

The Times They Are A-Changin': The Potential Impact of the Biden Administration on Antitrust Law and Enforcement

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While much of the impact of the new administration is still up in the air pending President-Elect Biden's appointments of key personnel and the results of the Senate run-offs in Georgia, we are likely to see changes to the focus of the Department of Justice ("DOJ") and Federal Trade Commission ("FTC"), and increased antitrust enforcement in several key industries, including tech, health care, and agriculture, over the next several years. However, drastic changes to antitrust law and enforcement are unlikely at the federal level, particularly given President-Elect Biden's moderate stance on antitrust issues historically, at best a razor-thin Senate majority for the Democratic party, and the impact that federal courts have on enforcement.

1. The Main Impact of the New Administration Lies in President-Elect Biden's Personnel Choices

When President-Elect Biden takes office in January, the most significant impact with respect to antitrust policy and enforcement will lie in the choices he makes in nominating leaders at the DOJ and FTC. Presidents typically drive policy through their appointments of these leaders, who then make enforcement decisions autonomously (with President Trump and his tweets aimed at impacting decisions more directly as an anomaly). For example, the nomination of Makan Delrahim as Assistant Attorney General for the DOJ Antitrust Division in 2017 led to an increased focus on defining the boundaries of the role of antitrust law in the context of standard-setting organizations and FRAND licensing, and heightened skepticism of behavioral remedies resulting in the DOJ's challenge of the AT&T/Time Warner merger.

President-Elect Biden historically has had a moderate stance on antitrust issues and has not demonstrated the same activist positions on competition law as some of his fellow Democratic politicians, such as Senator Elizabeth Warren. Accordingly, President-Elect Biden's nominations are likely to be mainstream and centrist, particularly if the Republican party keeps control of the Senate following the run-off elections in Georgia.

Nonetheless, the individuals who are widely believed to be in the running for these leadership roles hold a wide range of viewpoints and, as such, there is uncertainty concerning the impact that the change in the administration will have until these important personnel choices are made. For example, depending on who President-Elect Biden nominates as Commissioners to the FTC, we may see increased creativity in the agency's use of its rulemaking authority under Section 5 of the Federal Trade Commission Act, in an effort to supplement antitrust adjudication.^[1]

However, despite the fact that President-Elect Biden will select the Chairperson to lead the FTC upon entering office, any significant change in policy at the FTC may not occur until at least 2023, as the terms of the five Commissioners are staggered to continue into the next administration. There are currently three Republican and two Democratic Commissioners, with Joe Simons, a Republican, serving as the Chairman. The earliest expiring term for a Republican Commissioner is not until September 2023, so unless one or more of the Republican Commissioners resigns before their term expires (which is certainly possible based on historical practice), the FTC would remain majority Republican until that time.

2. A Democratic Administration Is Likely to Result in Increased Antitrust Enforcement

It is commonly perceived that antitrust enforcement increases under Democratic administrations.^[2] Although the FTC has had a record busy year in 2020,^[3] enforcement at the DOJ has been down for both mergers and cartel prosecutions over the last several years.^[4] It is unclear whether this dip in prosecutions and fines by the DOJ is due to lower enforcement priorities or simply natural ebbs and flows as larger investigations ended, but it is likely that investigation and enforcement of collusive conduct will increase in the coming years. This is particularly so in light of the COVID-19 pandemic, as such crises tend to increase the opportunities or incentives for companies to collude. See [here](#) for our prior Competition Corner Podcast on the challenges companies are facing as the virus impacts

supply chains, and the steps companies should take to mitigate their antitrust risk. Indeed, the DOJ and FTC are already on heightened alert for antitrust violations in the wake of the pandemic and economic downturn.

In addition, there is likely to be increased merger enforcement by the DOJ, and we can expect that there will be more second requests overall under the new administration. With more second requests, more companies will ultimately walk away from deals that get challenged and more deals will likely be litigated as companies decide they may have a better chance in court than with the agencies. It is also possible that the DOJ may re-review old mergers from the Trump administration, to assess whether they have “created highly concentrated markets, demonstrably caused harm to workers, raised prices, exacerbated racial inequality or reduced competition.”^[5] In fact, the agencies are now reviewing past mergers, including those of nascent competitors and those that did not meet the HSR threshold, and there may be increased activity as a result of these reviews in the coming years. See [here](#) for our prior Competition Corner blog post on the FTC’s probes of prior deals that were below HSR reporting thresholds. We can also expect that merger review will be more predictable and less subject to the president’s personal feelings under the Biden administration.

3. Industries Beyond Tech Will See Increased and Prioritized Enforcement

Although Big Tech in particular has recently been in the spotlight, any tougher standards applied to the tech industry will apply to and have ramifications for other industries as well. See [here](#) for our prior Competition Corner blog post on the impact of antitrust enforcers’ increased scrutiny of aggregated customer data from the technology sector to other industries.

In particular, it is likely that pharmaceutical and health care industries will face greater scrutiny in the coming years. This is especially so in the midst of the COVID-19 pandemic, where there has been an increased focus on these sectors in terms of both monopoly pricing issues and concerns regarding how market concentration has led to fragility in the supply chain and shortages of personal protective equipment, ventilators, and medical supplies as the pandemic hit. Health care is also an area where there has historically been bipartisan support for antitrust enforcement, so we can expect that this will continue to be a priority for the Biden administration and Congress.

Notably, Democratic Commissioners have recently objected to FTC decisions approving mergers in the pharma sector.^[6] This trend seems likely to continue under the new administration, as President-Elect Biden has campaigned on the premise that he will aggressively “tackle market concentration across our health care system.”^[7] Vice President-Elect Harris, in particular, has significant experience, as the California Attorney General, scrutinizing and challenging under antitrust law transactions in the health care sector.^[8]

Similarly, the agricultural sector is likely to see increased enforcement under the new administration. During his campaign, President-Elect Biden called for strengthened antitrust enforcement in the sector to “help family farms and other small and medium-sized farms thrive.”^[9]

There is also likely to be increased scrutiny into labor markets effects, particularly in the wake of the pandemic. The DOJ and FTC have already been on the alert for limitations to competition for workers on the frontlines of the pandemic. See [here](#) for our prior Competition Corner blog post on the joint statement by the DOJ and FTC emphasizing the agencies’ continued commitment to protecting labor market competition during the pandemic. President-Elect Biden has indicated that he will charge antitrust regulators with “systematically incorporating broader criteria into their analytical considerations, including in particular the impact of corporate consolidation on the labor market, underserved communities, and racial equity.”^[10]

4. The Magnitude of Legislative Change Is Dependent on Whether Republicans Maintain Control of the Senate

The magnitude of legislative change is still largely unknown, pending the outcome of the run-off elections in Georgia, the results of which will have a pointed impact on antitrust policy in the next administration. Although there is some bipartisan support for minor legislative changes, sweeping legislation is unlikely if the Republicans maintain control of the Senate. While both parties have historically supported legislation related to enforcement of cartel law, including the permanent reauthorization of ACPERA,^[11] antitrust legislation in other areas of competition law typically does not get passed under a divided government.

There may, however, be some appetite in both parties for more minor changes to some key antitrust statutes. For example, Congress may increase resources for agencies—likely to be funded either through increased merger filing fees or lower reporting thresholds—in light of the hiring freeze and attrition that hurt enforcement efforts in the first few years of the Trump administration.^[12] In addition, there may be bipartisan support for legislation targeted at the tech industry, including, for example, legislation regulating the self-preference of platform operators or legislation prohibiting exclusion of competitors on tech platforms.^[13] The impact of the new administration on the tech industry in particular will be further explored in an upcoming Competition Corner post.

Beyond these minor legislative changes, however, the more aggressive legislative proposals that have been floated by the left in the wake of the pandemic are likely to encounter serious obstacles even if the Senate becomes split, with Vice President-Elect Harris serving as a tiebreaker. See [here](#) and [here](#) for our prior Competition Corner blog posts on some of these recent legislative proposals.

5. Federal Judges Will Play a Large Role in the Enforcement of Antitrust Law, Regardless of the Changes in Legislation

Regardless of whether there is increased enforcement of the existing laws through the appointment of diligent regulators or reformed legislation is passed, any sweeping change is likely to be impeded by the federal courts. Increased enforcement will likely result in more court cases, which in turn provides opportunities for federal judges to disagree with the regulators' theories—particularly any novel antitrust theories, given the 100 years of precedent related to the Sherman Act—and side with defendants. For example, after a long battle, the courts ultimately determined that the merger between AT&T and Time Warner was legal, despite the DOJ's arguments that the proposed merger would reduce competition in the television industry and ultimately result in higher prices for consumers.^[14] Similarly, federal judges with a different ideological bent may strike down reform legislation, provide limitations to the law, or find a way around enforcing the legislation.

The Supreme Court may also make rulings in the near term impacting antitrust enforcement, as critical issues such as whether the FTC can order monetary relief in civil cases are currently pending before the Court.

Thus, while we can certainly expect increased enforcement and policy changes under the new administration, changes to policy and enforcement are likely to be tempered. Nevertheless, beyond the federal level, we can expect that increased State Attorney General activity will likely continue. In some cases, new state laws may be much more aggressive than federal law as states grapple with addressing technology issues in the 21st century. See [here](#) for our prior Competition Corner blog post on New York's proposed legislative changes.

[1] See, e.g., Chopra, R. & L. Khan, The Case for "Unfair Methods of Competition" Rulemaking, *available at* https://www.ftc.gov/system/files/documents/public_statements/1568663/rohit_chopra_and_lina_m_khan_the_case_for_unfair_methods_of_com

[2] See, e.g., Acting Associate Attorney General Bill Baer Delivers Remarks at American Antitrust Institute's 17th Annual Conference, *available at* <https://www.justice.gov/opa/speech/acting-associate-attorney-general-bill-baer-delivers-remarks-american-antitrust-institute> (noting that the Obama Administration had successfully challenged or secured the abandonment of 39 mergers, which was a "dramatic increase from the 16 successful challenges or abandonments" during the prior Bush Administration).

[3] See Levine, G., A Busy Six Months, *available at* <https://www.ftc.gov/news-events/blogs/competition-matters/2020/07/busy-six-months>).

[4] See, e.g., U.S. DOJ Criminal Enforcement Trends Through Fiscal Year 2020, *available at* <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>.

[5] See Biden-Sanders Unity Task Force Recommendations, *available at* <https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf>.

[6] See Statement of Commissioner Christine S. Wilson, Joined by Commissioner Rohit Chopra, dated February 11, 2020, *available at* https://www.ftc.gov/system/files/documents/public_statements/1566385/statement_by_commissioners_wilson_and_chopra_re_hsr_6b.pdf.

[7] See <https://joebiden.com/healthcare/>; see also Biden-Sanders Unity Task Force Recommendations, *available at* <https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf> ("[T]he Task Force recommends aggressively using antitrust laws to fight against mega-mergers in the hospital, insurance, and pharmaceutical industries that raise prices for patients by undermining market competition.").

[8] See, e.g., Health Affairs Blog, What Does Senator Kamala Harris' Record as California's Attorney General Tell Us About Her Health Policy, *available at* <https://www.healthaffairs.org/doi/10.1377/hblog20200924.883634/full/>.

[9] <https://joebiden.com/rural-plan/#>; Biden-Sanders Unity Task Force Recommendations, *available at* <https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf> ("Since American farmers and ranchers are being hurt by increasing market concentration, protect small and medium-sized farmers and producers by strengthening enforcement of the Sherman and Clayton Antitrust Acts and the Packers and Stockyards Act . . . The federal government should strengthen enforcement of the Sherman and Clayton Antitrust Acts and the Packers and Stockyards Acts, especially in monopolistic markets, and reform patent laws to protect smaller farmers.").

[10] Biden-Sanders Unity Task Force Recommendations, *available at* <https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf>; see also <https://joebiden.com/empowerworkers/> (calling for the elimination of non-compete clauses and no-poaching agreements that hinder the ability of employees to seek higher wages, better benefits, and working conditions by changing employers).

[11] See Department of Justice Applauds President Trump's Authorization Of The Antitrust Criminal Penalty Enhancement and Reform Permanent Extension Act, *available at* <https://www.justice.gov/opa/pr/departement-justice-applauds-president-trump-s-authorization-antitrust-criminal-penalty>.

[12] See Representative Ken Buck's The Third Way Report, *available at* https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Buck%20Report.pdf ("We agree that antitrust enforcement agencies need additional resources and tools to provide proper oversight.").

[13] See Representative Ken Buck's The Third Way Report, *available at* https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Buck%20Report.pdf.

[14] See *United States v. AT&T*, 916 F.3d 1029 (D.D.C. 2019).

Authors

[Aldo A. Badini](#)

[Susannah Torpey](#)

[Jim Herbison](#)

[Lauren Duxstad](#)

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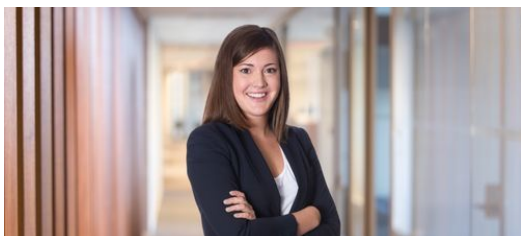
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