

A Second Trump Presidency: How Will It Impact Antitrust Merger Review?

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Last week, Donald Trump was elected to serve as the 47th president of the United States. President Trump's election raises questions about the future of antitrust policy and enforcement, particularly following the major policy shifts and increased scrutiny of mergers and acquisitions under the Biden administration. While much will depend on whom President Trump selects to head the Department of Justice Antitrust Division and chair the Federal Trade Commission (who have not yet been announced), regardless of whom President Trump appoints, we expect that many of the antitrust policies implemented during the Biden administration will be updated or abandoned but that certain other changes will remain. The federal antitrust agencies will likely dial back the aggressive merger enforcement and novel theories of harm to competition that the DOJ and FTC have been pursuing during the Biden administration under Assistant Attorney General Jonathan Kanter and FTC Chair Lina Khan, respectively. For instance, the DOJ and FTC will likely be more amenable to negotiating divestitures or other structural remedies as a condition to clearance, which the current administration has often declined to consider. The Trump administration will probably also ease the agencies' suspicion of private equity involvement in certain deals. The bipartisan antitrust focus on healthcare and Big Tech, however, is likely to remain. Similarly, the new, more burdensome HSR form will likely survive the transition, although Trump appointees may further modify the HSR form to reduce its burden.

WHAT IS LIKELY TO STAY THE SAME?

- **New HSR Form.** The new HSR form was approved last month by a 5–0 vote, with Republican FTC Commissioners Andrew Ferguson and Melissa Holyoak joining in support. Ferguson and Holyoak both issued concurring statements emphasizing that the final rule was a positive development required to address the agencies' need for additional information early on to evaluate increasingly complex markets. Given the Republican support for the new HSR form, it will likely survive a Trump administration, although it may be refined by the new administration to reduce the burden on filers in response to real-world experience implementing the new form.
- **Benefits of a Strong HSR Filing.** Since the expanded HSR filing requirements likely will have staying power, it will be more important than ever to prepare a strong HSR filing. As mentioned in our previous alert, the current HSR form is a relatively mechanical submission that does not provide room for narratives or advocacy. The new HSR form's requirement to provide a transaction rationale and explanations of competition and supply relationships between the parties to a transaction now offers the parties additional opportunities to explain the benefits of their proposed transaction from the beginning. A strong HSR filing is likely to significantly decrease the chances of a

costly Second Request and may even result in an early termination letter from the FTC, a possibility that the new HSR form has made available. The Republican commissioners' statements concurring in the new HSR form made clear that they had pushed for the return of early termination as part of a bipartisan compromise, giving cause for optimism that the new agency leadership will be increasingly willing to grant early termination to deals that present no serious competition concerns.

- **Continued Focus on Healthcare and Big Tech.** The Trump-led FTC was previously very active in the healthcare space, including bringing six challenges to healthcare transactions, four of which were challenges to provider transactions. In the current election cycle, public focus on healthcare issues has remained strong, signaling a likely continued focus on healthcare. We also expect continued aggressive enforcement when it comes to Big Tech mergers under President Trump. Indeed, under the previous Trump administration, the FTC launched a technology task force, which became a permanent Technology Enforcement Division, initiated a study of unreported acquisitions by the biggest technology companies, and filed the complaint against Google alleging that it illegally maintained a search monopoly. In addition, President Trump has expressed concern with Big Tech's increasing power, and Vice President-elect JD Vance has even said that FTC Chair Khan "is doing a pretty good job." Although the Trump administration is expected to be more friendly to business interests generally, we can expect its focus on Big Tech and health care to continue.

WHAT IS LIKELY TO CHANGE?

- **Merger Guidelines.** The antitrust agencies' merger guidelines, which describe the substantive standards they use to evaluate a proposed merger's competition effects, have seesawed across the last several administrations. The first Trump administration adopted new vertical merger guidelines near the end of its term. At the start of the Biden administration, agency leadership promptly repealed those vertical merger guidelines, and later adopted new merger guidelines addressing both horizontal and vertical mergers. Those Biden-era guidelines were approved by a 3–0 vote of only Democratic commissioners of the FTC. They marked a significant departure from the agencies' previous horizontal and vertical merger guidelines. These guidelines, among other things, lowered the HHI thresholds required for transactions to trigger a presumption of competitive harm and signaled a greater focus on private equity, potential competition, and labor markets. In a recent webinar, Republican FTC Commissioner Holyoak stated she would strongly consider rescinding or revising the 2023 merger guidelines. Republican Commissioner Ferguson also stated he would be open to revising the guidelines but cautioned that "I don't think we should get into a cycle where we are just rescinding guidelines every time the chairmanship changes hands." Given this significant criticism of the 2023 merger guidelines, these guidelines are unlikely to survive a Trump administration intact.
- **Return of Divestiture Remedies.** The Biden FTC and DOJ have expressed a policy preference for blocking mergers and acquisitions, rather than accepting a divestiture remedy. Although the antitrust agencies under the previous Trump administration preferred structural, rather than behavioral remedies, they accepted divestiture remedies much more frequently. Reflecting this reality, Kroger's stock jumped this week, as investors eyed the possibility of approval of its proposed merger with Albertsons, subject to divestiture, by antitrust agencies during a Trump administration. When evaluating antitrust risk, parties should more strongly evaluate well-structured divestiture remedies in Republican-led antitrust agencies.
- **Less Focus on Labor in Merger Review.** The federal antitrust agencies have broken new ground with criminal no-poach and noncompete cases, an effort that started under the former Trump administration. Republican FTC commissioners, however, have not embraced an increased focus on labor issues in merger enforcement. For instance, earlier last year, Democratic FTC commissioners issued a proposed new HSR form, which would have required merging parties to report detailed worker-related information. After intense pushback from Republican commissioners, these additions did not make it into the final HSR form. While these commissioners acknowledged that mergers can raise labor-related concerns where the merging parties would gain control over a large share of specialized workers in a relevant market, they did not share the broader labor-related concerns expressed by the Democratic commissioners, because "[t]he agencies have never brought a standalone labor challenge to an acquisition." While we expect federal antitrust agencies under President Trump to continue to challenge anticompetitive conduct in labor markets, this focus will likely be relaxed with respect to mergers.

- **Potential Decreased Emphasis on Private Equity.** Since taking office as chair of the FTC, Khan has increased scrutiny of private equity buyers, claiming that “the growing role of private equity . . . may facilitate unfair methods of competition and consumer protection violations.” Kanter has similarly expressed skepticism of private equity. The agencies have taken enforcement action against private equity transactions, focusing particularly on roll-up transactions. To that end, the new HSR form increases disclosure requirements for roll-up transactions. However, Republican FTC Commissioners Holyoak and Ferguson have not signaled a particular focus on or skepticism of private equity, and President Trump is unlikely to appoint a private equity skeptic to lead the federal antitrust agencies.
- **Greater Focus on Foreign Interests.** Earlier this year, Trump proposed a 10% universal tariff on all imports and a 60% tariff on imports from China. These protectionist policies point to a potential for increased scrutiny of foreign interests or sponsors of mergers and acquisitions of U.S. businesses. While there are other mechanisms to review foreign investments for national security concerns under the Committee on Foreign Investment in the United States (CFIUS), the antitrust agencies may give greater attention to acquisitions of U.S. businesses by foreign purchasers.
- **Decreased Coordination with Foreign Agencies.** As the Biden administration’s antitrust-enforcement theories aligned more closely with foreign counterparts, the federal antitrust agencies have increased their coordination with foreign antitrust agencies. Senate Republicans have expressed concerns that this increased coordination comes at the detriment of American businesses, particularly in light of recent EU fines against American businesses routinely totaling billions of dollars. Although federal antitrust agencies will continue to coordinate with their foreign counterparts, as their enforcement priorities diverge more, the Trump administration’s antitrust enforcers are less likely to coordinate as closely with foreign jurisdictions on antitrust investigations.
- **Greater Enforcement by State Attorneys General.** While antitrust enforcement from the antitrust agencies during the Trump administration is expected to be more business-friendly, state attorneys general, particularly in states with Democratic leadership, are likely to step in to fill the gap to some extent. These state attorneys general are likely to target sensitive sectors with significant local impact like healthcare, but may also sue to block other transactions that federal antitrust enforcers are failing to challenge. For instance, during Trump’s previous presidency, the DOJ conditionally approved T-Mobile’s merger with Sprint, but a coalition of state attorneys general sought to block the transaction. The California attorney general also challenged Valero Energy’s proposed acquisition of two San Francisco-area petroleum terminals after the FTC decided not to challenge the proposed transaction, causing Valero to abandon the deal. As state attorneys general have become increasingly active in antitrust enforcement in recent years, parties will need to pay more attention to state attorneys general to avoid similar actions.

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