

NOVEMBER 27, 2024

CLIENT ALERT: TRUMP 2.0 – BACK TO THE FUTURE?

Authors: Benjamin H. Diessel, Robert M. Langer, and Michael Kucharski

*If you have any questions
about this Advisory,
please contact:*

BENJAMIN H. DIESEL
203.498.4304
bdiessel@wiggin.com

ROBERT M. LANGER
860.297.3724
rlanger@wiggin.com

MICHAEL KUCHARSKI
212.551.2625
mkucharski@wiggin.com

After winning the presidency, Donald Trump will look to bring his own antitrust enforcement priorities to his second administration. During his first term, Donald Trump's Federal Trade Commission (FTC) and Department of Justice (DOJ) engaged in relatively robust enforcement of the antitrust laws, including suing to block the proposed merger of AT&T/Time Warner, as well as bringing cases against Google and Meta (formerly Facebook) for alleged anticompetitive behavior. While we expect changes under the incoming Trump administration relative to the Biden administration, we anticipate that the second Trump administration is likely to continue the trend from his first term of fairly aggressively pursuing antitrust enforcement. That said, much will come into sharper focus with respect to enforcement priorities and velocity once new leadership is in place at the DOJ Antitrust Division and at the FTC.

TRENDS IN ENFORCEMENT: WHAT TO EXPECT?

- **More Mainstream Theories of Harm.** Under the Biden administration, both the FTC and DOJ have pursued aggressive enforcement of the antitrust laws, and they have, in particular, sought to block many potential mergers, often based on novel theories of harm. For example, the FTC pursued a fairly novel application of tying in its effort to block the Amgen/Horizon transaction. The Trump administration is likely to curtail significantly the deployment of novel theories of harm and hew more closely to more traditional theories of harm, as was the case in the first Trump term.
- **Potentially Slow FTC Changeover.**^[1] We may be in a bit of a waiting game for Trump to make his mark on the FTC. There is a reasonable possibility that the FTC will retain its Democratic majority during some portion of the Trump administration, and we would expect that this may slow the potential rollout of some aspects of the Trump administration's antitrust agenda.^[2] FTC Chair Lina Khan's term ended in September, but she is permitted to remain as a Commissioner until Trump appoints a new Commissioner to fill her role. That could take some time. For example, during Trump's first term, the FTC did not have a Republican majority of Commissioners until fifteen months after Trump was inaugurated.

¹ The current Commissioners are Lina Khan, Alvaro Bedoya, and Rebecca Slaughter (Democrat) and Melissa Holyoak and Andrew Ferguson (Republican).

² 15 U.S.C. § 41 states, in part, "Not more than three of the Commissioners shall be members of the same political party."

TRUMP 2.0 – BACK TO THE FUTURE?

- **Policy Priorities Impacting Enforcement and Scrutiny.** While we generally expect that the Trump administration will be somewhat less aggressive in its enforcement of the antitrust laws compared to the Biden administration overall, we expect that there will continue to be a focus on so-called “Big Tech” companies. The first Trump administration brought several high-profile lawsuits against Big Tech companies, including a suit against Meta for alleged dominance in the social media market and Google for alleged dominance in search. Vice President-elect Vance is a noted skeptic of Big Tech companies, and we would expect that this skepticism could be reflected in the administration’s antitrust enforcement priorities. In addition to a focus on Big Tech, we expect that the Trump administration will continue to focus on the healthcare sector, as well as on various consumer-facing industries. For example, we would expect transactions such as Kroger/Albertsons to continue to face scrutiny in the Trump administration, insofar as the deal allegedly could cause inflated consumer prices, as reducing inflation was a key pillar of Trump’s campaign. Certain industries and deals may also be subject to increased antitrust attention to the extent that President Trump personally focuses attention on them. How that will play out is highly uncertain.
- **Potential Easing of Scrutiny in Certain Industries Based on Policy Priorities.** By contrast to the potential for amplified scrutiny in some sectors, such as Big Tech, we expect that in the second Trump administration there will be a potential lessening of scrutiny in certain other sectors, potentially creating an enforcement atmosphere more conducive to mergers. For example, on the campaign trail Trump strongly advocated for increased oil and gas exploration, signaling that energy will remain a priority. This stands in potential contrast to the Biden administration, which scrutinized ExxonMobil’s acquisition of Pioneer and required specific behavioral remedies be put in place prior to approving the transaction.
- **A Return of “Fix it First.”** Under the Biden administration, the FTC and the DOJ adopted a hostile posture toward divestitures to cure competition concerns – colloquially known as “fix it first” efforts. In particular, the agencies have been deeply skeptical of divestitures to private equity funds. Under the Trump administration, we would expect a likely reversion to the historical norm of allowing behavioral remedies and divestitures as a means to obtain clearance and allay potential competition concerns.
- **Potential Rollback of Reforms.** In October 2024, the FTC finalized the new HSR form and in 2023 the DOJ and FTC jointly published new Merger Guidelines. Both of these reforms reflect heightened antitrust scrutiny and increased the potential antitrust challenges presented to merging parties. We expect that the Merger Guidelines may well be rescinded or redrafted under the Trump administration to more closely align with the incoming Trump administration’s enforcement priorities, including a likely focus on bigger deals. The HSR form is, however, less likely to be rescinded, as it was passed with bipartisan support with a unanimous vote at the FTC, and several of its most controversial provisions were already removed during the notice and comment period. Additionally, the new HSR form includes provisions related to foreign ownership and national security, which may provide a vehicle for scrutiny of foreign entanglements in a transaction – a feature that may potentially align with the Trump administration’s “America First” agenda.

CONTINUED

TRUMP 2.0 – BACK TO THE FUTURE?

This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.

■ **Changes to Consumer Protection and Non-Antitrust Statutory Authority.** Historically, the FTC has exercised significant consumer protection authority. This authority was used extensively under the Biden administration. For example, on October 16, 2024, the FTC adopted a new rule significantly increasing the scope of its rules with respect to negative options (i.e., the so-called “click-to-cancel” rules) which significantly simplified the ability for consumers to cancel online subscriptions, among other provisions.^[3] We expect that the FTC, once it receives a Republican majority, will likely pursue a rollback of substantive rulemaking with respect to consumer protection, as well as other non-antitrust areas of enforcement. We may also see a rollback of the 2022 expanded notion of what constitutes an “unfair method of competition” under Section 5(a)(1) of the FTC Act to the previous narrower standard.^[4] A related space to watch is the potential reintroduction of Republican efforts to strip the FTC of its competition authority.^[5] Although we would consider such an effort to be potentially unlikely, and even less likely to succeed in Congress, sustained dissatisfaction with the FTC’s exercise of its authority may cause the new Trump administration to take a fresh look.

■ **Closer Coordination with the States.** The Supreme Court decided in 2012 in AMG^[6] that the FTC lacks the ability to obtain restitution under the Section of the FTC Act it had utilized for decades.^[7] Although there is an alternative provision under the FTC Act^[8] that does permit the FTC to obtain restitution, it is a more cumbersome procedure with certain required preconditions. This state of affairs has incentivized the FTC in recent years to work more closely with state enforcers, because the state level analogs to the FTC Act generally permit restitutionary relief for consumers, and thus provide an alternative means of enforcement to supplement FTC authority. At least with respect to non-antitrust matters, such as traditional FTC consumer protection initiatives, we see no reason that the Trump administration would back away from such efforts. Returning money to consumers who have been harmed by allegedly unfair or deceptive business practices has always had bipartisan support.

Overall, we expect that the new Trump administration will continue to pursue aggressive antitrust enforcement, albeit with a likely return to more mainstream theories of harm and emphasis on challenging larger deals in certain industries. There will likely also be a continued focus upon several antitrust priorities from both the Biden and first Trump administrations, including a renewed emphasis on Big Tech.

Wiggin and Dana routinely advises clients in connection with the full range of antitrust matters, including potential transactions and representations before the FTC and DOJ.

³ See https://www.wiggin.com/wp-content/uploads/2024/10/WD24-Advisory-FTC-Has-Expanded-Scope-of-Negative-Option-Rule_v5.pdf.

⁴ In 2024, the FTC finalized a rule that substantially banned non-competes. This rule was later enjoined by a federal judge in Texas. We would expect to see similar skepticism from the Trump administration towards rules of this nature that were implemented under the Biden administration. See <https://www.wiggin.com/publication/federal-trade-commission-issuing-non-compete-clause-rule/> (discussing the issuance of the rule); <https://www.wiggin.com/publication/texas-court-strikes-down-ftcs-rule-banning-non-competition-covenants/> (discussing the enjoining of the rule in Texas).

⁵ Previous efforts were led by Senator Mike Lee (R-Utah). See e.g., <https://www.lee.senate.gov/2019/6/just-one-agency-should-enforce-antitrust-law>.

⁶ *AMG Capital Mgmt, LLC v. FTC*, 593 U.S. 67, 141 S. Ct. 1341, 209 L. Ed. 2d 361 (2021).

⁷ 15 U.S.C. § 53(b).

⁸ 15 U.S.C. § 57b.