

# The Biden Administration's Antitrust Priorities

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Kevin Goldstein from Winston's Antitrust/Competition group recently moderated and spoke at a panel on "The Biden Administration's Antitrust Priorities" hosted by the Chicago Bar Association. The panel discussed the current antitrust political climate, including new initiatives and new leaders at the U.S. antitrust enforcement agencies, with a particular focus on recent and expected developments in technology, healthcare, and labor markets.

## Key takeaways from the program include:

- President Biden has put a significant focus on aggressive competition policy and appointed a new team of progressive leaders—at the FTC, DOJ Antitrust Division, and on his staff at the White House—who promise to bring new vigor and new theories to their enforcement actions, sometimes under the mantle of “hipster antitrust.” (See [here](#) to watch a Winston webinar titled “Hipsters vs. Boomers: The Antitrust Revolution is Here.”) The Administration is also pursuing a [whole-of-government approach to competition policy](#), touching on agencies beyond the traditional two antitrust enforcers at the DOJ and FTC. At the same time, more aggressive antitrust enforcement has also garnered fairly broad bipartisan political support, and there are various bills circulating in Congress with both Democratic and Republican co-sponsors that could alter and expand antitrust law.
- Priorities for the Administration include technology, labor, healthcare, agriculture, banking, intellectual property, government contracting transportation, broadband, and more.
- While the antitrust laws remain the same, and it's uncertain whether new legislation will be enacted, policy and guideline updates from the FTC and DOJ Antitrust Division are anticipated and already coming. These developments include that the FTC has already [withdrawn the Vertical Merger Guidelines](#) it issued jointly with the DOJ in 2020; announced a new policy that will require parties to future merger settlement agreements to obtain [approval for subsequent transactions](#); begun issuing pre-consummation [warning letters](#) in merger reviews, warning that it may bring action even after the statutory HSR waiting period expires; and published multiple blog posts and memoranda outlining other new initiatives. Most of this action has been at the FTC so far, but that is in part because the [new FTC chair](#) has been in place since June 2021, while the nominated DOJ Antitrust Division head is still awaiting Senate confirmation as of October 2021. Expect additional revisions and new rules, guidelines, and policies to continue in the foreseeable future.

- In the technology sector, the FTC and DOJ are both pursuing antitrust actions against large technology companies which may affect the agenda going forward. The FTC's use of its authority under Section 5 is notable because it could be used to bring a broader array of enforcement actions targeting conduct that the Sherman Act and Clayton Act may not reach.
- In labor markets, the Administration is expected to continue the existing focus on bringing civil and criminal no-poach and wage-fixing conduct cases, and expand its scrutiny of labor issues into merger reviews and monopsony claims as well. In merger reviews, there are reports that enforcers have increasingly been asking questions about labor impacts, including considering whether a merger could lock up potential competition through non-compete agreements for senior executives, affect unionization of employees, or result in reduced competition for hiring. This represents a potentially large shift in antitrust analysis, should the FTC or DOJ pursue a merger challenge on the theory that it has negative impacts in labor markets.
- In healthcare, the Administration has identified specific priorities focused on prescription drugs and encouraging the FTC to adopt new rules restricting pay-for-delay agreements; making hearing aids more available over the counter; promoting health insurance and exchange plan competition; and increasing scrutiny of hospital consolidation. Hospital mergers have been frequently challenged under the current and past administrations.

Video of the panel, slides, and on-demand CLE credit are available to Chicago Bar Association members [here](#).

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