

ANTITRUST TRADE AND PRACTICE

Examining the Biden Administration's Antitrust Priorities

A new presidential administration necessarily ushers in a change in leadership and presents the possibility of a different antitrust regime. Yet these new appointees must still grapple with the vestiges of the old guard. The administration of newly elected President Joe Biden has inherited large, ongoing antitrust investigations along with mounting bi-partisan pressures to consider sweeping changes to antitrust law. Though both President Biden and Vice President Kamala Harris have voiced their support for stricter antitrust measures, they have not concretely defined their antitrust priorities since taking office. They also have not yet nominated individuals to key leadership positions in the Antitrust Division of the Department of Justice (DOJ)

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or the Federal Trade Commission (FTC). As the Biden administration sets its antitrust policy agenda, will their choices have a transformative effect on antitrust policy—or just continue the status quo?

Historically, one would expect antitrust enforcement to throttle up under a Democratic administration. Progressive antitrust policies are viewed as less accepting of synergies and efficiencies arguments and on more heightened alert for potential losses in consumer welfare versus pure competition concerns. As the past four years under Republican leadership demonstrate, however, antitrust enforcement on the whole is on a new footing. The outgoing administration made antitrust enforcement, particularly

on large technology players and transactions involving killer acquisitions, a defining feature. Against the backdrop of high-profile investigations and enforcement actions, there have been seemingly incessant calls to expand antitrust law's purview. Even outgoing Assistant Attorney General (AAG) Makan Delrahim devoted his final address as AAG to consider specific antitrust policy changes, including establishing a specialized antitrust court and implementing a presumption that, for firms with more than 50 percent market share in a certain market, further acquisitions in that market are anticompetitive. See U.S. Department of Justice, *Assistant Attorney General Makan Delrahim Delivers Final Address* (Jan. 19, 2021). Recently appointed Acting FTC Chair Rebecca Slaughter noted that she agreed with almost all of the ideas former AAG Delrahim promoted in his final address, further highlighting the overwhelming bi-partisan support for potential

sweeping changes to the current antitrust regime. See Curtis Eichelberger, *Acting FTC Chair Slaughter Says Agency Should Consider Whether Decisions to Add Structural Inequities*, MLex (Jan. 26, 2021).

Significant legislative reform to the antitrust laws may be on the horizon. Last week, Sen. Amy Klobuchar, the incoming head of the Senate antitrust committee, introduced a comprehensive bill addressing various reforms in antitrust law. Among its provisions, the Competition and Antitrust Law Enforcement Act (CALERA) would lessen the burden on plaintiffs to challenge a merger by changing §7 of the Clayton Antitrust Act from prohibiting mergers that “substantially lessen” competition, to prohibiting mergers that “create an appreciable risk of materially lessening competition.” The bill also shifts the burden to merging parties to show that the proposed transaction would not harm competition by more than a de minimis amount in situations including acquisitions of nascent competitors by firms with a 50% or higher market share, “mega-mergers” involving transactions over \$5 billion, or where the acquiring company has a market cap of more than \$100 billion and makes an acquisition of \$50 million or more. If effectuated, these policies would result in a much more robust merger review regime and

could create significant hurdles for merging parties.

Despite action from Congress to implement antitrust reform, during his first weeks in office Biden himself has provided few insights into his antitrust priorities. His first actions may be to implement recommendations he created while on the cam-

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paign trail. After Biden secured the Democratic Party’s presidential nomination, he and Senator Bernie Sanders built the Biden-Sanders Unity Task Force, creating a variety of progressive policy recommendations to address everything from climate change to criminal justice reform. Among the task force’s guidance for the economy was a series of recommendations for “tackling runaway corporate concentration,” suggesting that federal regulators review a subset of recent mergers and acquisitions, prioritizing the pharmaceutical, health care, and agricultural industries, to assess whether any have increased market concentration, raised consumer prices, demonstrably harmed workers, increased racial inequality, or reduced competition, and then assign appropriate remedies. As a result, we could

expect to see more merger retrospectives, like the FTC’s recent 6(b) study examining past acquisitions by large technology companies, or potentially, though less likely, more enforcement actions against prior mergers, such as the FTC’s suit against Facebook seeking potential divestitures of prior acquisitions of WhatsApp and Instagram.

Using Antitrust Law to Account for Social Inequities

The Biden-Sanders Unity Task Force also recommended that regulators consider the effects of future mergers on areas that have been traditionally outside of antitrust law’s scope, including on the labor market, on low-income and racially marginalized communities, and on racial equity. While this would require the antitrust agencies to take a new view on potential anticompetitive effects and efficiencies resulting from a merger, the idea that antitrust law should account for social inequities already has the support of at least one FTC leader. Acting FTC Chair Rebecca Slaughter has articulated the need for antitrust reform, including those outside of the typical efficiency bounds. At a panel on antitrust and structural racism, Slaughter urged antitrust policymakers to address structural social injustice within U.S. markets. Despite antitrust law’s reputation

of being “value neutral,” Slaughter noted that enforcement should shy away from these norms. Instead, Slaughter proposed the FTC consider social issues in antitrust analysis, including barriers to entry for minority entrepreneurs, the impact of divestitures to minority businesses and unforeseen harms to minority populations. See Curtis Eichelberger, *Acting FTC Chair Slaughter Says Agency Should Consider Whether Decisions to Add Structural Inequities*, MLex (Jan. 26, 2021). Though antitrust agencies are not accustomed to quantifying such harms, Slaughter’s calls for better demographic data in agency review could lead to a more robust economic analysis of potential disparate impacts on, for example, minority populations in certain geographic markets.

Antitrust enforcers traditionally have met calls to prioritize social considerations in antitrust enforcement with skepticism. Former AAG Delrahim noted that while addressing racial justice is commendable, competition law is not the appropriate mechanism. And former FTC Commissioner Maureen Ohlhausen has stated that antitrust is not well-suited to address social and economic problems such as income or wealth inequality. But now, given the new administration’s priorities, Acting Chair Slaughter’s proposals may be well received. Not only did the Biden-Sanders Unity Task

Force recommend consideration of social inequities when evaluating mergers, but within hours of his inauguration, President Biden issued an Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. Among other initiatives, this Order tasks each agency head to work

Two new cases last year featured disputes about the use of TAR approaches in e-discovery: one attempt to compel the use of a TAR approach and one attempt to prevent the use of a TAR approach. In each case, the court looked to Sedona Principle 6 and the line of cases discussed here.

with the Director of the Office of Management and Budget to “study methods for assessing whether agency policies and actions create or exacerbate barriers to full and equal participation by all eligible individuals,” identify the best methods to assist agencies in assessing equity, consider recommending pilot programs for new tools, and provide President Biden with identified best practices within six months. Slaughter’s proposals would fit within such a program, and such policy initiatives may be embraced by the FTC, which will soon have a Democratic majority once FTC Chair Simons’ replacement is confirmed.

Expected DOJ Leadership Changes and Criminal Enforcement

FTC’s sister agency, DOJ’s Antitrust Division, will also see changes at the helm. On Jan. 7, 2021, then-President Elect Biden announced Judge Merrick Garland as his choice to lead the Department of Justice as Attorney General. As the head of DOJ, Judge Garland would—if confirmed—play a significant role in executing President Biden’s overall vision and priorities for the department. In May 2016, Merrick Garland was nominated by then-President Barack Obama to fill an opening on the U.S. Supreme Court left by the passing of Justice Antonin Scalia. At that time, current Skadden partner Shepard Goldfein, and then partner James Keyte, analyzed Judge Garland’s stance on the antitrust laws, finding Judge Garland to be a non-ideological jurist with close adherence to precedents and a slightly pro-enforcement bent. See Shepard Goldfein and James Keyte, *Judge Garland: Supreme Court Nominee and Antitrust Scholar*, N.Y.L.J. (May 10, 2016). Though he has not ruled substantively on any antitrust-specific cases in the intervening years, Judge Garland will have ample opportunity to consider the future importance of antitrust law as he steps away from the bench. Among the most significant decisions an Attorney General Garland will have to make is the direction in which to

take the Antitrust Division's enforcement.

While Judge Garland's potential rise to Attorney General may not provide a clear enforcement direction for DOJ's Antitrust Division, who the Biden administration selects to lead the Antitrust Division will indicate what the next four years of antitrust enforcement will look like. Though a nominee for the role has yet to be announced, Richard Powers, the former Deputy AAG for Criminal Antitrust Enforcement has taken the role of Acting AAG. Given the recent focus on criminal cases out of DOJ—including bringing the first criminal charges for alleged anticompetitive conduct in labor markets in the Division's history—we can expect DOJ to continue to use its prosecutorial powers in the criminal context, especially given Powers' leadership until a nominee for Antitrust AAG is announced. Even when a nominee is announced, the transition will not be immediate as the candidate must undergo a Senate confirmation. This process can vary in length, with the most recent Antitrust AAGs time from nomination to confirmation taking anywhere from six to nine months.

Assessing the Need for an Antitrust Czar'

In light of the current climate of heightened antitrust scrutiny, some media outlets have reported

that Biden is considering creating a White House position of "antitrust czar," or a high-ranking official to oversee the administration's antitrust policies. Given the bicameral nature of the antitrust agencies, such an office could allow for a more holistic approach to setting antitrust enforcement policy. The informal term "czar," used as shorthand by the media to refer to a senior-ranking White House official tasked with defining a specific executive policy, has taken different forms in various administrations. For example, presidents have historically appointed "czars" to tackle everything from shipping and synthetic rubber production during World War II to the 1970s oil crisis. Modern administrations have participated in elevating policy officials to these levels as well: George H.W. Bush created the "drug czar" position to effectuate the administration's anti-drug policies and President Obama appointed Steven Rattner as the "car czar" to advise the Treasury Department on the rescue of the auto industry. Yet, such an office has never been created to oversee a nationwide approach to antitrust policy. Appointing a White House official to set and carry out large antitrust reforms could signal that the Biden administration is seriously considering its perspective on competition issues and antitrust enforcement. Oversight of broader

antitrust policy could also take place outside of the White House: Senator Klobuchar's CALERA bill contemplates establishing an Office of the Competition Advocate within the FTC, who would be tasked with recommending larger policy considerations to the FTC and DOJ. Such an official could ensure a consistent approach to policy among the two antitrust agencies, who have had recent public conflicts including DOJ's criticism of the FTC's enforcement action against Qualcomm.

Whether the Biden administration appoints an "antitrust czar" or effectuates its policies through the well-established antitrust agencies, it is clear that the administration is poised to grapple with the current bounds of our antitrust laws and enforcement. While it seems possible that the Antitrust Division and Federal Trade Commission will move towards more novel theories of antitrust harm and considerations of social inequities, the decisions that the Biden administration makes in its first few months—including selecting individuals to key antitrust leadership roles—will be crucial in determining the administration's impact on the future of antitrust law.