

January 24, 2025

Update on Transition at the U.S. Antitrust Agencies

- In the last few weeks, the Antitrust Division of the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) engaged in what is likely an unprecedented level of end-of-term activity.
- On Monday afternoon, the Trump administration began governing with a series of executive actions that have started to shape antitrust enforcement going forward.

Antitrust Enforcement at the Beginning of the Trump Administration

As of January 20, 2025, both the FTC and DOJ are under new leadership.

Department of Justice

The President [directed](#) that James McHenry, a career DOJ immigration lawyer, “perform the functions and duties of the [Attorney General] in an acting capacity until the position is filled by appointment.”

Last week a Senate committee held a hearing on the nomination of Pam Bondi to be Attorney General. A committee vote is expected next week, with a floor vote in the Senate likely soon after. Asked at her hearing about whether she would continue to prosecute the DOJ’s pending monopolization cases, Ms. Bondi testified that she has not “looked at those [cases] on a case-by-case basis, but [is] committed to that type of case and [to] protecting consumers.” She added that she “will look at” those cases along with Antitrust Division officials “right away” and at several points praised Abigail Slater, the nominee to head the Division.

The President formally [nominated](#) Ms. Slater to lead the Antitrust Division on Monday. Over the last 20 years, the time from nomination to confirmation for the Assistant Attorney General for Antitrust has ranged from less than two months to nearly 11 months. A reasonable estimate based on the central tendency of historical data from the last 20 years is that Ms. Slater’s confirmation process could take approximately five months. However, we expect that given Ms. Slater’s apparent widespread support, the time from her nomination to confirmation will likely be shorter.

In the meantime, Omeed Assefi, who joined the Antitrust Division as a criminal prosecutor sometime last year, has [reportedly](#) been named to serve as acting assistant attorney general. Mr. Assefi was previously an assistant United States attorney in the District of Columbia and served in the White House and at the DOJ Civil Rights Division during the first Trump administration.

Federal Trade Commission

President Trump [designated](#) Commissioner Andrew Ferguson to be Chairman of the FTC on January 20. It is the Chairman’s prerogative, subject to the approval of the Commission, to appoint bureau directors and he has appointed Susan Musser to be Acting Director of the Bureau of Competition. Ms. Musser is Chief Trial Counsel in the bureau and has been at the FTC since 2020. Prior to that, she was in private practice and was a Trial Attorney at the DOJ.

According to a January 24 [report](#) by Leah Nysten and Josh Sisco for Bloomberg Law, Chairman Ferguson has chosen Daniel Guarnera to be Director of the FTC Bureau of Competition. Mr. Guarnera currently is the Section Chief of the Civil Conduct Task Force in the Antitrust Division of the DOJ. In this role his focus is on civil non-merger matters, including the DOJ's tech monopolization matters. (Coincidentally Chairman Ferguson was also involved in one of these cases in his prior role as Solicitor General of the Commonwealth of Virginia, which joined with the DOJ and other state attorneys general in bringing the lawsuit.) Prior to the civil task force, Mr. Guarnera was counsel to former Assistant Attorney General Makan Delrahim, who led the Antitrust Division in the first Trump administration.

The President formally [nominated](#) Mark Meador to be a commissioner of the FTC. Over the past 20 years, the time from nomination to confirmation of an FTC commissioner has ranged from several weeks to over a year. A reasonable estimate based on the central tendency of historical data is that Mr. Meador's confirmation process will take approximately three and a half to four months.

Commissioner Khan announced that she will leave the FTC "by January 31." Until then, the Democrats will maintain a voting majority. After her departure, there will be a period of time when the Commission has the potential to deadlock, with two Republican commissioners and two Democratic commissioners. This could, in certain instances, prevent the FTC from accepting a consent order settlement, for example—at least for as long as the deadlock persists.

A [press release](#) issued by the FTC on January 22 stated that "Chairman Ferguson has taken [several] actions to protect the FTC's employees and the American people from DEI," including closing the FTC's Office of Workplace Inclusivity and Opportunity and placing "all employees within that office on administrative leave." According to another [press release](#): "The Federal Trade Commission approved a motion to give Chairman Andrew N. Ferguson authority needed to comply with President Trump's executive orders ending DEI across the federal government." The vote to approve was 2-1-2, with Commissioner Bedoya voting no and Commissioners Slaughter and Khan not participating.

Executive Actions

Executive Order on Ending the Weaponization of the Federal Government. The President has [directed](#) that insofar as it is consistent with applicable law and "subject to the availability of appropriations," the "Attorney General, in consultation with the" Chairman of the FTC, "shall take appropriate action to review the activities of . . . the Federal Trade Commission, over the last 4 years and identify any instances where [the FTC's] conduct appears to have been contrary to the purposes and policies of this order, and prepare a report to be submitted to the President . . . with recommendations for appropriate remedial actions to be taken to fulfill the purposes and policies of this order."

The "purposes and policies" of the order relate to ending the alleged "weaponization of government," i.e., actions that "appear oriented more toward inflicting political pain than toward pursuing actual justice or legitimate governmental objectives."

Memorandum on Regulatory Freeze Pending Review. The President has also [ordered](#) all executive departments and agencies to, among other things, "consider postponing for 60 days from the date of this memorandum the effective date for any rules that have been published in the *Federal Register* . . . for the purpose of reviewing any questions of fact, law, and policy that the rules may raise" insofar as this is "consistent with applicable law." It remains to be seen whether this directive will have any effect on the pending HSR rules, which have been published and are set to become effective on February 10, 2025, unless postponed. It also remains to be seen whether the FTC under Chairman Ferguson will postpone the effective date of the new HSR rules under section 705 of the Administrative Procedure Act while a [legal challenge](#) seeking to set aside the rules is pending.

Executive Order on Initial Rescissions of Harmful Executive Orders and Actions. The President also issued an executive [order](#) rescinding a lengthy list of prior executive orders. President Biden's Executive [Order](#) on Promoting Competition in the American Economy was *not* included.

Actions Taken at the End of the Biden Administration

The antitrust agencies engaged in a flurry of activity at the end of the Biden administration. Some of these actions, such as concluding open enforcement matters, are fairly characterized as routine law enforcement activity. However, the agencies also commenced several enforcement actions in court and issued policy guidance within days of the transfer of responsibility for antitrust enforcement.

Resolution of Matters on Consent

- *Gun Jumping Complaint.* On January 7, 2025, the DOJ [obtained](#) a record \$5.6 million civil penalty from oil companies accused of violating pre-merger “gun-jumping” prohibitions. The DOJ alleged that interim operating covenants in the purchase agreement giving the buyer approval rights on expenditures over \$250,000 had the effect of giving the buyer control over certain ordinary course business decisions. According to the DOJ, this and other instances of pre-merger coordination between the buyer and target allowed the buyer to obtain beneficial ownership of the target company’s business before the expiration waiting period required by the HSR Act.
- *Merger Challenge.* On January 17, 2025, the FTC alleged that a private equity firm was involved in “anticompetitive acquisitions to suppress competition and drive up prices for anesthesiology services across Texas.” In a [settlement](#) announced at the same time, the firm agreed to limit its ownership of the portfolio company, reduce its board representation to one seat and to notify the FTC of and obtain prior approval for certain future transactions. The FTC characterized this as an “antitrust roll-up scheme case” in line with the 2023 Merger Guidelines. Then-Commissioner (now Chairman) Andrew Ferguson took issue with this characterization, explaining in a concurring [statement](#) joined by Commissioner Holyoak that the Clayton Act does not prohibit roll-ups, it prohibits anticompetitive “acqui[sitions]’ . . . which is what the complaint here alleged.”
- *Criminal Matters.* In addition, the DOJ in recent days announced several guilty pleas in connection with [information technology](#), [commercial roofing](#) and [asphalt](#) bid rigging conspiracies.

New enforcement actions in active litigation

In the weeks leading up to January 20, the DOJ initiated three new enforcement actions:

- *Section 1 Conduct Complaint.* On January 7, 2025, DOJ [sued](#) six landlords for violating section 1 of Sherman Act by allegedly participating in an “algorithmic pricing scheme” involving the sharing of competitively sensitive information. The new defendants were added in an amended complaint filed in a civil enforcement action that has been pending in the Middle District of North Carolina since August 23, 2024.
- *Merger Challenge.* On January 10, 2025, DOJ sued to enjoin the acquisition of CWT Holdings by Amex Global Business Travel Group.
- *HSR Enforcement Action.* On January 14, 2025, the DOJ sued a private equity firm for alleged HSR Act violations.

The FTC initiated two new enforcement actions:

- *FTC Section 2 Conduct Action.* On January 15, 2025, the FTC [sued](#) Deere & Company in federal court for violating section 2 of the Sherman Act by illegally monopolizing an alleged market for “restricted repairs for Deere Large Tractors and Combines” and violating section 5 of the FTC Act by illegally leveraging its alleged monopoly power in a market for “Fully Functional Repair Tools to harm competitive conditions in the market for restricted repairs for Deere Large Tractors and Combines.” According to the dissenting commissioners’ statement, the defendant and FTC staff were in “active negotiations over a fix” to resolve the matter on consent.

- *Another Robinson-Patman Act Enforcement Action.* On January 17, 2025, the FTC sued PepsiCo for violating the Robinson Patman Act. The vote was 3-2. [According](#) to the FTC, PepsiCo “has engaged in illegal price discrimination by providing one customer—a large, big box retailer—with unfair pricing advantages, while raising prices for competing retailers and customers.” The two Republican dissenting commissioners argued that the complaint is unsupported by facts and questioned the timing. Commissioner Holyoak [wrote](#) that this is “the worst case I have seen in my time at the Commission.” The complaint, she said, is “wholly deficient,” “fail[s] to state a claim” and was “rushed . . . out the door” without “evidence to support the allegations.” Chairman Ferguson’s [statement](#) was similarly critical.

Under the Federal Rules of Civil Procedure, a plaintiff may voluntarily dismiss an action by filing a notice of dismissal at any time before the answer or a motion for summary judgment is filed by the defendant or at any time by filing “a stipulation of dismissal signed by all parties who have appeared.” This raises the possibility that the new agency leadership could direct agency lawyers to dismiss any of these complaints or to reach a settlement with defendants. We know nothing of incoming DOJ officials’ views on the strength of any of the DOJ complaints. However, the strong dissenting statements of Chairman Ferguson and Commissioner Holyoak in the FTC’s PepsiCo matter suggest that, if there were a third vote, the Commission might agree to dismiss the action or perhaps agree to a settlement. As a general matter, while settlement of antitrust matters was disfavored—especially at the DOJ—during the prior administration, it may be that new majority will be more amenable to compromise.

Issuance of Guidance Documents on Labor Antitrust Issues

Throughout the Biden administration, the DOJ and FTC withdrew antitrust guidance documents and policy statements that, in many cases, antitrust counsellors had referenced for years, on topics such as: unfair methods of competition enforcement (later replaced), vertical mergers (later replaced), bank mergers, standards-essential patents, collaboration with competitors and information sharing. It was somewhat surprising, then, to see the agencies issue three guidance and policy documents. All three relate to labor issues.

FTC Enforcement Policy Statement on Exemption of Protected Labor Activity by Workers from Antitrust Liability. On January 14, 2025, the FTC also issued a rather lengthy enforcement policy [statement](#) on gig workers and the antitrust labor exemption. The statement concludes that “the Commission [at the time the statement was issued] believes that workers who provide labor services are not subject to antitrust liability when engaging in protected collective action—such as seeking better compensation and job conditions—even if the firm whose labor practices the workers seek to improve classifies (or misclassifies) them as independent contractors.” The FTC vote to approve the guidance was 3-2, with the Republican commissioners voting no.

DOJ and OSHA Statement on Non-Disclosure Agreements That Deter Reporting of Antitrust Crimes. In a January 14, 2025 [press release](#), the DOJ along with OSHA “jointly affirmed that corporate non-disclosure agreements (NDAs) that deter individuals from reporting antitrust crimes undermine the goals of whistleblower protection laws, including the Criminal Antitrust Anti-Retaliation Act of 2019 (CAARA).” The DOJ noted that “NDAs that undermine CAARA or otherwise interfere with employees’ freedom to report potential crime will cost the employer when the Antitrust Division makes its charging decisions and sentencing recommendations,” and could also have consequences for a company’s ability to qualify for leniency from the Antitrust Division.

DOJ and FTC Antitrust Guidelines for Business Practices Affecting Workers. These [guidelines](#), issued on January 16, 2025, replace 2016 Antitrust Guidelines for Human Resource Professionals issued in October 2016 at the end of the Obama administration. They cover topics such as wage-fixing and no-poach agreements, franchise no-poach agreements, exchange of compensation information, non-competes, provisions in training-repayment agreements, non-solicitation agreements and exit fee/liquidated damages provisions.

The guidelines are “intended to promote clarity and transparency for the public about how the Agencies identify and assess business practices affecting workers that may violate the antitrust laws.” The timing of the release of these guidelines casts some doubt on their utility going forward (will the new administration use the same approach to analyzing these practices?). Nevertheless, they, like the 2023 Merger Guidelines, cite case law and are therefore at least useful as a starting point for

research into questions related to the topics they cover. The FTC vote to approve the guidance was 3-2, with the Republican commissioners voting no.

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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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