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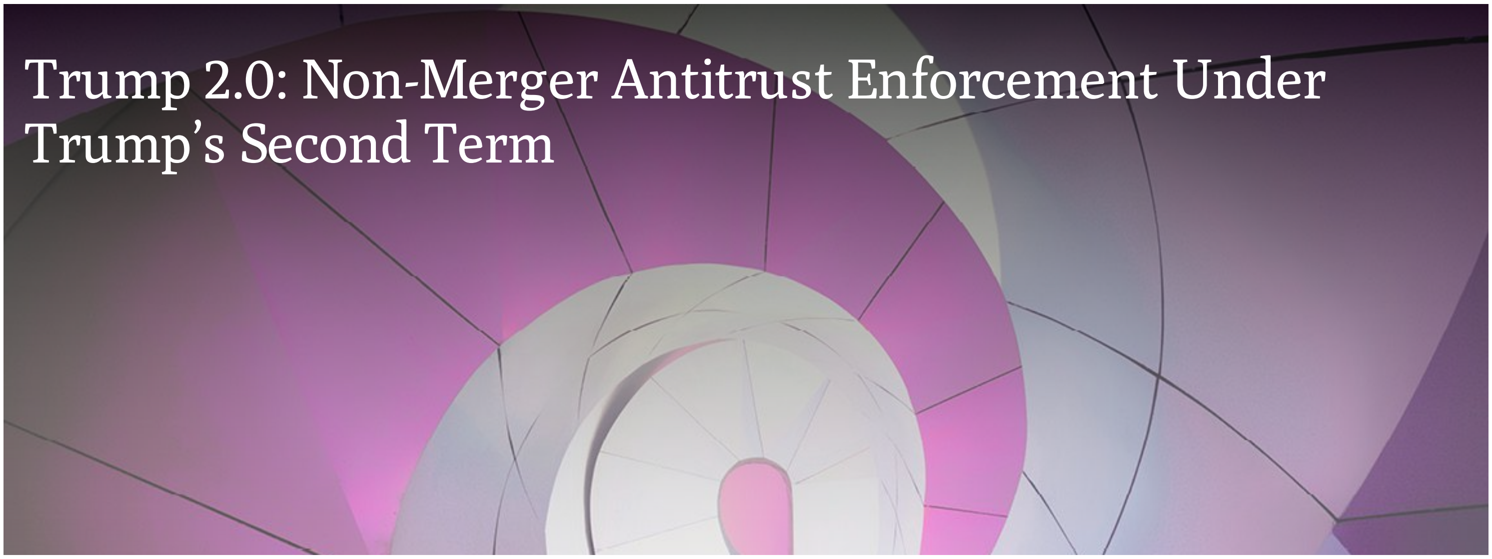
BLOG

Trump 2.0: Non-Merger Antitrust Enforcement Under Trump's Second Term



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A second Trump administration brings some uncertainty about the trajectory of non-merger antitrust enforcement. Under the Biden administration, the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) took an aggressive approach to antitrust enforcement across several industries and were particularly hostile to mergers and acquisitions. President Trump's nominees to lead the antitrust agencies signal that the new administration is likely to continue current levels of vigorous antitrust enforcement—particularly in Big Tech and other hot-button industries—but will likely relax M&A enforcement and return to more predictable and traditional tools and theories of harm. What remains to be seen is how the regulators' self-proclaimed return to a more pro-business approach will play out in practice.

Key Appointments

ASSISTANT ATTORNEY GENERAL OF THE DOJ ANTITRUST DIVISION

In December, President Trump announced Gail Slater as his pick for Assistant Attorney General (AAG) to run the Antitrust Division. Slater is a highly knowledgeable and seasoned antitrust expert, having worked at the FTC for a decade and most recently serving as an economic policy advisor to Vice President Vance. President Trump hopes, and it seems likely, that, if confirmed, Slater will channel her expertise in the DOJ's antitrust fight against key players in the Big Tech industry, but otherwise take a more balanced approach to antitrust enforcement. For more information on Slater's appointment, see our prior post.

FTC CHAIR AND COMMISSIONER

President Trump's selection of FTC Commissioner Andrew Ferguson to replace prior FTC Chair Lina Khan, and nomination of Mark Meador as the fifth Commissioner, signal that the FTC will continue to actively enforce antitrust laws, particularly in the tech industry, but will likely adopt a less aggressive regulatory approach than the Biden/Khan-FTC and reduce merger enforcement. In a recent press release announcing the appointment of Daniel Guarnera as Director of the Bureau of Competition, Chairman Ferguson praised Guarnera's experience litigating antitrust cases in "critical markets, including agriculture and Big Tech" and described "labor and healthcare markets" as two of his "top priorities." As Commissioner Melissa Holyoak recently stated, "[u]nder Chairman Ferguson's leadership. . . we will usher in a new season at the FTC—something that has already begun."

Ferguson's brief tenure as commissioner was marked by multiple noticeable dissents, which indicate he is less willing than Khan to push the boundaries of antitrust law and FTC authority. Most significantly, he dissented from the FTC's nationwide ban on noncompete agreements, arguing that it vastly exceeded the FTC's authority. With Ferguson as Chair, it is likely that the non-compete rule will be reversed, and the FTC will return to the case-by-case approach it adopted prior to the rule. Similarly, the FTC will likely withdraw the FTC's 2022 policy statement, which announced a renewed focus on rigorous enforcement of Section 5 of the FTC Act, and instead return to a more lenient approach that focuses Section 5 enforcement on conduct that violates the familiar rule of reason that serves as the general test for violations of the Sherman Act. For more information on Section 5 and the 2022 policy statement, see our prior post.

A Ferguson-led FTC would likely also pull back on enforcement of the Robinson-Patman Act (RPA), which after decades of non-enforcement has seen a recent revival. The RPA is often called a "price discrimination act" because it prohibits sellers of commodities from discriminating in price or promotional deals among their customers when those customers compete with one another for the resale of those commodities. The FTC brought its first enforcement action under the RPA in over two decades in December 2024 against Southern Glazer's Wine and Spirits. Ferguson voted against the complaint, issuing a 30-page dissenting statement in which he questioned the majority's decision to bring the complaint. While he acknowledged that it was an error to treat the RPA "as a nullity for decades," he cautioned that "the [FTC] must soundly exercise discretion about when to enforce [the RPA.]" Ferguson noted that "[t]he Commission should focus its enforcement efforts on price discrimination in the heartland of the concern that animated the Act's passage—large retailers with buying power." The dissent provides insight on federal RPA enforcement over the next four years. While it leaves open the possibility for future RPA cases, his analysis raises doubts about which cases will be considered worthy of an enforcement action.

Notwithstanding Ferguson's vocal dissent of many aspects of Khan's enforcement approach, President Trump's nomination of Mark Meador, an FTC veteran and antitrust specialist, to fill Ferguson's vacancy suggests that certain aspects of Khan's FTC may remain. Meador previously served in the DOJ Antitrust Division and the FTC's Health Care Division. Like Khan, Meador has been outspoken in his antitrust critiques of Big Tech, and has proposed that antitrust enforcement should focus more on preventing the under-deterrence of anticompetitive behavior rather than focusing too much on curbing over-enforcement of antitrust law. His fairly pro-enforcement outlook corresponds with views Khan has expressed regarding an emphasis on deterrence and departs from traditional Republican views. For more information on Ferguson and Meador, see our prior post.

Enforcement Targets

As noted above, for the next four years, the regulators' primary enforcement target will likely remain Big Tech and other hot-button industries like healthcare. Where the Trump administration is likely to deviate from its predecessor is with respect to enforcement efforts in more novel industries, such as the Artificial Intelligence (AI) space, prioritizing research and development over antitrust enforcement. The Trump administration's stated pro-business agenda will also likely lead to less aggressive merger enforcement while continuing the bipartisan focus on healthcare and Big Tech. For more information on antitrust merger review under a second Trump administration, see our prior post.

BIG TECH

Big Tech is expected to remain a primary focus of antitrust enforcement under the new administration. The Trump administration will inherit several pending antitrust suits against Big Tech companies—including Google, Amazon, and others—some of which were initiated during the first Trump administration. The first antitrust case against Google is currently in the remedies stage after a judge found that Google maintained an illegal monopoly in internet search, and the second, alleging Google also maintains an illegal monopoly in advertising technology, recently wrapped up a bench trial. The antitrust case against Amazon is ongoing after most claims survived a motion to dismiss.

While on the campaign trail, Trump called Big Tech companies "too big" and "too powerful," and Vance praised Khan's aggressive approach to antitrust enforcement against Big Tech. Ferguson also expressed censorship concerns, vowing that while he is Chair, the FTC will "end Big Tech's vendetta against competition and free speech."

Similarly, Holyoak has stated that the FTC must “fight against Big Tech censorship.” Meador was previously involved in drafting a bill intended to force the breakup of Google’s digital advertising business. Trump’s nomination of Slater further signals an aggressive approach to Big Tech. In announcing Slater’s nomination, Trump stated that “Big Tech has run wild for years,” touting his fight against Big Tech in his first term and vowing that his “[DOJ] antitrust team will continue that work under [Slater’s] leadership.”

ARTIFICIAL INTELLIGENCE

Unlike Big Tech, Trump is likely to rein back enforcement in more novel and developing industries, such as AI, in the name of promoting competition.

In line with Biden’s Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence, which detailed a framework for the regulation of AI, the FTC and DOJ focused their enforcement efforts on AI during the latter half of Biden’s term. The FTC and DOJ agreed to divide enforcement of the largest market participants in the AI industry and later issued a joint statement on AI competition risks and strategies. In September 2024, the FTC announced “Operation AI Comply,” which was intended to crack down on companies using AI deceptively or unfairly. Those initiatives are likely to cease under Trump.

During President Trump’s first term, he issued an Executive Order that established the American AI Initiative and emphasized investing in AI research and development. And just a few days into his second term, President Trump issued an Executive Order titled “Removing Barriers to American Leadership in Artificial Intelligence” which proposed to “revoke[] certain existing AI policies and directives that act as barriers to American AI innovation.” President Trump also already revoked Biden’s Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence mentioned above.

President Trump has voiced support of AI development rooted in free speech. As President Trump expressed in his nomination of Slater, his intent is to ensure “competition laws are enforced, both vigorously and FAIRLY, with clear rules that facilitate, rather than stifle, the ingenuity of our greatest companies.” Likewise, Commissioner Ferguson emphasized that the FTC will make sure America is the “best place for innovators to bring new ideas to life.”

Notably, on January 17, 2025, the FTC issued a staff report on three Big Tech-AI partnerships between three of the largest Cloud Service Providers and two of the most prominent generative AI developers. Ferguson issued a concurring and dissenting statement, joined by Commissioner Holyoak, that praised the report for helping the public understand how these partnerships between the Big Tech companies and AI model developers work. In his concurrence, he noted how AI technology “could be a driving force for innovation, economic growth, and increased productivity for American workers in the coming years” and that “AI may also be the most significant challenge to Big Tech firms’ dominance since they achieved that dominance.” Ferguson advocated that these two possibilities require the FTC “to strike a careful and prudent balance” between “charg[ing] headlong to regulate AI” and remaining “a vigilant competition watchman, ensuring that Big Tech incumbents do not control AI innovators in order to blunt any potential competitive threats.” Commissioner Holyoak has stressed that the FTC must aim to promote innovation in AI, not “hamper it” through “unclear regulations or misguided enforcement actions.”

In all, the second Trump administration is expected to take a more hands-off approach to enforcement in the AI industry and similar novel industries.

HEALTHCARE AND PHARMACEUTICAL

Healthcare and pharmaceutical companies are expected to remain targets of both merger and non-merger antitrust enforcement under the second Trump administration. Rising healthcare and pharmaceutical costs remain a key bipartisan concern. Under the Biden administration, the FTC released two interim staff reports on the prescription drug middleman industry, which focused on pharmacy benefit managers’ (PBM) influence over specialty generic drugs. The second interim report, published on January 14, 2025, found, among other things, that the three major PBMs imposed markups for many lifesaving drugs and that PBMs overwhelmingly favor their own pharmacies, limiting competition and choice. All five Commissioners, including Ferguson, voted unanimously to allow staff to issue the report. Ferguson issued a concurring statement, explaining that “[t]he Commission still has more work to do on the study,” but that he “remain[s] committed to bringing it to a conclusion, culminating in a final report.” Thus, the FTC seems poised to continue its investigation into PBM practices and rising drug costs under Ferguson, and the possibility remains for future enforcement action in this industry.

Relatedly, key members of the second Trump administration have a history of healthcare and pharmaceutical enforcement. Pam Bondi, the new U.S. Attorney General, was involved in antitrust litigation against generic drugmakers during her time as Attorney General of Florida. Meador's previous stint with the FTC was in its Healthcare Division, where he was involved in the FTC's campaign against pay-for-delay agreements and product-hopping in the pharmaceutical industry.

While perhaps slightly less of a target than Big Tech, major players in the healthcare and pharmaceutical industries will likely remain antitrust enforcement targets throughout the second Trump administration.

Takeaways

Generally, non-merger antitrust enforcement during Trump's second term will be shaped by the actions of his recently announced appointments to the FTC and DOJ. As his recent appointments and the antitrust enforcement trends of his first term suggest, vigorous antitrust enforcement is likely to continue, with Big Tech expected to remain the primary target, and healthcare a close second. That said, Trump's business- and innovation-focused platform suggests that he may take a step back from Biden's boundary-pushing antitrust enforcement approach, opting for more traditional antitrust tools and theories of harm and reduced reliance on new rulemaking.

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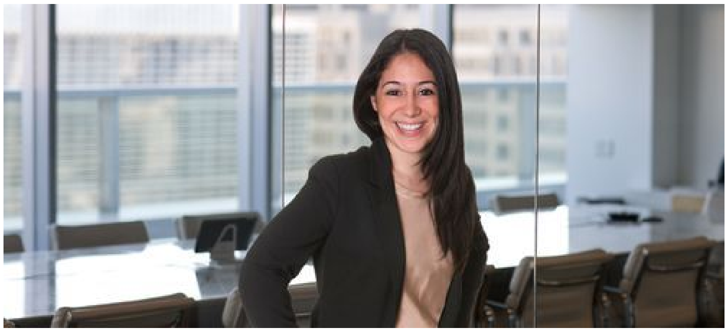

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