

Keep Your Seatbelts Fastened: The Wild Antitrust Ride May Not Be Over

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Key Points

- We expect the second Trump administration to take a relatively aggressive approach to antitrust enforcement, as regulators did during President-elect Trump’s first term, because there is bipartisan support for strong enforcement, particularly in areas such as prescription drugs and technology.
- But the merger review process is likely to become more predictable and focus again on consumer welfare factors.
- It is likely that the incoming administration will rescind the revised 2023 Merger Guidelines and withdraw the FTC’s near-total ban on noncompetes.
- We expect that the DOJ and FTC will not press to expand the law as Biden officials have, or pursue litigation as actively.

Antitrust enforcement during the first Trump administration was more aggressive than expected for a typical Republican administration, with challenges to vertical mergers and so-called killer acquisitions, monopolization claims and a tough stance on merger remedies.

The Trump Department of Justice’s (DOJ) Antitrust Division sued Google for allegedly abusing its monopoly power in general search and text advertising, a case the DOJ recently won. The Trump Federal Trade Commission (FTC) created a permanent Technology Enforcement Division, then sued Facebook to unwind its decade-old acquisitions of Instagram and WhatsApp, a case now headed for trial.

Aggressive enforcement in the technology sector and other industries is expected to continue in the second Trump administration, and, while challenges to mergers will likely persist, President-elect Donald Trump may roll back some of his predecessor’s policy moves.

The Biden Administration’s Shift to the Left

Over the past four years under President Joe Biden, aggressive enforcement continued, but with a sharp shift to the left on policy as both agencies pushed to

assert aggressive and expansive interpretations of legal principles, criticized the consumer welfare standard and favored antitrust to achieve societal goals such as combating income inequality instead of reining in conduct only when it harms competition.

Both the DOJ and FTC sought to frustrate mergers, rescinding early termination under the Hart-Scott-Rodino Act (HSR), preferring to block deals rather than resolve them with remedies, introducing more extensive and intrusive HSR requirements and using the overall investigative process to impose a “merger tax” to deter deals.

Together, the DOJ and FTC rewrote the 2010 Merger Guidelines to lower the bar for blocking mergers, introduce novel theories of harm and deemphasize economics. In a 2022 policy statement, the FTC announced that Section 5 of the FTC Act, which prohibits “unfair methods of competition,” reaches beyond conduct prohibited by the Sherman Act and could be used to prevent “coercive, exploitative, collusive, abusive, deceptive, [or] predatory” conduct that “tend[s] to negatively affect competitive conditions.”

This interpretation adopted a vague, “we-know-it-when-we-see-it” type approach without a clear legal standard.

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Historically, the agency had applied Section 5 together with a Sherman Act claim rather than as a stand-alone case.

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Most recently, the Biden FTC used its rulemaking process to attempt to impose a ban on noncompete agreements, widely used for decades to protect businesses. President Biden's DOJ and FTC also filed a raft of "statements of interest" in private antitrust litigations — typically in support of the plaintiffs — to influence the evolution of antitrust doctrine on such issues as information exchanges and algorithmic pricing.

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But even in some of the losses, they gained acceptance of new legal standards. For example, four federal district courts across four appellate circuits have ruled that no-poach and wage-fixing agreements may be prosecuted criminally. In *Meta/Within*, a federal court agreed with the FTC that in a potential merger challenge, the government could meet the legal standard simply with proof of the acquiring company's capabilities and incentives to enter the market.

The DOJ raised eyebrows for its aggressive tactics when it sued Google for allegedly monopolizing online advertising in the U.S. District Court for the Eastern District of Virginia, nicknamed the "Rocket Docket" because cases there tend to move to trial quickly, and requested a jury trial and damages.

The FTC sued using its administrative process to block the Illumina/Grail merger, lost the trial before the FTC administrative law judge, won a reversal before the commissioners and prevailed after the merging parties abandoned the deal following the U.S. Court of Appeals for the Fifth Circuit remand to the FTC. Prior administrations tended to avoid pursuing deal challenges in the FTC's administrative process in the face of criticism that the agency unfairly played prosecutor, trial judge and court of first appeal.

The Outlook for the Second Trump Administration

Aggressive antitrust enforcement has enjoyed bipartisan support for the past three administrations. Recently, a number of prominent Republicans have expressed approval of FTC Chair Lina Khan's efforts to rein in big corporations in order to lower consumer prices and protect jobs. However, much of the praise from these so-called "Khanservatives" focuses on the consumer protection side of the FTC, which has taken on junk fees and other pricing practices.

President-elect Trump's pick for FTC chair, Andrew Ferguson, has served as a commissioner since April 2024 and dissented on a number of Chair Khan's decisions. He has conservative bona fides, having worked for U.S. Sen. Mitch McConnell, clerked for U.S. Supreme Court Justice Clarence Thomas, and served as solicitor general of Virginia under Gov. Glenn Youngkin.

The president-elect has selected Mark Meador to fill the fifth commissioner seat that will be vacated by Chair Khan. Like Ferguson, Meador has a conservative background, having worked in the Texas attorney general's office and, more recently, on the staff of Utah Republican Sen. Mike Lee. Meador spent time at both the FTC and the DOJ's Antitrust Division, and in private antitrust practice.

The pick for assistant attorney general for the DOJ's Antitrust Division, Gail Slater, was an attorney adviser to a Democratic-appointed commissioner at the FTC but also worked for the first Trump administration as an adviser on technology, telecommunications and cybersecurity.

President-elect Trump won the 2024 election with a pronounced populist agenda, and we expect robust enforcement will continue, but with some tempering of the most aggressive Biden antitrust policies. (See "[Resilient Economy and Promises of Lessened Regulation, Lower Taxes Raise Hopes for a Surge in M&A.](#)")

First and foremost, the incoming administration likely will repeal the 2023 Merger Guidelines and return to the 2010 version. The Trump administration is expected to be less hostile to mergers and return to more historic norms for evaluating the potential for competitive harm. The agencies likely will once again accept traditional merger remedies and employ more transparent investigative processes.

The administration is also expected to repeal the FTC's rule banning noncompete agreements. For more than 100 years before the rulemaking, state laws governed the validity of noncompete agreements. Returning enforcement to the states is consistent with President-elect Trump's opposition to federal government overreach, and his caution about unorthodox uses of statutory authority is in sync with the U.S. Supreme Court's recent decision overturning *Chevron* deference.

For the same reasons, we do not anticipate seeing the Trump FTC attempt to wield substantive rulemaking power. On the other hand, business collaborations related to environmental, social and governance (ESG) issues may attract greater scrutiny from Trump antitrust enforcement as potential restraints of trade under Section 1 of the Sherman Act.

Given the president-elect's stated disapproval of climate regulation and ESG efforts, the incoming administration may seek to punish businesses coordinating their ESG efforts as unreasonable restraints of trade. (See "[A Significant Shift Away From ESG and Toward Crypto Is Expected at the SEC](#)" and "[Some States Prepare for the Expected Rollback of Biden Environmental Regulations](#).")

The FTC likely will withdraw the 2022 policy statement on Section 5 and revert to the more limited historical approach.

Even so, the incoming administration is likely to continue to pursue claims brought by the Biden administration against the nation's three largest

pharmacy benefit managers (PBMs). In September 2024, the FTC brought a stand-alone Section 5 case alleging the PBMs used their economic power to "rig[] pharmaceutical supply chain competition in their favor," resulting in "unfair rebating practices" that increased the cost of insulin.

The cost of insulin has been a political football since the first Trump administration, and the incoming one is more likely to litigate the claims rather than appear to favor big pharmaceutical middlemen over patients. Traditionally, new administrations have continued to prosecute ongoing cases, even if they would not have brought the original complaint. Here, continuing the case is in line with the populist bent of

the incoming administration, but it may also create a hard-to-explain conflict with a decision to reject the Biden administration's radical expansion of the scope of Section 5.

Enforcers likely will continue existing cases in the technology sector and launch new ones; after all, the first Trump administration brought the Facebook case and the Google search case. However, the incoming administration likely will be more open to settlements and remedies short of breaking up companies.

(See also "[China Merger Control Process Should Remain Navigable Even if Tensions Rise](#).")