

ANTITRUST TRADE AND PRACTICE

Deal or No Deal? Anticipating Antitrust Under the Next Administration

By Karen Hoffman Lent and Kenneth Schwartz

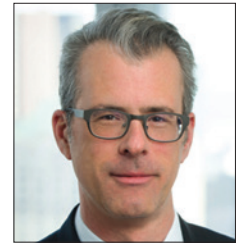
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As the November election draws closer, Wall Street is anticipating how the deal-making environment will look under the next administration. Both the Trump and Biden presidencies amplified antitrust scrutiny, and while dealmakers do not expect enforcement to disappear, they do hope a new president brings some relief to current competition policy and enforcement.

Though Republican administrations are traditionally viewed as more business-friendly, Trump's FTC and DOJ increasingly scrutinized deals, applying aggressive theories such as harms from vertical deals and the capture of potential and nascent competitors. Under Biden, who has proudly made antitrust enforcement a hallmark of his tenure, the agencies have only become more hawkish. Respectively led by Lina Khan and Jonathan Kanter, the FTC and DOJ Antitrust Division under Biden have increased the burdens of deal-making, roughly doubling the average number of complaints seeking to enjoin transactions filed each year, compared to agency filings during the Trump administration.



By **Karen Hoffman Lent**



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As Biden's control of the agencies begins to sunset, dealmakers are eager to learn whether the next presidency will scale back antitrust oversight or maintain the status quo. Given that the 2024 election features current and former White House policy-makers, there is a certain predictability coloring Wall Street's forecast of the coming competition environment. In the last few months, however, both presidential tickets experienced shake-ups that may impact how their respective administrations craft policy.

Summer Shake-Ups Impacting Antitrust

The most seismic shock to antitrust observers was Biden's decision to withdraw from the presidential race and Vice President Kamala Harris' ascension to replace him as the Democratic nominee. Biden's withdrawal prompted a sigh

of relief among dealmakers as his antitrust enforcement agenda has arguably been the most aggressive since that of President Theodore Roosevelt. In 2022, the antitrust agencies set a record for merger enforcement activity, challenging 50 deals, which likely contributed to a 10-year low in global M&A deal volume and deal count in 2023. Accordingly, many expect that a Harris administration would represent at least some positive development for deal-making, even if only a marginal upgrade.

On the Republican side, Trump may have disappointed those hoping that a potential

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second term would reel back antitrust enforcement when he selected JD Vance as his running mate. Vance has espoused aggressive views on antitrust and largely departed from the rest of his party when he described Khan as "one of the few people in the Biden administration I think is doing a pretty good job." In an Aug. 11 interview, Vance affirmed that he is "one of the few Republican supporters of antitrust reform" and said, "I think these [Big Tech] companies are too big. We ought to take the Teddy Roosevelt approach to some of them. Break 'em up." These populist comments have alarmed some business leaders who were expecting that a Trump victory would coincide with the ouster of Khan and the dawn of a more friendly deal environment.

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Trump/Vance: First Term Sequel? VP Influence?

For the Trump/Vance ticket, two key considerations control how policy may look: whether Trump would continue his first term antitrust agenda and whether Vance would have meaningful influence on the administration's antitrust policy. Trump's first term in office sent conflicting signals to competition observers. On the one hand, he was praised for ushering in a new age of pro-antitrust rhetoric and enforcement. In October 2016, he stated that the AT&T/Time Warner merger would be "too much concentration of power in the hands of too few" and spoke against the dominance of Big Tech. Once elected, Trump's DOJ sought, though failed, to block AT&T's acquisition of Time Warner and sued Google in a historic suit that the DOJ recently won. Meanwhile, the FTC opened several investigations against Big Tech firms and sued Facebook, challenging a practice it termed "killer acquisitions"—a novel theory of antitrust harm resulting from an incumbent's purchase of a potential competitor. The agencies challenged other deals under similar novel theories, including suits against vertical mergers—traditionally not viewed as anti-competitive in the antitrust realm.

On the other hand, the agencies received criticism at times for allegedly weaponizing antitrust at the behest of the president to either assist Trump allies or strong-arm his opponents. For example, the aforementioned DOJ challenge of AT&T/Time Warner was reportedly motivated by Trump's disdain for CNN, owned by Time Warner. But, since his presidency, Trump has largely been silent on antitrust and has avoided the topic throughout his election bid. This is in stark contrast to his VP pick, Vance, who has championed competition policy repeatedly in his two months since joining the campaign trail. Yet,

commenters are split as to how much influence Vance would have on competition policy in a Trump administration.

One big bank lobbyist said that he is “very concerned about J.D. Vance playing an outsized role in a Trump administration.” For his part, Trump recently stated, “the vice president, in terms of the election, does not have any impact.” Nevertheless, Vance has seemingly positioned himself to play a significant role in antitrust enforcement and to pick up where Trump’s previous administration left off. Some expect that Vance’s influence on antitrust policy may turn on the strength of Trump and Vance’s relationship. After all, Trump reportedly brushed former Vice President Mike Pence aside early on in his tenure when it became clear that Trump and Pence did not align on many policy views.

At a minimum, a second Trump presidency would likely continue the pro-enforcement stance from his first four years. If Trump entrusts Vance with significant control over competition policy, their administration may look surprisingly similar to the current, potentially including the appointment of someone with a similar populist agenda to Khan to the helm of the FTC. In any event, it seems likely that a Trump/Vance administration would maintain pressure on Big Tech.

Harris/Walz: Backing Big Tech? Rhetoric or Action?

Determining Harris’ stance on competition policy is a bit more difficult because she has made few public statements on antitrust enforcement or policy during her time in the Biden administration. Her work prior to her service as vice president seems to be a mixed bag in terms of antitrust enforcement. In 2016, Harris announced that California, along with 11 other states and the District of Columbia, joined the DOJ in filing an antitrust suit to block the \$48 billion merger between

Anthem and Cigna. She also led 31 states in an amicus brief urging the Supreme Court to end “pay for delay” practices in the pharmaceutical industry as antitrust violations. But earlier, during her 2010 run for attorney general, Harris made an appearance at Google, which had become the focus of a Texas antitrust investigation at the time. On the topic of antitrust enforcement, Harris stated, “We cannot be short-sighted ... we have to allow these [tech] businesses to develop and grow because that’s where the models will be created. This is a very significant source of California’s economy.” Beyond these limited touch-points, however, there has been little else to define Harris’ position on antitrust.

Some speculated that Biden’s hardline approach to antitrust enforcement may have motivated some uncertainty from institutional Democratic donors, many of whom were rumored to have reduced or withheld contributions to his campaign over the summer. Once Harris became the face of the ticket, fundraising multiplied with Wall Street Democrats returning to support Harris. Most notably, LinkedIn founder Reid Hoffman, who had already donated at least \$7 million to the Biden-Harris campaign, said that he was “redoubling” support to Harris, though with a caveat: that she remove Khan as FTC Chair. Hoffman is not alone; other Democratic donors have reportedly urged Khan’s removal (though the Harris campaign has said that there have been “no policy discussions” about replacing Khan).

More than a month into her campaign, Harris has largely remained quiet on antitrust, but may have concerned those critical of enforcement in her first major economic policy speech in mid-August when she took aim at price gouging in the grocery and food industries. She stated her intention to pass a federal ban on price gouging

and also said she would “take on corporate landlords and cap unfair rent increases” and “take on Big Pharma to cap prescription drug costs.” While she did not explicitly mention antitrust, Harris’ rhetoric could be interpreted as furthering the Biden administration’s competition agenda. Further, in the days following the FTC suit against the Kroger-Albertsons merger, Harris’ campaign issued a statement warning that she plans to “crack down” on mergers between large food companies if elected president.

Yet, even after Harris’ speech, some antitrust onlookers remain unconvinced that such rhetoric will be reflected in competition policy given that her rhetoric largely follows similar anti-corporate talking points that typically arise during election cycles. Many of these skeptics point to her ties with Big Tech: Harris has received significant fundraising from those in Silicon Valley throughout her political career, and some of her staff includes those who formerly worked in Big Tech. Further, Gov. Wes Moore (D-MD) made news recently when he publicly stated that he believed the Harris administration would police antitrust differently from the Biden administration, suggesting that antitrust enforcement in a Harris administration would consist of more “growth-focused” policies.

Of course, most of these indications are speculative and Harris’ actual antitrust enforcement agenda remains unknown. For his part, running mate Tim Walz has even less of a record on antitrust enforcement, so forecasters of competition policy must rely upon Harris’ background. The little evidence that exists seems to suggest that a Harris FTC would likely approach Big Tech with a lighter touch than the current FTC or a potential

Trump/Vance FTC. Whether that entails replacing Khan remains to be seen, though such a move would likely receive backlash from the progressive wing of the Democratic party, which has been supportive of Khan. Yet her rhetoric on the campaign trail suggests that Harris would likely remain tough on non-Big Tech players, while bringing extra scrutiny to the sectors identified in her speeches: food, housing and health care.

Antitrust Enforcement to Continue

Irrespective of the party elected, aggressive antitrust scrutiny seems here to stay. The most significant daylight between Trump and Harris competition policy may center on Big Tech enforcement, where the Republican ticket seems poised to crack down harder while the Democratic ticket could potentially ease scrutiny. However, in the non-tech industries, the answers to whether Vance will influence Trump, and whether Harris’ competition agenda will match her rhetoric will inform the level of scrutiny these sectors receive.

As organizations prepare for acquisitions or ready themselves for litigation, they should remain cognizant of the aggressive theories the current federal agencies are employing, which are likely to continue under the leadership of either incoming presidency. Companies concerned with changing competition policy can best prepare for enforcement under the next administration by engaging with outside counsel early.

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