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## Skadden Discusses Antitrust Enforcement in Biden Administration

*By Boris Bershteyn, Tara L. Reinhart, David P. Wales, Evan R. Kreiner and Jessica R. Watters* May 10, 2021

### Comment

President Biden has signaled a pro-enforcement approach to antitrust policy by naming Columbia Law School professor Tim Wu as a White House adviser and nominating Lina Khan, who also teaches at Columbia Law, to be commissioner of the Federal Trade Commission (FTC). Both are known for expansive views of the antitrust laws and advocacy of forceful enforcement, particularly against technology companies. The president has not yet announced nominees for the most critical antitrust enforcement positions — assistant attorney general for antitrust or FTC chairman — and may choose centrists or more progressives. Regardless, the president’s choices of Mr. Wu and Ms. Khan signal that antitrust could play an even greater role in policy-making and enforcement decisions than during the Trump administration. Meanwhile, recent bipartisan congressional calls for antitrust reform suggest the president could support legislative change. (See “Congressional Investigative Priorities Emerge.”)

Mr. Wu has been an outspoken critic of Big Tech and a leader in the progressive movement to break up large technology platforms, which in his view have grown too big and face little competition. Mr. Wu previously served as adviser to the FTC and enforcement counsel at the New York State Office of the Attorney General. As the special assistant to the president for technology and competition policy, Mr. Wu will work across the federal government to identify policies designed to promote competition in the technology sector. When asked about Mr. Wu’s appointment, the White House press secretary focused on “the abuse of power from big technology companies and their executives” and noted that Mr. Wu will help to address “the economic and social challenges posed by the growing power of tech platforms.”

Ms. Khan previously was a legal fellow in the office of FTC Commissioner Rohit Chopra and as counsel to the House Judiciary Committee’s Subcommittee on Antitrust, Commercial and Administrative Law. She helped prepare the House Judiciary Antitrust Subcommittee report in October 2020 that recommended legislation to break up large technology firms and place the burden on dominant firms to prove that a merger is necessary to serve the public interest.

Mr. Wu and Ms. Khan are known as founders of the “hipster antitrust” movement. Both advocate use of antitrust enforcement to address a range of policy concerns beyond the traditional focus on consumer welfare — including, for example, protecting labor interests by blocking mergers that result in a reduced work force or stagnation of worker pay.

The focus on large technology companies is hardly new: The Trump administration aggressively pursued technology platforms, including by suing Facebook to unwind transactions the FTC had previously investigated and allowed to close. It also sued Google for alleged monopolization and challenged a number of vertical mergers, with mixed results. While the president has yet to nominate an antitrust enforcement head at the Department of Justice and FTC, the Biden administration’s first two antitrust picks suggest that aggressive antitrust enforcement will continue and likely intensify. Digital platforms and technology companies pursuing acquisitions in the coming months can expect greater scrutiny and longer investigations.

*This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm’s memorandum, “Antitrust Enforcement Expected To Intensify,” dated April 30, 2021.*