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Antitrust Enforcement in Trump's Second Term: Policy Changes, Enforcement Priorities, and Leadership Turnover

The return of Donald Trump to the U.S. presidency raises important questions about what to expect from antitrust agencies over the next four years and what a Republican FTC and DOJ will prioritize in Trump's second term. During the Biden Administration, FTC Chair Lina Khan expanded enforcement, applying creative theories of harm, bringing hard-to-win cases, and attempting to make more lasting changes via new guidelines, rules and policy statements. Chair Khan's FTC and Jonathan Kanter's DOJ took aggressive stances across sectors, particularly technology and healthcare, and against private equity. Trump's first term, too, departed from conservative norms in its tech challenges. However, a Republican-led FTC will likely roll back many of Chair Khan's initiatives, such as the FTC's Section 5 statement on unfair competition and the non-compete rulemaking. It is also likely that the 2023 DOJ and FTC merger guidelines could be abandoned or altered. Yet, ambiguities exist regarding the role of J.D. Vance in antitrust enforcement, as he has signaled support for some of Chair Khan's policies and actions, and the uncertain influence of Elon Musk in Trump's inner circle. Regardless, change should be expected and businesses can likely expect a more merger-friendly regime to assume power in January, and a return to traditional theories of harm focused less on market structure and more on consumer impact and prices, an issue close to public concern.

1. Expect Significant Policy Changes, and Likely Bid Farewell to the Non-Compete Rule and Section 5 Statement.

Policy changes should be expected in Trump's second term, and significant changes seem likely to be swift, particularly at DOJ. Change may be slower to come at the FTC, where the Republicans will not gain a majority until a new Commissioner is confirmed, even though the Chair position will likely be turned over immediately to one of the two sitting Republican Commissioners. It is therefore likely that the Democratic majority will persist—or the Commission will be split—until later in 2025 when a new Commissioner is confirmed to fill Lina Khan's seat.

- ***2023 FTC and DOJ Merger Guidelines to Change, Eventually***

  The DOJ and FTC under Trump seems poised to rescind or significantly revise the 2023 Merger Guidelines, to make room for more business-friendly provisions supporting mergers and acquisitions. However, given the Trump team's more complicated views of some sectors like tech, healthcare and pharmaceuticals, we are hesitant to say that enforcement in those sectors will decline markedly. In terms of how the Merger Guidelines could change, they could be rescinded completely in favor of the versions they replaced, or there may just replace the most controversial aspects, like the treatment of vertical mergers, which could revert to the 2019 Vertical Merger Guidelines issued by the first Trump administration. The lower HHI concentration and 30% "leading firm" thresholds for presumptive competitive concerns are also candidates to be revisited. While a new FTC Chair could direct the agency not to rely on the 2023 Merger Guidelines, any formal changes to the Guidelines would have to wait until a new majority is formed, as the Democrats are unlikely to acquiesce to changes before then.

- ***HSR Rules Expected to Change***

  New, more expansive reporting requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") are expected to become effective February 10, 2025. This is one area where we largely expect business as usual. While the FTC could vote to revoke the rule, this would be an unlikely about-face given unanimous vote across the Democratic and Republican Commissioners in favor of the rule, and the compromises made to make the rule less burdensome for filing parties than originally proposed. The next Congress will have an opportunity to review the rule, and could potentially submit a joint resolution, which if not otherwise vetoed by the President could render the rule ineffective in its entirety. However, it is not clear that this is a high priority for the new administration.

- ***FTC Likely to Retract or Limit Section 5 Policy Statement***

  Both Republican FTC commissioners, Commissioner Christine Wilson and Noah Phillips, voted against the FTC's broad interpretation of Section 5 in 2021 and again in 2022. The Section 5 policy statement in 2022 stated an intention to move beyond current antitrust laws to pursue other potential "unfair methods of competition" and affirmatively advocated that the FTC does not need to show market power or actual harm to pursue cases under Section 5. Republicans have opposed the statement, with then-Commissioners Wilson and Phillips dissenting and claiming that it creates a lack of clarity for businesses and signals a potential overreach of regulatory power. So, it is likely that a Republican led FTC would retract the statement, when possible, restoring Section 5 policy to the narrower view articulated in the 2015 statement.

- ***FTC Unlikely to Continue Appeal to Save Non-Compete Ban***

  In April 2024, the FTC, along party lines, voted in favor of banning non-compete agreements, with some limited exceptions. In August, the rule was set aside by a Trump-appointed Judge and the current FTC has appealed. Republicans have historically viewed bans on non-competes as contrary to business interests and would be expected to view federal regulation on this point to overstep governmental authority. The US Chamber of Commerce opposed the rule, and it is widely opposed by Republicans. It is, though, worth noting that some prominent Republicans in Trump's orbit, such as Representative Matt Gaetz, Trump's nominee for Attorney General, have signaled support for the ban. Nevertheless, we think that the most likely outcome is that a Trump administration would abandon the appeal.

2. Expect a Continued Focus on the Tech Sector, Lengthy Merger Investigations, and a Willingness to Litigate Horizontal Mergers.

While President-elect Trump has yet to articulate a specific antitrust enforcement agenda for his second term, his administration will likely feature a continued focus on Big Tech and healthcare and pharmaceuticals, lengthy merger investigations, and a willingness to litigate horizontal mergers.

Though a second Trump term will likely have more pro-business features than the first Trump and Biden administrations, certain heightened enforcement trends seen in the latter half of the first Trump administration may continue. For example, we expect the FTC and DOJ to maintain a heightened focus on Big Tech. However, there also will likely be a shift away from pursuing the novel antitrust theories of harm brought by Khan and Kanter over the past four years.

- ***Hostility Toward Big Tech***

  A second Trump administration may not approach Big Tech as a monolith and rather address companies on a case-by-case basis, which would reflect a departure from the Biden administration's emphasis on taking aggressive positions across the tech sector. For example, then-Candidate Trump expressed skepticism in October 2024 over breaking up Google via antitrust enforcement, citing China's competition with Google. On the other hand, Trump-ally and potential advisor Elon Musk sued OpenAI in both March and August 2024, alleging breach of contract as OpenAI shifted towards a relationship with Microsoft. Though not an antitrust lawsuit, the role of Musk is unclear and his influence may signal increased scrutiny of the AI industry, with antitrust being a tool to pursue this scrutiny. In general, a Republican-led FTC will likely maintain a focus on Big Tech albeit with less fervor than the Biden administration.

- ***Lengthy Merger Investigations***

  Lengthy merger investigations are likely to continue. Both the first Trump and Biden administrations saw an increase in the length of merger investigations. In general, deals that garner regulatory scrutiny will continue to require significant lengths of review, even if Trump has otherwise signaled a deregulatory focus for his second term. With overall deal volume being expected to grow during Trump's second term, agencies may pursue proportionally fewer lengthy merger reviews than the Biden administration, but scrutinized mergers will continue to see lengthy reviews. As discussed below, it is also possible that Trump's "America first" agenda will also include paying closer attention to potential acquisitions of U.S. companies by foreign companies, and using antitrust as a tool to strengthen this policy focus. However, this may just be campaign signaling and may not amount to any significant change in focus.

- ***Willingness to Litigate Horizontal Mergers***

  Antitrust enforcers in Trump's second term will likely be more willing to litigate horizontal mergers than vertical mergers that have been a particular feature of the Kanter-Khan enforcement agenda. Towards the end of the first Trump administration, Republican-led agencies brought several high-profile horizontal merger cases, a trend that we expect will likely continue in a second term. And vertical enforcement is unlikely to be off the table completely, as the first Trump administration brought the AT&T/Time Warner case and the Illumina/Grail challenge was supported by both Republican FTC Commissioners.

- ***Uncertain Impact from Vice-President Elect J.D. Vance and Trump-Ally Elon Musk***

  The roles of J.D. Vance and Elon Musk are a bit of a wildcard for antitrust policy and enforcement priorities in Trump's second term. Vice President-elect Vance has signaled support for Chair Khan in the past, and may reflect a new Republican view more hostile to business interests than previous Republican leaders and more concerned with perceived issues of corporate power.

Vance's views may diverge from the views held by many of his Republican colleagues, as evidenced by the October 31, 2024 report from the House Committee on Oversight and Accountability that accused Chair Khan of undermining the FTC's mission. Elon Musk, differing from Vance, has expressed opposition to Chair Khan – posting on X, formerly Twitter, on October 31, 2024, that Chair Khan would be fired soon.

- ***More willingness to pursue behavioral remedies***

  A second Trump term will likely see less hostility to merger settlements and even a return of so-called behavioral remedies in some cases (e.g., firewalls or commitments not to foreclose competitors from access to key products). The DOJ and FTC under the Biden Administration have been reluctant to settle case that have anticompetitive effects, and those that were settled generally required divestitures and additional onerous terms like "prior approval" obligations that require companies to seek regulatory approval for future, non-reportable deals. One of the early tests will be in DOJ's Google cases, where a breakup remedy has been floated. President-elect Trump has voiced concerns about breaking up companies like Google, suggesting that there may be a greater appetite for behavioral remedies. Coupled with a broader philosophical antipathy towards the "administrative state," the FTC and DOJ during Trump's second term may more willing to settle on behavioral remedies to address competitive harms.

3. With an 'America First' Agenda, Expect Less Cooperation with International Enforcers and a Greater Focus on Foreign Acquisitions of US Companies.

During the Biden administration, there has been significant alignment between antitrust regulators in the US, UK, and EU, as each has largely shared a willingness to pursue novel theories of harm. With leadership changes both in the US and EU, it is possible a greater divergence in enforcement may emerge. It is therefore possible that with less cover from a Republican-led DOJ and FTC, the CMA may be less likely to block deals on tenuous theories, as it did during the Biden administration in unwinding Meta's acquisition of Giphy.

4. Key Takeaways

- The more expansive reporting requirements under the HSR Act are likely to go into effect and while the next Congress could reconsider the changes, it is not clear this is a high priority for the next administration.
- The Trump administration will be unlikely to continue the FTC's challenge to save the non-compete rule.
- Following Khan's departure, expect the Section 5 policy statement to be withdrawn and the 2023 merger guidelines to be overhauled or revised.
- Scrutiny of big tech, healthcare and pharmaceutical companies will likely continue, although it is less likely that Trump's second term will continue the novel theories of harm advanced by the Biden administration's antitrust agencies.
- President-elect Trump's reluctance towards breaking up Google suggests less reliance on structural remedies than seen in the Biden Administration.

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