

Antitrust Developments to Monitor Under the Next Trump Administration

December 4, 2024

In the coming months, the President-elect will appoint, and the Senate will confirm, a new Assistant Attorney General in charge of the Department of Justice (DOJ) Antitrust Division[1] and a new Commissioner to fill a slot at the Federal Trade Commission (FTC). (Current Chair Lina Khan's term as a Commissioner expired on September 25, 2024. By statute, she may remain a Commissioner until a replacement is confirmed.) The President-elect will also choose which FTC Commissioner will serve as Chair. Once these new leaders are in place, they will shape policies and navigate a range of issues that could mark significant shifts in direction for antitrust enforcement.

Premerger Notification Form. In June 2023, the FTC and DOJ published a draft revision to the Premerger Notification and Report Form for public comment, which contained significantly expanded filer obligations. The Commission comprised only Democrats at the time, as there were two open seats. Since then, two new Republican Commissioners have been confirmed. On October 10, 2024, the FTC and DOJ released a scaled-back final rule by a unanimous 5-0 vote.[2] Key new document and information requirements include transaction documents from the supervisor of each merging party's deal team; a description of each party's business lines describing areas of competition and any supply relationships between the firms; high-level business plans related to competition; a narrative description of the strategic rationales for the transaction; identification of additional investors in the buyer; and English translations of all documents.[3] The final rule eliminated several other requirements in the initial proposed rule, such as draft transaction documents and information related to labor markets. The rule is set to take effect on February 10, 2025, but may fall under a blanket regulatory freeze typically issued by each new administration, which could delay the date past February. As to the revised form's ultimate fate, both Republican Commissioners issued concurring statements criticizing the initial proposed rule but defending their support for the final rule, with Commissioner Ferguson concluding that it represents "a lawful improvement over the status quo."[4] The bipartisan approval of the new requirements suggests they will be implemented irrespective of the Commission's future composition.

Merger Guidelines. In December 2023, the FTC and DOJ released overhauled, comprehensive Merger Guidelines that set forth frameworks for analyzing whether mergers violate the antitrust laws.[5] The Guidelines analyze 11 types of merger fact patterns, some of which extend beyond theories the agencies have pursued in court in recent decades. Because the Commission comprised only three members at the time, all Democrats, the 2023 Guidelines do not represent a bipartisan consensus document. For that reason, recent history suggests they are vulnerable. For instance, the 2010 Horizontal Merger Guidelines issued under the Obama administration received a unanimous bipartisan 5-0 vote at the FTC and remained in effect for thirteen years. In contrast, the 2020 Vertical Merger Guidelines issued under the Trump administration only passed by a 3-2 vote over Democratic opposition. Just one year later, the FTC withdrew them under the Biden administration (via another 3-2 vote). That pattern does not guarantee that three Republican commissioners at the FTC will favor withdrawing the 2023 Guidelines, but Commissioner Holyoak has already signaled that she would consider that path. The next Attorney General would have the authority to withdraw the DOJ's approval of the 2023 Guidelines. If the Guidelines are withdrawn, it is unclear what will replace them and whether any new Guidelines will have bipartisan support.

Noncompete Rule. On April 23, 2024, the FTC issued a rule that would make noncompete clauses in employment contracts unenforceable for most workers.[6] The vote was 3-2, with Republican Commissioners Ferguson and Holyoak voting no. The rule was immediately challenged, and on August 20, 2024, a federal court in Texas issued an order stopping the FTC from enforcing the rule. The FTC has appealed that decision to the Fifth Circuit. If the Republican Commissioner who is named as the next Chair opposes the rule, they may direct the agency to abandon the appeal, leaving the blanket ban set aside. The FTC still retains the ability to address noncompetes through case-by-case enforcement actions.

Section 5 Statement. Section 5 of the FTC Act prohibits "unfair methods of competition in or affecting commerce."[7] The scope of practices that the statute proscribes has been the subject of longstanding debate. In November 2022, the FTC issued a policy statement broadly interpreting Section 5 to cover conduct that "may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature … [or] otherwise restrictive or exclusionary, depending on the circumstances."[8] The statement further identifies historical examples of conduct that constitutes an incipient violation of the antitrust laws or that violates the spirit of the antitrust laws, which, per the policy statement, would also violate Section 5. The statement passed by a 3-1 party-line vote with only Democratic support. An upcoming Commission with a Republican majority may consider withdrawing the 2022 Section 5 statement.

Structural Remedies. The Biden administration has shown a preference for seeking to block mergers outright versus accepting consent decrees containing divestiture remedies. In particular, the

DOJ has not accepted any upfront divestiture to avert merger litigation since Jonathan Kanter began as Assistant Attorney General for the Antitrust Division in November 2021. In some cases, the FTC has continued to accept structural fixes through consent decrees but has included a "prior approval" provision requiring parties to seek the agency's approval for future acquisitions in relevant markets where the FTC alleges harm. Under the incoming Trump administration, the antitrust agencies may be more open to approving transactions via consent decrees that implement well-designed structural fixes to address potential harms.

Serial Acquisitions. Under the current administration, the enforcement agencies have made identifying serial acquisition strategies and scrutinizing transactions involving private equity a policy focus, particularly in health care markets. In March 2024, the FTC and DOJ, together with the Department of Health and Human Services, launched a cross-government inquiry to identify transactions by private equity firms and other corporations that "may increase consolidation and generate profits for firms while threatening patients' health, workers' safety, quality of care, and affordable health care for patients and taxpayers."[9] Then, in May 2024, the FTC and DOJ issued a public request for information to identify serial acquisitions and roll-up strategies more broadly across the economy.[10] In the last several years, the FTC has required divestitures and prior notice to settle investigations involving serial acquisitions of veterinary clinics and dialysis clinics, both of which had the unanimous bipartisan support of Commissioners. The FTC is also currently in court challenging a roll-up involving anesthesiology practices.[11] The next administration may not pursue policy initiatives specifically targeting serial acquisitions and private equity. Still, staff and agency heads may continue to scrutinize such transactions when investigations reveal competitive concerns resulting from serial acquisition strategies.

Big Tech. The antitrust agencies are currently pressing monopolization cases in federal court against several major technology companies. Notably, it was the Trump administration that initially filed some of these cases. The Biden administration continued to litigate those previously filed cases and filed additional cases against other large tech companies. President-elect Trump has indicated that his next administration will continue an aggressive posture vis-à-vis Big Tech.

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1 On December 4, 2024, President-elect Trump named Gail Slater to head the Antitrust Division. Ms. Slater is a former FTC attorney who served as a National Economic Council advisor for President Trump and as an advisor to Vice-President-elect J.D. Vance.

2 FTC press release, "FTC Finalizes Changes to Premerger Notification Form," (Oct. 10, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/10/ftc-finalizes-changes-premerger-notification-form.

3 See Katten's advisory, "Premerger Filing Requirements Under Hart-Scott-Rodino Set to Expand Significantly," (Oct. 14, 2024).

4 Concurring Statement of Comm'r Andrew N. Ferguson, In the Matter of Amendments to the Premerger Notification and Report Form and Instructions, and the Hart-Scott-Rodino Rule 16 C.F.R. Parts 801 and 803, File No. P239300, (Oct. 10, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-final-hsr-rule-statement.pdf; Statement of Comm'r Melissa Holyoak, Final Premerger Notification Form and the Hart-Scott-Rodino Rules, File No. P239300, (Oct. 10, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-hsr-rule-statement.pdf.

5 U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines, (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

6 FTC press release, "FTC Announces Rule Banning Noncompetes," (Apr. 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes.

7 15 U.S.C. § 45(a)(1).

8 FTC, "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act at 9, File No. P221202," (November 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

9 FTC press release, "Federal Trade Commission, the Department of Justice and the Department of Health and Human Services Launch Cross-Government Inquiry on Impact of Corporate Greed in Health Care," (Mar. 5, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/03/federal-trade-commission-department-justice-department-health-human-services-launch-cross-government.

10 FTC press release, "FTC and DOJ Seek Info on Serial Acquisitions, Roll-Up Strategies Across U.S. Economy," (May 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/05/ftc-doj-seek-info-serial-acquisitions-roll-strategies-across-us-economy.

11 *Federal Trade Commission v. U.S. Anesthesia Partners, Inc.*, 2024 WL 2137649, No. 4:23-cv-03560 (S.D. Tex. May 13, 2024) (denying USAP's motion to dismiss but granting non-controlling investor's motion to dismiss).

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