented in two commission votes not to challenge vertical mergers. When the commission voted to allow Staples, Inc.'s acquisition of Essendant Inc. with behavioral remedies in January 2019, Commissioner Slaughter dissented on the ground that FTC staff had "identified significant evidence of likely harm" and the companies had not "provided evidence showing that the merger's likely harm is offset by cognizable procompetitive benefits." She called for "a requirement that the parties substantiate the magnitude and merger-specificity of the claimed benefits in the same way the Commission endeavors to substantiate theories of harm." Commissioner Chopra noted in his dissent that "[i]ncreased buyer power exerted by the combined firm against its upstream trading partners in this matter would not be an efficiency at all if it stems from an increase in market power on the buy side of the market."

A month later, in *In re Fresenius Medical Care*, Commissioner Chopra argued that "vertical mergers in health care markets choke off entry by small startups and other firms" and ultimately hurt patients. Fresenius, one of only two major providers of hemodialysis services through a chain of clinics and related equipment, was buying a company that offered equipment for in-home hemodialysis. He asserted that the acquisition would severely limit the incentive for new entrants in the at-home dialysis market, because one of the two major manufacturers and customers would now have an in-house option.

The more pro-enforcement positions by the Democratic commissioners in these cases, along with the more aggressive actions by the Trump-appointed Republicans at the DOJ and the FTC on vertical mergers and in technology markets, provide a good road map of the type of enforcement that we may see once the Biden administration appoints new leadership at the antitrust agencies. Because of the less conventional approach by the Trump enforcers, we may not see more substantial change from the Biden team than one might ordinarily anticipate when a Democratic administration replaces a Republican one. However, the enforcement posture of the new administration will depend in large part on whether President Biden appoints traditional Democratic enforcers or more aggressive, populist-minded personnel. Prior to his inauguration, the president identified many former officials from the Obama era to serve in his administration, but the approach of the two Democratic FTC commissioners has been more progressive than the Obama-era antitrust convention. With the recent announcements that Chairman Joseph J. Simons will step down on January 29, 2021, and that the new administration plans to nominate Commissioner Chopra to head up the Consumer Financial Protection Bureau, President Biden will have at least two slots to fill at the FTC, in addition to the head of the DOJ's Antitrust Division. In the meantime, Commissioner Slaughter will lead the agency as FTC chairman.