

ANTITRUST/COMPETITION

Antitrust Merger Review Under a Second Trump Administration

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Personnel Is Policy

Example: While antitrust enforcers under Biden have been skeptical of private equity, including rejecting divestitures to private equity companies, reduced scrutiny of private equity should positively impact public companies looking to sell assets and divisions.



“These short-term profit-extracting strategies can undercut long-term value, and, in the context of health care, have life-or-death consequences.”

– Lina Kahn



“Enforcers cannot look at each individual deal in a vacuum detached from the private equity firm.”

– Jonathan Kanter



“There is . . . no reason for the Commission to single out private equity for special treatment.”

– New FTC Chair
Andrew Ferguson

Andrew Ferguson – New FTC Chair



As FTC Commissioner, Ferguson:

- Negotiated with the FTC's Democratic commissioners to dial back changes to the new HSR Form and bring back early termination
- Dissented from the FTC's ban on employee noncompete agreements, calling it a regulatory overreach
- Signaled an openness to reforming, without revoking, the 2023 Merger Guidelines to promote regulatory certainty
- Dissented from settlements based on novel theory that addition of directors from one company to another turns an unobjectionable merger into a Section 7 violation

Mark Meador – Incoming FTC Commissioner



Meador's Priorities:

- Drafted a bill, later introduced by Senator Lee, intended to force Google to break up its digital advertising business
- “I do not understand how in the year of our Lord 2024 someone can say with a straight face that users struggle to identify a connection between Big Tech abuses and market power”
- Worked on pay-for-delay cases while a staff member at the FTC's Healthcare Division

Gail Slater – Incoming Assistant AG, DOJ Antitrust Division



Prior Experience:

- Worked on Trump’s National Economic Council on tech, telecom, and cybersecurity issues and advocated for a free-market approach to 5G wireless technology
- Represented Big Tech interests at the Internet Association, a now-defunct trade association whose members included Google and Meta

But President-elect Trump’s announcement suggests that she will continue to focus antitrust enforcement on “Big Tech”

Election's Impact on Antitrust Policy

CONTINUITY?

- Bipartisan support for continued scrutiny on key industries
 - Big Tech
 - Healthcare
- New HSR form
 - Still subject to challenge on at least two fronts – litigation and Congressional Review Act
 - May be streamlined to reduce burden

CHANGE?

- Less aggressive merger enforcement stance
- Greater openness to negotiated remedies, including return to accepting divestiture remedies
- Easing of scrutiny on private equity
- Reduced attention to labor market impacts in merger reviews
- More skepticism of foreign acquisitions of U.S. companies
- Less coordination with foreign competition enforcers



Industries in Focus: Big Tech

- Vocal concern with Big Tech's power
- Multiple ongoing lawsuits, including against Google, Meta, Amazon, and Apple
- Prior Trump DOJ launched Google search monopolization case
- FTC under prior Trump Administration launched technology task force, which became the Technology Enforcement Division
- But Trump has surrounded himself with Big Tech leaders, particularly Elon Musk

Industries in Focus: Healthcare

- Continued focus on provider consolidations, pharma deals, and other healthcare transactions
- Prior Trump Administration brought six challenges to healthcare transactions, including four provider deals
- Public and bipartisan concern over costs



New HSR Form

The screenshot displays the Federal Register page for a rule titled "Premerger Notification; Reporting and Waiting Period Requirements". The page is dated 11/12/2024 and is a rule issued by the Federal Trade Commission. The document ID is 2024-25024 (89 FR 89216). The page includes a sidebar with navigation options such as PDF, Document Details, Document Dates, Table of Contents, Public Comments, Regulations.gov Data, Sharing, Print, Document Statistics, Other Formats, and Public Inspection. The main content area shows the following information:

DOCUMENT HEADINGS
Federal Trade Commission
16 CFR Parts 801 and 803
RIN 3084-AB46

AGENCY:
Federal Trade Commission.

ACTION:
Final rule.

SUMMARY:
The Federal Trade Commission ("FTC" or "Commission"), with the concurrence of the Assistant Attorney General, Antitrust Division, Department of Justice ("Assistant Attorney General" or "Antitrust Division") (together the "Agencies"), is issuing this final rule and Statement of Basis and Purpose ("SBP") to amend the Premerger Notification Rules (the "Rules") that implement the Hart-Scott-Rodino Antitrust Improvement Act ("the HSR Act" or "HSR"), including the Premerger Notification and Report Form for Certain Mergers and Acquisitions ("Form") and Instructions to the Notification and Report Form for Certain Mergers and Acquisitions ("Instructions"). The final rule requires parties to transactions that are reportable under the HSR Act to provide documentary material and information that are necessary and appropriate for the Agencies to efficiently and effectively conduct an initial assessment to determine whether the transaction may violate the antitrust laws and whether to issue a Request for Additional Information ("Second Request") as provided by the HSR Act. In addition, the final rule implements certain requirements of the Merger Filing Fee Modernization Act of 2022 ("Merger Modernization Act") and ministerial changes to the Rules as well as the necessary amendments to the Instructions to effect the final changes.

- **Now effective:** Applies to all deals closing after February 10, 2025
- **More burden:** New HSR form substantially increases the number of documents and amount of information submitted with an HSR filing
- **Appeared to have bipartisan support:**
 - Approved by a 5–0 vote, including support from Republican Commissioners Ferguson and Holyoak
 - Republican commissioners negotiated somewhat less burdensome requirements, but may seek to further reduce the burden of the new form
- Must still withstand potential challenges in court and from Congress

Benefits of a Strong HSR Filing



- **New advocacy opportunities:** Parties can now provide transaction rationale and explain competition dynamics
- **Avoiding delays:** Robust filing can preemptively address competition concerns, reducing likelihood of Second Request and increasing chances of early termination
- **Early termination:** Bipartisan compromise brokered by Republican commissioners, who advocated for more efficient review processes, reinstates early termination, which can reduce 30-day waiting period

DOJ Suit Against KKR for Alleged HSR Violations

PRESS RELEASE

Justice Department Sues KKR for Serial Violations of Federal Premerger Review Law

Tuesday, January 14, 2025

For Immediate Release

Office of Public Affairs

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KKR Violated Hart-Scott-Rodino Act at Least 16 Times by Withholding and Altering Documents and Failing to Make Required Filings

- In a civil suit filed last month, DOJ alleges
 - KKR failed to submit required Item 4(c) documents
 - KKR altered documents, including info on competitive implications, before submitting them
 - KKR failed to file HSR notifications before closing
- DOJ is seeking unprecedented civil penalties in the hundreds of millions of dollars
- KKR's countersuit claims DOJ's suit is politically motivated, and penalties are unconstitutional due to vague FTC rules and excessive fines

DOJ's aggressive stance on HSR Act compliance highlights the importance of accurate and complete filings. Ensuring all necessary documents are collected and submitted is crucial to avoid penalties. Engaging antitrust counsel early can help mitigate risks.

Merger Guidelines: Rescission or Revision?

- Biden-era 2023 Merger Guidelines at risk for rescission or at least revision
 - Passed by FTC 3–0 with only Democratic commissioners
 - Republican Commissioners Ferguson and Holyoak have criticized 2023 Guidelines for their significant departure from recent precedent
 - New lower thresholds for presuming a deal is anticompetitive
 - Emphasis on private equity, potential/nascent competition, vertical concerns, and labor markets
- Trump Administration expected to revise or rescind these guidelines, aiming for more business-friendly standards while avoiding frequent shifts in enforcement priorities
 - Commissioners have expressed concern about frequent guideline changes and seek more stable policies

Return of Divestiture Remedies



**GREATER
ACCEPTANCE**

Unlike the Biden Administration's preference for outright blocking of anticompetitive deals, Trump-era agencies are likely to return to accepting well-structured divestitures as a condition for merger clearance

**MEANINGFUL
ENGAGEMENT
ON REMEDIES**

"I hope the Commission will return to normal operations with regard to divestitures."

- Commissioner Holyoak (Jan. 30, 2025)

Greater Acceptance of Efficiency Justifications



- **Vertical Mergers**

- Biden Administration applied greater scrutiny to vertical mergers, successfully challenging several transactions and rescinding Vertical Merger Guidelines
- Trump's first administration also challenged vertical transactions, but agencies under Trump are likely to be more accepting of efficiency justifications, which are well-recognized for vertical mergers

- **Horizontal Mergers**

- Agencies under Trump will also be more likely to accept efficiencies in horizontal transactions, but it is difficult to win approval on efficiencies in a horizontal deal under any administration

An illustration on the left side of the slide shows a 3D grid of light blue cubes. Inside and around these cubes are several stylized figures of business professionals in dark blue suits and dresses, some carrying briefcases or holding documents. The overall aesthetic is clean and modern, representing a corporate or legal environment.

Labor in Merger Review

- **Reduced focus:** Republican commissioners are less inclined to pursue labor-related competition concerns in merger reviews
 - “The antitrust agencies have never successfully challenged any transactions based on labor market theories that could have been identified by the proposed requirements.” – Andrew Ferguson
- **Targeted challenges still possible**
 - FTC “is wise to focus its resources on protecting competition in labor markets. After all, the antitrust laws protect employees from unlawful restraints of the labor markets as much as they protect any output market.” – Andrew Ferguson

Foreign Acquisitions of U.S. Companies



- Trump's proposed tariffs and other policies signal heightened scrutiny of foreign-backed mergers, especially from countries like China
- Greater attention to foreign acquisitions of U.S. businesses may complement existing national security reviews under Committee on Foreign Investment in the United States (CFIUS)
 - *Example:* Trump publicly vowed to block Nippon Steel's proposed acquisition of U.S. Steel

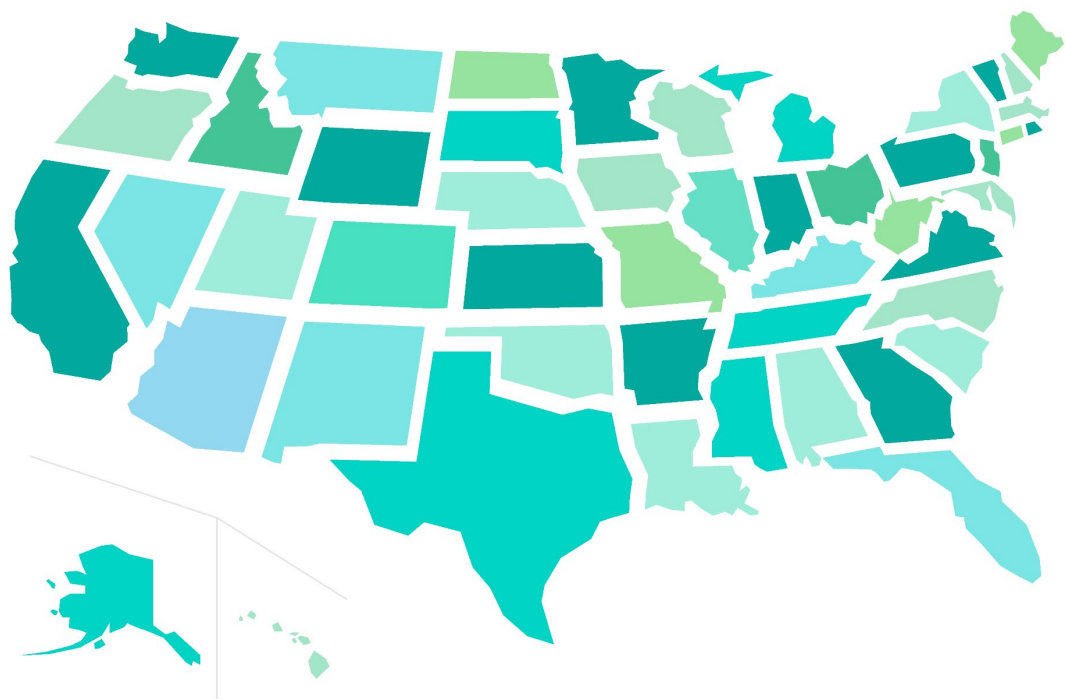
Coordination with Foreign Agencies

- The Trump Administration is expected to reduce collaboration with foreign antitrust authorities, reflecting concerns over how EU penalties on U.S. businesses have been handled

- Diverging enforcement approaches could lead to fewer coordinated cross-border investigations



State Attorney General Enforcement



- Enforcers from Democrat-led states are likely to step up challenges in areas where federal agencies are perceived to be lenient, particularly in the healthcare and energy sectors
- State AGs previously challenged or blocked deals like T-Mobile-Sprint and Valero Energy’s proposed acquisitions when federal agencies chose not to act
- More states have passed “Baby HSR” laws—particularly in healthcare

Parties will need to monitor and address state-specific concerns to avoid challenges, especially in politically active states like California and New York

WINSTON
& STRAWN
LLP