



# Antitrust Enforcers Will Take a Friendlier Approach to Mergers but Retain Biden-Era Guidelines and HSR Rules

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## Key Points

- The government's new antitrust leaders have signaled a less skeptical stance on mergers but a continued focus on enforcement, especially in Big Tech and the health care and agriculture sectors.
- President Trump has fired the FTC's two Democratic commissioners, which may impact ongoing cases.
- The Biden administration's 2023 Merger Guidelines and new HSR filing rules remain in effect.
- Both FTC and DOJ heads have stated that they plan to streamline merger review where feasible and have indicated an openness to remedies.

President Donald Trump's antitrust leaders are in place, with Andrew Ferguson elevated to Federal Trade Commission (FTC) chairman and Gail Slater heading the Department of Justice's (DOJ's) Antitrust Division.

Both have pledged to be less skeptical of mergers than their Biden predecessors and more open to remedies while maintaining a continued focus on enforcement, especially in the Big Tech, health care and agriculture sectors. To date, the new administration has continued to pursue cases against several tech companies.

## Additional Shake-Ups at the FTC

- President Trump fired the FTC's two Democratic commissioners, challenging the precedent of the U.S. Supreme Court's 1935 decision in *Humphrey's Executor v. United States* limiting the president's power to dismiss commissioners without cause — namely, "inefficiency, neglect of duty, or malfeasance in office." The commissioners have contested their firings as illegal.

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- The FTC can still operate with the three remaining Republican commissioners: Andrew Ferguson, Melissa Holyoak and the recently confirmed Mark Meador. However, there may be an impact to ongoing cases. A major lawsuit regarding insulin pricing has already been paused after the FTC's general counsel granted a stay requested by the FTC's complaint counsel and respondents in the case. Chairman Ferguson and Commissioner Holyoak were recused from the matter and Commissioner Meador had not yet been confirmed. Chairman Ferguson has since unrecused himself and, with Commissioner Meador's confirmation, the FTC is expected to seek to resume the case with just two commissioners.

## No Changes to Merger Guidelines, HSR Rules

- Emphasizing the value of "stability," FTC Chairman Ferguson and Assistant Attorney General (AG) Slater have made it clear the Biden administration's 2023 Merger Guidelines, which attempted to expand the types of deals that may be challenged, will remain in effect.
- The new Hart-Scott-Rodino (HSR) filing rules initiated under the Biden administration have also taken effect, materially increasing the amount of information and number of documents merging companies must submit, including descriptions of overlaps between the parties. Parties to a transaction that is HSR reportable now must factor in the extra time and effort required to complete an HSR filing.
- Along with the new HSR rules, the agencies have reinstituted early termination, shortcutting merger reviews where there are no significant issues. Heads of both the FTC and DOJ have stated that they plan to streamline merger review where feasible and "get out of the way" of transactions without competitive issues.

## A Friendlier Approach to Mergers — With Exceptions

- Chairman Ferguson and Assistant AG Slater have both indicated an intent to depart from their predecessors' "ideological disposition against M&A," including by once again considering remedies.
- However, both agency heads have said they will pursue merger enforcement to protect Americans and review proposed remedies critically.
- Both have also made it clear they intend to target Big Tech, which Chairman Ferguson has described as having a "vendetta against competition and free speech."
- Assistant AG Slater has also stated that issues in the agriculture and health care industries will be priorities under her leadership.
- The first FTC case under the new administration challenged a deal involving manufacturers of medical device coatings, based on traditional horizontal competition theories.
- Notably, both Chairman Ferguson and Assistant AG Slater have stated that the consumer welfare standard is not limited to economic or price effects, suggesting an openness to testing novel theories.

## Looking Ahead

It has been an active 100 days, and while we have learned more about what to expect from this administration's antitrust agenda, uncertainties remain. Although remedies may return, businesses should still expect a continued focus on vigorous enforcement. The new HSR rules grant the agencies the ability to spot potential issues early on, but they may also shorten the time it takes to clear deals where challenges would be without merit.

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