Paul | Weiss

CLIENT MEMORANDUM

March 5, 2025

Update on Trump Administration Antitrust Enforcement

Executive Summary

In the month and a half since Inauguration Day, the Trump administration has taken several significant steps related to antitrust enforcement.

- **Senior agency leadership**. Senate committees recently held confirmation hearings for Gail Slater to be assistant attorney general for antitrust at the DOJ and Mark Meador to be an FTC commissioner. Votes are expected in the coming weeks. The FTC Bureau of Competition has new leaders with notable experience in tech antitrust enforcement. We expect senior Antitrust Division leadership to be announced shortly after Ms. Slater is confirmed.

- **Merger enforcement**. The new, more onerous HSR premerger notification rules became effective on February 10, 2025. On February 18, we learned that the agencies are continuing to use the 2023 Merger Guidelines. We expect early terminations of HSR waiting periods for qualifying deals to resume in the coming weeks. The agencies appear to be once again amenable to resolving competitive concerns with divestitures where possible. It remains to be seen whether the FTC will narrow its use in consent decrees of provisions requiring prior approval for future transactions.

- **FTC tech platform inquiry**. The FTC recently announced an inquiry into "how technology platforms [allegedly] deny or degrade users' access to services based on the content of their speech or affiliations, and how this conduct may have violated the law."

- **Labor markets and non-competes**. The FTC formed of a Labor Market Task Force which, according to the Chairman's directive, is "to prioritize rooting out and prosecuting unfair labor-market practices that harm American workers." Recent statements suggest the agencies will continue giving attention to non-compete clauses, although in a much more limited way than under the currently enjoined FTC non-compete clause rule.

- **Changes intended to expand presidential power over FTC**. Overhanging much of this are questions surrounding the status of the FTC, which was originally designed to have a degree of political independence. The president, the DOJ and FTC Chairman Ferguson have, by contrast, asserted that under the Constitution the president must have more power over the FTC.

Continue reading for more detail on each of these actions.

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Recent Trump Administration Actions Affecting Antitrust Enforcement

Senior Antitrust Enforcement Personnel Named for DOJ and FTC

- *Gail Slater – DOJ*. The Senate Judiciary Committee held a hearing on February 12, 2025 to consider the nomination of Gail Slater to be assistant attorney general in charge of the Antitrust Division of the DOJ. A Senate vote on Ms. Slater's nomination could come as early as this week. Appointments of her deputies will follow.

- *Mark Meador – FTC*. The Senate Commerce Committee held a confirmation hearing for Mark Meador to be an FTC Commissioner on February 25, 2025. The confirmation of Mr. Meador will result in a full complement of commissioners at the FTC, with three Republicans having the majority over two Democrats. A senate vote on Mr. Meador's nomination is expected in the coming weeks.

- *FTC Bureau Directors*. In line with the FTC chairman's recent statement that "big tech is going to remain under the microscope," new leaders at the Bureau of Competition all have prior tech-related experience. Daniel Guarnera, the new director of the Bureau of Competition, was formerly chief of the Civil Conduct Task Force at the DOJ Antitrust Division and was involved in the DOJ's recent monopolization actions. David Shaw, the new principal deputy director, was also recently at the DOJ Antitrust Division, where he helped lead investigations of technology companies. Kelse Moen, the new deputy director, recently worked on antitrust and technology issues for Senator Lindsey Graham (R-SC).

Merger Enforcement

- *New HSR Premerger Notification Rules Go into Effect*. On February 10, 2025, the new more onerous Hart-Scott-Rodino (HSR) premerger notification rules became effective. Chairman Ferguson endorsed the updated rules, writing that they "will allow us to find anticompetitive mergers efficiently, while more quickly getting out of the way of deals that will benefit the American people" and that they "were long overdue." The rules remain subject to a pending court challenge. A resolution of disapproval under the Congressional Review Act, which, if passed, would nullify the new rules, has been introduced in Congress.

  According to FTC Chairman Ferguson, the Premerger Notification Office (PNO) received a wave of filings made under the old rules in the run-up to the effective date. Whereas in a typical week there are "between 35 and 50 transactions" notified, in the week before the new rules became effective, the PNO "received 394 filings accounting for about 200 transactions." Premerger notification filings, which can be made on the basis of a letter of intent, start the clock on the HSR waiting period that parties must observe before closing. The waiting period for the last of the deals subject to the old rules filed on February 7, 2025 before 5 p.m. is set to expire on March 10, 2025 at 11:59 p.m. The acceleration of filings to take advantage of the old rules likely means that there were far fewer filings than normal submitted in the first few weeks under the new rules, especially given the onerous burdens and extra time now required to prepare HSR notifications. This may give the agencies some breathing room to work through the surge of filings.

- *Early Terminations of HSR Waiting Period Set to Resume*. According to an earlier statement, now that the new rules are in effect, the FTC intends to "lift its categorical suspension on early termination" of the HSR waiting period. This is in part because the new rules "provide the agencies with additional information necessary to conduct [early] antitrust assessments." We expect early terminations of the waiting period for transactions that do not raise competitive issues (as determined by the agencies) will resume in short order once the recent of surge filings is addressed.

- *2023 Merger Guidelines Remain in Effect*. On February 18, 2025, the Chairman of the FTC endorsed the continued use of the 2023 FTC-DOJ Merger Guidelines. In a memo to FTC staff, the chairman cited the benefit of "stability" and the resource cost of "wholesale recission and reworking of guidelines." He wrote that, while they may not be "perfect," the new guidelines are a "restatement of prior iterations of the guidelines, and a reflection of what can be found in case law." The acting assistant attorney general of the DOJ Antitrust Division also endorsed the continued use of the new guidelines, citing comments by Gail Slater, nominee for the AAG position, at her confirmation hearing that she will "follow the legal and economic framework described in the" new guidelines.

We note that this does not mean that the agencies will pursue every theory of potential competitive harm described in the guidelines at every turn. However, courts have thus far favorably cited aspects of the guidelines. Indeed, the courts in the *IQVIA-DeepIntent*, *Kroger-Albertsons* and *Tapestry-Capri* matters all cited the market concentration thresholds in the new guidelines in determining that each of these deals was likely to harm competition. (It should be noted, however, that a read of these opinions suggests that the same conclusions would have been reached had the courts used the higher thresholds in the prior guidelines.)

- *Merger Remedies Are Back in the Mix*. The agencies may once again be willing to settle merger matters with divestiture remedies. DOJ Antitrust Division head nominee Abigail Slater said at her confirmation hearing that "often remedies, if done right, if they're robust divestitures, for example, can remove any competitive harm from a merger in order to allow it to proceed in a pro-consumer, pro-competitive manner." In a speech in January, FTC Commissioner Melissa Holyoak said: "Where a divesture can successfully preserve lost competition from the underlying merger, the agencies should consider it, and should focus on the potential benefits to innovation from the remainder of the merger."

- *Will the FTC Limit the Use of Prior Approval Provisions in Consent Orders?* It remains to be seen whether the FTC will continue routinely to require prior approval provisions in consent orders resolving merger matters, as was the policy in the prior administration. These provisions generally require parties to obtain approval from the FTC prior to closing future transactions involving the same relevant market, and have the potential to cause deal uncertainty and indefinitely delay parties' ability to close a deal.

FTC Big Tech "Censorship" Inquiry

On February 21, 2025, the FTC announced an inquiry into whether "technology platforms deny or degrade users' access to services based on the content of their speech or affiliations," and, if so, "how this conduct may have violated the law." The press release asserts that "[t]ech firms can employ confusing or unpredictable internal procedures that cut users off, sometimes with no ability [to] appeal the decision" and that these actions "may harm consumers, affect competition, may have resulted from a lack of competition, or may have been the product of anti-competitive conduct." The FTC issued a request for information (RFI) and is accepting comments.

Antitrust Enforcement in Labor Markets

FTC Labor Market Task Force

On February 26, 2025, the FTC announced the formation of a Labor Market Task Force which, according to the Chairman's directive, is "to prioritize rooting out and prosecuting unfair labor-market practices that harm American workers." The task force is FTC-wide, involving the Bureaus of Competition, Consumer Protection and Economics and the Office of Policy Planning. Among the objectives of the task force is coordination of "all conduct investigations and enforcement actions" among the FTC's bureaus "such that deceptive, unfair, or anticompetitive labor market conduct is fully prosecuted as a matter of consumer protection and competition law."

Conduct "fall[ing] under the FTC's jurisdiction" includes: no-poach, non-solicitation and no-hire agreements; wage-fixing agreements; non-compete agreements; labor-contract termination penalties; and unfair or deceptive trade practices that harm gig economy workers. Many of these topics are covered in the DOJ-FTC *Antitrust Guidelines for Business Practices Affecting Workers* issued at the end of the Biden administration over the dissents of now-Chairman Ferguson and Commissioner Holyoak, who questioned the timing—but not necessarily the substance—of the guidance.

The memo also lists "collusion or unlawful coordination on DEI metrics, which may have the effect of diminishing labor competition by excluding certain workers from markets, or students from professional-training schools, on the basis of race, sex, or sexual orientation."

DOJ and FTC Views of Non-Compete Clauses

In his confirmation hearing last week, FTC commissioner nominee Mark Meador said that non-competes have "been overused and abused" and "there's a lot more the FTC can do, including through competition enforcement actions" focused on non-competes. This is in line with Chairman Ferguson's recent statement on the Fox Business Channel that non-competes are "an example of the type of thing that can injure workers that sometimes can violate the law." He further stated that it is a priority for him to have the FTC look "for non-compete agreements [and] no poach agreements that violate the Sherman Act" and to "enforce[e] those laws to protect America's workers." With respect to the DOJ, at her confirmation hearing, Abigail Slater said that non-competes are "of concern in many parts of the country," that they "prevent[] workers from switching jobs easily," and that they are "quite prevalent in markets that are highly concentrated."

To be sure, Mr. Ferguson's mention of the Sherman Act and Ms. Slater's reference to highly concentrated markets both imply that, at least for vertical employer-worker non-competes, enforcement would be limited to situations where a non-compete is "unreasonable" and the employer has market power in the relevant labor market. By contrast, under the FTC non-compete clause rule, currently enjoined, nearly all employer-worker non-competes are considered per se illegal.

Status of FTC Commissioners and Administrative Law Judges

The new administration has made several pronouncements that would serve to increase the ability of the president to control the FTC despite the agency having initially been set up by Congress to have a degree of political independence. An executive order on Ensuring Accountability for All Agencies directs the director of the Office of Management and Budget (OMB) to ensure that the FTC is operating consistent with the president's policies and priorities and directs the FTC chairman to "regularly consult with and coordinate policies and priorities with the directors of OMB, the White House Domestic Policy Council, and the White House National Economic Council."

Furthermore, the administration is advocating changes in the law that would give the president the authority to fire FTC commissioners and administrative law judges (ALJs) at will. Currently, commissioners may be removed only for "inefficiency, neglect of duty, or malfeasance in office." ALJs may be removed "only for good cause established and determined by the Merit Systems Protection Board" whose members, in turn, "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." The administration, including the FTC chairman, argue that these restrictions are unconstitutional encroachments on the president's executive authority and the Solicitor General will not defend the restrictions in litigation.

If the courts concur and hold that the removal protection provisions are unconstitutional, the effect of such a ruling will likely depend on whether those provisions are severable from the rest of the FTC's statutory scheme—that is, whether Congress would still have enacted the applicable statutory scheme without the removal protection provisions. If the Supreme Court were to determine that the removal protections were unconstitutional but severable, the commissioners could likely continue in office, albeit without the removal protection protections. (An extreme result—throwing out the entire FTC Act—could occur if the Court were to determine that the removal protection provisions were not severable.) The FTC chairman argued in opinion in an FTC matter last October that the ALJ removal protection provisions were severable, such that ALJs could continue performing their duties at the FTC without those protections.

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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:

Paul D. Brachman
+1-202-223-7440
pbrachman@paulweiss.com

Katherine B. Forrest
+1-212-373-3195
kforrest@paulweiss.com

Martha L. Goodman
+1-202-223-7341
mgoodman@paulweiss.com

Katharine R. Haigh
+1-212-373-3607
khaigh@paulweiss.com

Marta P. Kelly
+1-212-373-3625
mkelly@paulweiss.com

Jessica E. Phillips
+1-202-223-7338
jphillips@paulweiss.com

Jacqueline P. Rubin
+1-212-373-3056
jrubin@paulweiss.com

Scott A. Sher
+1-202-223-7476
ssher@paulweiss.com

Yuni Yan Sobel
+1-212-373-3480
ysobel@paulweiss.com

Joshua H. Soven
+1-202-223-7482
jsoven@paulweiss.com

Eyitayo “Tee” St. Matthew-Daniel
+1-212-373-3229
tstmatthewdaniel@paulweiss.com

Aidan Synnott
+1-212-373-3213
asynnott@paulweiss.com

Brette Tannenbaum
+1-212-373-3852
btannenbaum@paulweiss.com

Christopher M. Wilson
+1-202-223-7301
cmwilson@paulweiss.com

Charles E. Crandall IV
+1-212-373-2816
ccrandall@paulweiss.com

Chad de Souza
+1-212-373-3674
cdesouza@paulweiss.com

J. Todd Hahn
+1-212-373-2919
jhahn@paulweiss.com

Zuzanna Knypinski
+1-202-419-7128
zknypinski@paulweiss.com

John W. Magruder
+1-202-223-7329
jmagruder@paulweiss.com

Practice Management Attorney Mark R. Laramie contributed to this Client Memorandum.