November 11, 2024

Potential Merger Enforcement Changes in the Trump Administration

With the change of administrations in January 2025, antitrust enforcement priorities are likely to shift next year. We expect the Antitrust Division of the Department of Justice (DOJ) and Federal Trade Commission (FTC) in the Trump Administration to continue to enforce the antitrust laws aggressively, while de-emphasizing some of the more novel antitrust theories pursued by the Biden DOJ and FTC, marking a return to a more traditional antitrust analysis. We anticipate that the DOJ and FTC will continue to closely investigate horizontal consolidations, but will be more likely to approve vertical transactions and less likely to focus on theories such as potential harm to labor markets.

We expect the following changes in the incoming Trump Administration:

- Curtailment or revision of the 2023 Merger Guidelines, which represented a significant departure from previous agency guidelines and set forth an expansive framework for merger enforcement
- Less burdensome and more focused Second Requests, likely resulting in shorter investigations
- Greater willingness to accept structural remedies (i.e., divestitures) in lieu of litigating merger challenges
- A return to only limited use of "prior approval" provisions in FTC consent decrees, meaning that parties that become subject to decrees would normally only need to notify the FTC of certain future transactions rather than receive the FTC's permission to engage in such transactions
- Less emphasis on proactively investigating interlocking directorates

Agency Leadership

The next Assistant Attorney General (AAG) of the Antitrust Division of the DOJ and the next Chairman of the FTC have not yet been publicly announced. Regardless of who takes over leadership of the agencies, we expect continued aggressive enforcement of the antitrust laws.

The Antitrust Division is run by an AAG who is nominated by the President and confirmed by the Senate, a process that historically has taken between two to 10 months following the inauguration. Given Republican control of the Senate, we expect new leadership could be in place by the Spring of 2025. In the interim, an Acting AAG will be appointed by the incoming administration at some point after Inauguration Day to run the Antitrust Division until the Senate confirms the President's nominee.

The FTC has five Commissioners who are nominated by the President and confirmed by the Senate for staggered seven-year terms. A maximum of three can be from the same political party. The President designates one Commissioner as Chairman. The Chairman sets the strategic policy and enforcement goals of the FTC and is responsible for running the agency on a day-to-day basis. Chair Lina M. Khan's term expired in September but she can remain as a Commissioner until a successor receives Senate

confirmation, which we expect will happen by around April 2025. After Inauguration Day, we expect one of the sitting Republican Commissioners would be designated as Acting Chair pending confirmation of a third Republican Commissioner. The upshot is that until a new Republican Commissioner is confirmed or one of the Democratic Commissioners resigns, for the foreseeable future, we expect continued aggressive enforcement by the FTC as the three sitting Democratic Commissioners will continue to have the ability to vote to clear or block transactions.

Substantive and Procedural Aspects of Merger Enforcement

Biden-Era Merger Guidelines May be Withdrawn or Curtailed

In line with Republican Commissioners' statements, we expect the FTC and DOJ to withdraw or curtail the 2023 Merger Guidelines. The guidelines are intended to set forth the framework that the agencies follow when reviewing transactions. The current guidelines represent a stark departure from prior enforcement principles and reflect the Biden Administration's aggressive antitrust enforcement agenda by significantly lowering the thresholds at which the agencies presume a merger to be illegal and by introducing novel and untested legal theories they might use as a basis to challenge a merger.

We expect the new administration to modify the guidelines with regard to several issues:

- **Structural emphasis.** According to the 2023 Guidelines, the agencies presume that mergers that result in a combined share of 30% or more in a relevant market are illegal. Prior administrations considered such concentration statistics relevant, but not dispositive. We believe that the agencies in the new administration will deemphasize the structural presumptions set forth in the 2023 Guidelines and return to a mode of analysis that requires the agencies to conduct a fact-based assessment to determine whether the effect of a merger "may be substantially to lessen competition." Additionally, we expect the new administration will rely more on economic analysis in considering whether a transaction raises competitive concerns. The 2023 Guidelines minimized the importance of economic analysis in merger review.

- **Vertical mergers.** The 2023 Merger Guidelines, in another significant departure from prior agency guidance, do not credit vertical mergers as presumptively pro-competitive and discount the importance of efficiencies stemming from vertical mergers, such as the elimination of double marginalization. We expect the new administration will restore the presumption that vertical mergers are pro-competitive.

- **Labor issues.** The 2023 Guidelines emphasize that the agencies consider potential harm to labor markets when analyzing whether transactions raise competitive concerns. We expect the next administration will deemphasize this issue, and focus on potential labor market harm when a merger combines two entities that employ a significant percentage of uniquely-skilled workers who are not otherwise available on the market to competitors.

New and Expansive HSR Form Rules Have Staying Power

Last month, the FTC issued changes to rules under the Hart-Scott-Rodino (HSR) Act that will overhaul premerger notification filing requirements. The new requirements are set to become effective on February 10, 2025, and are expected to substantially increase the burden, time and expense required to complete HSR notifications for all filers—and in particular private equity buyers. The Commission vote to issue the rules was 5-0 and we expect the rules will remain in place even with a change of administration, although FTC informal guidance interpreting their application might take a more pragmatic approach than under the Biden Administration. The new rules might face legal challenges that could delay their implementation; though as far as we are aware, no challenge has been filed to date.

In exchange for agreeing to vote for the new rules, the Republican Commissioners required the HSR waiting period early termination regime (which had been "temporarily" suspended in February 2021) to be reinstated. We expect that the FTC will reinstitute early termination in February 2025 when the new HSR rules are set to go into effect and we believe that the agencies will begin regularly granting early termination again for transactions that clearly raise no competitive concerns. It remains to be seen whether the FTC will grant early terminations at the frequency it did prior to the 2021 suspension.

Less Burdensome Second Request Compliance Obligations
Second Requests themselves may become less onerous. Under the Biden Administration, the agencies added nonstandard specifications and implemented process changes to an already burdensome process. By contrast, a goal of the prior Trump-era Antitrust Division was to reduce the burden on parties receiving Second Requests by implementing several reforms to presumptively limit the volume of documents and number of depositions, with an aim to complete Second Request investigations within six months. This was driven by an observation by the then-head of the Antitrust Division that "[d]elay is a form of uncertainty and risk, [which the agency] should seek to remove . . . from the merger-review process whenever possible."

Fewer Litigation Challenges to Mergers and More Merger Settlements Expected
The number of merger challenges litigated in federal courts or in administrative proceedings at the FTC will likely drop, in part as a result of a greater willingness to resolve cases with divestitures.

Traditionally—and during the prior Trump Administration—the agencies have accepted structural remedies (i.e., divestitures of assets or business units) to address competition concerns. Under the Biden Administration, however, ideology and resources were focused on litigating rather than settling cases and there are scant examples of the DOJ or FTC agreeing to any consent decrees in the past four years. This approach also led to more signed deals being abandoned in the face of protracted review and potential litigation: 20 deals were abandoned under Biden versus six under the prior Trump Administration.

The next administration will likely be more amenable to settling complex merger investigations than the current one, and is less likely to cultivate an enforcement regime that will compel parties to abandon transactions at the pace we observed during the Biden Administration. In addition, the next administration may reinstate the DOJ Merger Remedies Manual that was revised under the prior Trump Administration.

More Favorable View of Vertical Mergers
While the DOJ in the Trump Administration brought the first vertical merger challenge in federal district court in roughly 40 years, ultimately losing at the District Court and Court of Appeals, overall the Trump Administration viewed vertical mergers more favorably than the Biden Administration has. Under Biden, the FTC aggressively pursued challenges to vertical transactions, including suing to block Illumina's acquisition of Grail, and Microsoft's acquisition of Activision. This approach to vertical transactions—and the wider policy of pursuing expansive theories of harm—have been met with mixed reception by federal courts, who ultimately adjudicate merger challenges. (The FTC lost the Microsoft case and has appealed.) We expect the new Trump Administration to have a greater willingness to recognize the economic efficiencies that a vertical merger can bring.

Private Equity Likely to be Viewed Less Skeptically
The Biden Administration has approached private equity with skepticism, increasing scrutiny of so-called serial acquisitions and expressing skepticism about the fitness of private equity-funded divestiture buyers. The next administration is likely to take a less suspicious approach towards private equity and focus enforcement only on transactions that potentially raise issues under traditional theories of harm, whether or not they are conducted by financial or strategic buyers. Indeed, the DOJ Merger Remedies Manual under the prior Trump Administration generally treated strategic and financial buyers neutrally, and in some cases even indicated a preference for private equity buyers, stating that "in some cases funding from private equity and other investment firms [is] important to the success of the remedy because the purchaser [has] flexibility in investment strategy, [is] committed to the divestiture, and [is] willing to invest more when necessary."

Return to Limited Use of Prior Approval Provisions in FTC Consent Orders
Prior approval provisions in FTC orders require parties to obtain FTC permission before entering into transactions covered by the provision. For decades, the FTC limited the use of these provisions to narrow situations where it believed that parties to mergers the FTC found to be anticompetitive would "attempt the same or approximately the same merger" with "essentially the same relevant assets." In 2021, the FTC announced that it would expand the use of prior approval provisions to include any future transactions involving the same relevant market; any re-sale of assets acquired by a divestiture purchaser as part of a merger remedy; and, in certain circumstances, future transactions involving different relevant markets. This prior approval regime is

separate from the requirement to notify a transaction under the HSR Act and is not subject to the same statutory controls over timeline or process. In practice, merging parties operating under consent decrees could face indefinite, lengthy reviews and uncertainty. We expect the FTC in the Trump Administration to return to only limited use of prior approval provisions and instead require only prior notice for covered transactions.

Active Enforcement of Interlocking Directorates Likely to be Deprioritized

The DOJ and FTC under the Biden Administration have dedicated significant resources to enforcement of Section 8 of the Clayton Act, which prohibits interlocking directorates. The agencies under the Biden Administration have taken a more aggressive stance toward Section 8 enforcement by actively looking for potential interlocks and requiring resignations to cure purported violations. We anticipate that the incoming administration may dedicate fewer resources to investigations broadly searching for potential Section 8 violations, though we note that the new HSR rules require significant disclosures from directors and officers meant to identify potential Section 8 concerns.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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