

Trump's Antitrust Strategy Continues to Take Shape with New FTC Picks

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On December 10, President-elect Trump [announced](#) that he will elevate current FTC commissioner Andrew Ferguson to be the next Chair of the Federal Trade Commission. In a [follow-up post](#), Trump also announced his selection of antitrust lawyer Mark Meador to serve as a new Republican FTC commissioner. These announcements herald a major political shift for the Commission, with Meador's anticipated appointment expected to create a Republican majority on the Commission. These announcements follow President-elect Trump's nomination a few days earlier of [Gail Slater to lead the Department of Justice's Antitrust Division](#).

With Big Tech companies still under intense scrutiny by the President-elect—and singled out in his postings announcing both the FTC's Chair and the Antitrust Division's AAG—these appointments signal a continued focus on a populist antitrust agenda aimed at regulating and curbing the power of major technology firms. At the same time, each of these new antitrust agency leaders rose through traditional pathways consistent with mainstream Republican antitrust enforcement.

While it remains to be seen what the new antitrust leadership will prioritize, our overall impression is that these leaders are likely to pursue a relatively traditional Republican antitrust agenda in many areas, punctuated with some outliers that reflect unique Trump Administration priorities and an increasingly bipartisan view that antitrust enforcement should be more aggressive. Examining both Ferguson's and Meador's backgrounds, experiences, and policy positions offers valuable insights into each individual's philosophy on antitrust enforcement, as well as the potential future of the FTC.

Andrew Ferguson

BACKGROUND

Ferguson is the newest currently-serving FTC Commissioner, having been confirmed in March 2024. Prior to joining the FTC, Ferguson served as Virginia's Solicitor General for two years. His earlier experience includes serving as a senior legal advisor to several influential Republican senators, including Mitch McConnell, Lindsey Graham, and Chuck Grassley, as well as stints in private antitrust practice at large law firms, and clerkships in the D.C. Circuit and for Supreme Court Justice Clarence Thomas.

Consistent with his Republican pedigree, Ferguson has frequently dissented from FTC enforcement actions while in the minority during the Biden Administration, indicating that he has a higher threshold to challenge deals and litigate to stop allegedly anticompetitive conduct. Nonetheless, he has also called for the FTC to utilize its powers to investigate the use of perceived anticompetitive behavior to further liberal social goals such as reducing emissions.^[1]

This suggests that the shift to a Republican majority will not be universally less aggressive in antitrust enforcement, requiring close attention to new Republican enforcement priorities.

NEW HSR FORM

The new Republican majority may not doom the new HSR form pushed by the Democratic majority Commission, which is currently set to become effective on February 10, 2025. As Commissioner, Ferguson concurred with, and voted in favor of, the Commission's amendments to the premerger notification and report form and instructions under the Hart-Scott-Rodino (HSR) Act. In his concurrence, Commissioner Ferguson noted that the amended HSR form originally proposed by the Democratic commissioners would have "abused [the Commission's] authority by imposing onerous, unlawful requirements that could not have survived judicial review," but that the arrival of Republican Commissioners, i.e., Commissioner Holyoak and himself, brought changes that "rescued the Final Rule from the [proposed HSR form's] lawlessness." Commissioner Ferguson's stance here suggests that, under President Trump, the agencies will keep at least some version of the new form in place, although they may consider revisions to reduce burdens on merging parties to disclose information that will make the merger process smoother and less costly.

Commissioner Ferguson also helped push for the return of early termination, which is "the Commission practice of informing merging parties that the Commission is terminating its investigation into the merger before the conclusion of the statutory [30 day] waiting period, thereby freeing them to consummate the merger immediately." This stance suggests that the FTC under Republican control will likely grant early termination in investigations more freely, leading to faster deal closures, particularly for deals that do not raise any significant competitive questions.

WORKER NON-COMPETE BAN

Unlike the new HSR form, the proposed ban on worker non-compete agreements stands on shakier ground. On April 23, 2024, the Commission promulgated a rule banning non-compete clauses in contracts with employees and other workers. In Commissioner Ferguson's view, the Commission's issuance of the rule exceeded its statutory grant of power from Congress.^[2] A federal court subsequently agreed and set aside the FTC rule. Yet, although he generally thinks that the Commission's actions in this space exceed their authority, Commissioner Ferguson stated that "[t]he Commission is wise to focus its resources on protecting competition in labor markets," indicating the FTC under his leadership may continue to eye opportunities to address anticompetitive practices affecting workers.

ROBINSON PATMAN ACT

Companies practicing price discrimination will likely be at less risk under a Ferguson-led FTC. In a dissenting statement published on December 12, 2024, Commissioner Ferguson seemingly accepted, albeit in a limited form, the FTC's recent attempts at reviving enforcement of the Robinson Patman Act (RPA), which generally prohibits price discrimination. Ferguson acknowledged that the FTC erred in failing to enforce the RPA for decades, but cautioned that "the [FTC] must soundly exercise" its discretion to enforce the RPA, and took particular issue with the case before him, in which he believed the FTC was "unlikely to prevail even on its own theory of the Act" and was making an "imprudent use of . . . enforcement resources even if it were likely to prevail." Ferguson's dissent suggests that even where, as with the RPA, the FTC appears bound to expand its enforcement regime, Ferguson will favor a more restrained use of the Commission's powers.

OUTLOOK

Taking together all of Commissioner Ferguson's views on antitrust topics, we expect that the FTC under his leadership will focus enforcement on more traditional antitrust cases. We similarly expect that the Commission will take a narrower view of the scope of its own power, in particular with respect to rulemaking. Additionally, strong Republican criticism of the 2023 merger guidelines indicates the Commission is likely to conduct a thorough review of the guidelines to determine whether they will be revised or replaced. However, given Commissioner Ferguson's words of caution about partisan rescission of merger guidelines, we expect the merger guidelines will undergo significant changes during the Trump Administration rather than full replacement.

Mark Meador

In the same day President-elect Donald Trump announced Ferguson would lead the FTC, he also selected antitrust lawyer Mark Meador to serve as the FTC's third Republican commissioner. Meador is a veteran antitrust attorney,

having served in private practice, at the FTC, in the Department of Justice's (DOJ) Antitrust Division; and most recently, as an advisor to Senator Mike Lee on antitrust matters. In his previous stint with the Commission, Meador was involved in the FTC's campaign against pay-for-delay agreements and product-hopping in the pharmaceutical industry. In the DOJ's Antitrust Division, Meador worked on several antitrust investigations, including the Division's ultimately successful challenge of the proposed Visa/Plaid merger.

Meador's approach to Big Tech, one of Trump's favorite targets on the campaign trail, is likely to involve aggressive antitrust enforcement. In online posts to X (formerly known as Twitter), Meador has been outspoken on antitrust and Big Tech, repeatedly criticizing practices and positions taken by Google, Amazon, and the industry at large. Meador has already taken action on this front, drafting a bill, later introduced by Senator Lee, intended to force Google to break up its digital advertising business.

Outside of Big Tech, Meador may also seek a more robust antitrust enforcement approach, albeit one that is likely less vigorous than that of his Democratic counterparts in the FTC. "What we're seeing now," Meador stated in an interview, is "a return to the authentically conservative understanding that concentrated economic power is just as dangerous as concentrated political power."^[3] In order to avoid concentrated economic power, Meador proposes that antitrust enforcement should focus more on preventing the *under-deterrence* of anticompetitive behavior, as opposed to focusing too much on curbing *over-enforcement* of antitrust law,^[4] a view that largely echoes sentiments of current Democratic FTC Chair Lina Khan, who has embraced a deterrence strategy as a way to leverage the FTC's limited resources.^[5] Exemplifying this approach to antitrust enforcement, Meador believes "antitrust should absolutely play a role in the development of AI and ensure that those markets remain competitive," and also takes issue with "the level of quality and prices in the airline industry," pointing out that "[t]here has not been a lot of congressional oversight of that sector in quite a while."^[6] While the full extent of his approach to other industries is not yet known, Meador appears likely to generally favor, at minimum, a moderate level of enforcement.

One area in which Meador may have less traditional Republican views is with respect to the RPA. Meador has publicly expressed support for enforcement of the RPA, writing that despite disagreement over the merits of the law, the RPA "remains the binding policy of the federal government . . . [and] it remains the duty of federal law enforcers to enforce the law as written." Paired with Commissioner Ferguson's qualified acceptance of RPA enforcement in a recent dissent, Meador's open support for bringing RPA cases to protect consumers from price discrimination suggests the FTC may not fully discard RPA enforcement.

Takeaways

The nominations of Andrew Ferguson as FTC Chair and Mark Meador as a Republican FTC commissioner signal a significant policy and enforcement shift at the FTC. They are expected to balance aggressive antitrust enforcement, particularly with respect to Big Tech, with reducing unnecessary regulatory costs. This shift will likely also include a more cautious approach to expanding the FTC's authority, including a more restrained revival of RPA enforcement and the abandonment or dialing back of Biden-era FTC enforcement initiatives, such as the non-compete rule. For further updates on the second Trump administration's FTC and antitrust enforcement priorities and initiatives, continue to watch this space.

Law clerk Ryan Chen also contributed to this blog post.

[1] *The Fiscal Year 2025 Federal Trade Commission Budget: Hearing Before the H. Subcomm. on Innovation, Data, and Com.*, 118th Cong. 3 (2024) (statement of Andrew Ferguson, Comm'r, Federal Trade Commission).

[2] Dissenting Statement of Commissioner Andrew N. Ferguson Joined by Commissioner Melissa Holyoak in the Matter of the Non-Compete Clause Rule, Matter No. P201200, June 28, 2024. https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf. ("Section 6(g) of the Federal Trade Commission Act does not authorize the Commission to make substantive rules regulating private conduct ... Even if Section 6(g) of the FTC Act grants us substantive rulemaking authority, it does not grant us the authority to issue this rule. Under the major-questions doctrine, administrative agencies may enact rules of great 'economic and political significance' only if congress has clearly and unambiguously granted them the authority to do so. Congress has not clearly and unambiguously granted us the authority we today claim. The Final Rule is therefore unlawful even if Congress has conferred on us some substantive rulemaking power.").

[3] Interview, *Will We Revolutionize Antitrust?* (ft. Mark Meador), American Moment (July 31, 2023) available at <https://www.youtube.com/watch?v=n4IGMBf6-ys>.

[4] *Id.*

[5] Lina M. Khan, *Vision and Priorities for the FTC* (September 22, 2021) (“More broadly, we need to find ways to deter unlawful transactions . . . [i]dentifying ways to reduce the agency resources and burden associated with investigating and filing lawsuits against unlawful mergers will be important.”) available at https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_22-21.pdf.

[6] Davide Mamone, *Mark Meador: The Exit Interview*, Global Competition Review (July 3, 2023) available at <https://globalcompetitionreview.com/gcr-usa/article/mark-meador-the-exit-interview>.

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Conor Reidy



Jean Vardaramatos

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