

FTC Says “We Are Watching” for Anticompetitive Conduct During Pandemic, in One of Many Signs of More Aggressive Antitrust Approach Under Biden Administration

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During a panel hosted by the Organization for Economic Cooperation and Development (OECD) on February 24, 2021, acting Federal Trade Commission (FTC) Chair Rebecca Kelly Slaughter said that the agency is focused on “opportunistic economic conduct” as businesses attempt to recover from the COVID-19 pandemic.^[1] While this should not come as a surprise—the FTC and U.S. Department of Justice announced in April 2020 that they would be “on alert” for collusive labor market agreements during the pandemic—a closer look at recent statements and appointments foreshadows an aggressive approach to antitrust enforcement from the Biden administration.

FTC’s Early Actions Indicative of New Approach

On February 4, 2021, the FTC and DOJ issued a joint statement to announce a brief “temporary suspension” of grants for early termination of required waiting periods for merger approval under the HSR Act. This followed a slow period for such grants shortly after the Biden administration came into power: After 22 early termination grants on January 15, only one additional grant was issued before the suspension. In her OECD comments, Slaughter suggested that the FTC was wary of the a “rollup opportunity” in which companies used the pandemic’s economic pressures as an excuse for acquiring competitors in problematic deals. She framed the temporary suspension of early termination grants as a necessary measure to ensure that problematic deals do not slip through the cracks, as the agency deals with an “extraordinary” number of filings.

In designating Slaughter—who was critical of a perceived lack of government enforcement during the Trump administration—as acting Chair of the FTC, President Biden picked a noted advocate for greater resources and authority for the FTC. During her OECD panel comments, Slaughter also called attention to the April 2020 FTC and DOJ announcement that they would be “on alert” for anticompetitive conduct from participants in labor markets, particularly those who took advantage of the pandemic by lowering wages or reducing salaries, and making clear that the “warning remains really important and operative.” Slaughter emphasized that “the markets need to know we are watching,” and that collusion will not be tolerated.

While her reassertion of the announcement was not unexpected, the comments should be read in the context of Slaughter’s new role as Chair. At the time of the earlier announcement, she was an oft-dissenting member of the minority calling for tougher enforcement, along with Rohit Chopra. The two had long criticized the majority’s lax

enforcement under the Trump administration, including the FTC's \$5 billion fine against Facebook for privacy violations, which they said was not harsh enough. While Chopra may go on to lead the Consumer Financial Protection Bureau ("CFPB") and would be expected to return the CFPB to its role as an enforcement agency, Slaughter now leads the FTC, and her influence over the agency is still coming into view.

Biden Appointments Suggest Even More Aggressive Focus on Big Tech

It has been reported that President Biden will soon nominate Lina Khan as a Commissioner to replace the seat vacated by former FTC Chairman Joseph J. Simons. Khan is a noted Big Tech critic and key figure behind the government's investigation into Facebook, Amazon, Google, and Apple. A three-member Democratic majority with Slaughter, Khan, and Chopra (or his replacement) would be expected to be aggressive in its enforcement priorities, with a continued focus on Big Tech.

In more bad news for Big Tech firms, President Biden recently hired Columbia Law School Professor Tim Wu as a top antitrust advisor who will serve on the National Economic Council. Wu, a vocal critic of past antitrust enforcement efforts who has advocated for breaking up the Big Tech firms, creating stricter merger review rules, and using FTC and DOJ resources to launch sprawling investigations and lawsuits, may attempt to guide the Biden administration to consider making fundamental changes to antitrust policy. Together with the hiring of Khan and the promotion of Slaughter, Wu's mere appointment suggests that the new administration is open to such change.

[1] Bryan Koenig, *FTC Remains Alert to 'Opportunistic Conduct' in Pandemic*, Law360 (Feb. 24, 2021), <https://www.law360.com/articles/1358622/ftc-remains-alert-to-opportunistic-conduct-in-pandemic>.

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