

## ANTITRUST

# Antitrust Yearly Recap: Aggressive Changes by the Biden Administration Precede President Trump's Return

By Karen Hoffman Lent and Kenneth Schwartz

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**A**s seen in countless news headlines over the past four years, antitrust enforcement was a major focus of the Biden Administration. Throughout President Joe Biden's term, FTC Chair Lina Khan and Assistant Attorney General Jonathan Kanter aggressively sought to enforce federal antitrust laws across multiple industries and break new ground.

This past year saw the release of new Hart-Scott-Rodino (HSR) Act filing requirements, an intensified focus on labor market competition, including the issuance of a ban on noncompete agreements, an increase in litigation against Big Tech companies using novel legal theories and merger challenges under the 2023 Merger Guidelines. Here's a recap of the major antitrust events of 2024 and developments to look for in 2025.

**New HSR Rules Increase the Burden of Reporting Obligations.**

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The HSR Act requires companies to file premerger notification with the FTC and DOJ for acquisitions meeting certain thresholds. In October, the FTC unanimously approved a major overhaul of the premerger filing requirements that will dramatically increase the amount of information and documents that the parties to a transaction must submit to the agencies. The changes were part of the Biden Administration's stated intention to increase the agencies' ability to detect potentially anticompetitive acquisitions during the initial review process, especially for transactions involving private equity firms.

Key requirements in the new rules include reporting ownership structure, subsidiaries and minority shareholders, including certain limited partners, holding 5% or more of any entity within the acquisition stack; providing the deal's strategic rationale and key documents from the supervisory deal team lead (defined as anyone having the primary responsibility for a deal's strategic assessment unless such individual is already an officer or director); identifying officers and directors who also serve another entity in the same industry; and submitting certain ordinary-

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course documents shared with the board of directors or CEO that discuss competition and market share for overlapping products.

Critically, the new rules include a self-reporting element pursuant to which the parties must describe in narrative format any horizontal overlaps or vertical relationships between the parties' current or planned products. Though the new rules anticipate only a brief factual narrative, parties are required to explain even de minimis product or geographic overlaps, and the agencies may restart the waiting period if a party's overlap narrative is inconsistent with submitted documents.

While the new requirements are less burdensome than the 2023 proposed rules, the final rules represent a fundamental shift in the nature and scope of the antitrust reporting regime. Parties must now allocate significantly more resources and several additional weeks to comply with the expanded reporting requirements.

These new HSR requirements are slated to become effective in February, shortly after the Trump Administration takes office, although the effective date may be delayed by a regulatory freeze or held up by legal challenges. Andrew Ferguson, current Republican FTC Commissioner and President Donald Trump's nominee for FTC Chair, and Republican Commissioner Melissa Holyoak both approved the new rules and embraced the FTC's authority to engage in HSR rulemaking.

Commissioner Ferguson stated: "Were I the lone decision maker, the rule I would have written would be different from today's Final Rule. But it is a lawful improvement over the status quo." (Concurring Statement of Commissioner Andrew N. Ferguson in the Matter of Amendments to the Premerger Notification and Report Form and Instructions, and the Hart-Scott-Rodino Rule (Oct. 10, 2024).) Implementation of the rules could be delayed by 60 days if the Trump Administration requests a freeze for new regulations.

Also, this January the Chamber of Commerce sued for declaratory and injunctive relief to block the rule, arguing that it exceeds congressional limits for notification requirements and that the excessive reporting burdens outweigh the agencies' justifications. The new rule could also be reversed under the Congressional Review Act if the new Republican House and Senate issue a joint resolution disapproving the rule to be signed by the president.

### **A Focus on Labor Markets and the Ban on Noncompete Agreements.**

Last year, the agencies moved to expand the role of the antitrust laws in regulating labor markets. In April, the FTC voted 3–2 to promulgate a national ban on noncompete clauses in employment contracts. The rule is expansive and outlaws

an employer's use of noncompete clauses as a violation of section 5 of the FTC Act.

Specifically, the rule makes it unlawful for an employer to prohibit workers from seeking work in the United States with a competing business after their employment ends, or to penalize them for doing so. A narrow exception exists for "Sale of Business" agreements, which allows business acquirors to enter into noncompete agreements with the sellers of those businesses.

Despite having received more than 27,000 comments on the proposed rule last year, the only significant modification to the proposed rule was an additional exception to allow existing noncompetes for senior executives to remain in place.

The backlash to the FTC's ban was immediate. Lawsuits were filed in Pennsylvania, Florida and Texas shortly after approval, each arguing that the ban exceeded the FTC's authority. In the Pennsylvania suit, the court denied the plaintiff's request for a preliminary injunction against the ban, reasoning that the plaintiff had failed to establish irreparable harm or a reasonable likelihood of success on the merits. *ATS Tree Services, LLC v. FTC*, No. 24-cv-1743 (E.D. Pa. Jul. 23, 2024).

In the Florida suit, however, the court stayed the effective date of the ban and issued a preliminary injunction after finding a reasonable likelihood that the ban violated the "major questions doctrine," a long-standing principle governing the interpretation of statutes conferring power on administrative agencies that asks whether the agency can point to clear congressional authorization when an agency claims to have the power to issue rules of extraordinary economic and political significance. *Properties of the Villages, Inc. v. FTC*, No. 24-cv-316 (M.D. Fla. Aug. 15, 2024).

The court determined that approximately 30 million workers and more than \$400 billion in wages would be affected by the noncompete ban and that the plaintiff had shown a likelihood of success in proving that the ban exceeded the FTC's statutory authority. One week later, the Texas court granted the plaintiff's motion for summary judgment and barred the FTC from enforcing the noncompete ban nationally. *Ryan LLC v. FTC*, No. 3:24-cv-00986 (N.D. Tex. Aug. 20, 2024). The court held the FTC exceeded its statutory authority to make substantive rules regarding unfair methods of competition under section 6(g) or section 18 of the FTC Act and that the categorical noncompete ban was arbitrary and capricious.

The FTC has appealed the Florida and Texas decisions, but it appears likely that the noncompete ban will not survive 2025. In addition to Trump's pro-business views and the recent end of *Chevron* deference, Commissioner Ferguson criticized the noncompete ban when dissenting from passage of the rule, stating that "the FTC Act does not confer on [the FTC] the power to make legislative rules," and even if it did, "that conferral is an unconstitutional delegation." (Oral Statement of Commissioner Andrew N. Ferguson in the Matter of the Non-Compete Clause Rule (Apr. 23, 2024).)

With Trump in the White House and Commissioner Ferguson as FTC Chairman, the FTC's aggressive regulation of labor markets will likely diminish during the next administration.

### **Continued Litigation Against Big Tech.**

Litigation against large tech industry participants, much of which began during Trump's first term, defined tech enforcement in 2024. A central feature of Biden's Big Tech strategy was an increase in the assertion of

novel legal theories, many based on section 2 of the Sherman Act, which prohibits businesses from monopolizing trade.

In March, the DOJ sued Apple for monopolizing the smartphone market, alleging that Apple holds over 65% of the United States smartphone market and engages in practices that keep users locked into its products in violation of section 2. *United States v. Apple, Inc.*, No. 2:24-cv-04055 (D.N.J. Mar. 21, 2024).

The allegedly anticompetitive practices include diminishing cross-platform messaging with non-iOS devices, degrading the interoperability of non-Apple smart watches, limiting third-party fintech companies' access to Apple Wallet, stifling rollout of super apps and suppressing mobile cloud streaming services. Apple countered that it controls only 20% of the global smartphone market and that its practices have procompetitive justifications, including the promotion of cybersecurity. Trial is set for 2026.

In August, the D.C. District Court issued a historic ruling against Google for monopolizing the general search services market in violation of section 2. The case began in 2020 when Trump's DOJ alleged that Google controlled a nearly 90% share of the online search market. The court held that Google has illegally maintained dominance through exclusive dealing agreements with device manufacturers and wireless carriers to ensure that Google's search engine remains the default on phones and tablets. *United States v. Google, LLC*, No. 1:20-cv-03010 (D.D.C. Aug. 5, 2024).

Remedies will be determined in a separate trial in 2025. In November, the DOJ requested that the court order Google to divest its web browser, Chrome, and remain out of the browser market for five years. The DOJ also proposed contingent relief through Android's divestiture should the sale of Chrome and other behavioral remedies

be ineffective in alleviating competitive harm. Executive Summary of Plaintiffs' Proposed Final Judgment, *United States v. Google, LLC*, No. 1:20-cv-03010 (D.D.C. Nov. 20, 2024).

In September, a bench trial began in another lawsuit against Google alleging monopolization of the advertising technology market. The DOJ claims that Google exerts market power over the technology that matches online publishers and advertisers. Continuing with its efforts to break up the tech giant, the DOJ requested divestiture of Google's publisher ad server and ad exchange. *United States v. Google LLC*, No. 1:23-cv-00108 (E.D. Va. Jan. 24, 2023). The court's ruling is expected in early 2025.

Also in September, a federal judge denied Amazon's motion to dismiss a suit by the FTC under section 2, in which the FTC alleged that Amazon has maintained a monopoly in the online retail superstore market. Order, *FTC v. Amazon.com, Inc.*, No. 2:23-cv-01495 (W.D. Wash. Sept. 30, 2024). The FTC asserts that Amazon uses anti-discounting tactics and algorithmic tools to prevent merchants from competing on price.

The FTC also claims that Amazon coerces sellers into using its aftermarket business, Fulfillment by Amazon (FBA), by removing products from Amazon Prime that do not use FBA. Amazon disputes the FTC's allegations, and in December, Amazon asked the judge to enter judgment for the company arguing that the agency lacks the statutory authority to pursue the lawsuit.

In November, a federal judge denied Meta's motion for summary judgment in a lawsuit brought by the FTC alleging that Meta (formerly Facebook) unlawfully extended its social media monopoly under section 2 and seeking to unwind the acquisitions of Instagram and WhatsApp. Memorandum Opinion, *FTC v. Meta Platforms, Inc.*, No. 1:20-cv-03590 (D.C.C. Nov. 13, 2024).

The district court found that the FTC's evidence could convince a reasonable fact finder that Instagram and WhatsApp competed with Meta or constituted nascent threats to Meta's alleged monopoly when Meta acquired them. Trial is set for April 2025, where a primary issue will be how to define the boundaries of a social media market.

Although Trump has stated that he will make Big Tech a focal point of his antitrust policy—as he did in his first term—the extent to which the agencies under the Trump Administration will continue pending Big Tech enforcement actions remains to be seen.

### **Merger Enforcement.**

The FTC and DOJ released updated Merger Guidelines in December 2023. Consistent with the Biden Administration's aggressive antitrust policy, the updated Guidelines lowered the threshold at which mergers are presumptively anticompetitive and included novel theories regarding market definition, vertical integration and labor market competition.

In October, the FTC successfully blocked a proposed merger of Tapestry and Capri, which would have combined popular fashion brands Coach, Kate Spade and Michael Kors. *FTC v. Tapestry, Inc.*, No. 1:24-cv-03109 (S.D.N.Y. Oct. 24, 2024). The FTC alleged that the \$8.5 billion acquisition would reduce head-to-head competition in the accessible luxury handbag market.

The district court granted the FTC's motion for a preliminary injunction. Despite the defendants' argument that "accessible luxury" was an overly narrow product market definition, the court, relying on the *Brown Shoe* factors and the parties' internal documents, found that the merger would harm competition and raise prices for good-quality, affordable handbags.

In December, federal and state courts in Oregon simultaneously blocked Kroger's \$24.6 billion acquisition of Albertsons. The deal would have been the biggest supermarket merger in history, combining two of the largest U.S. supermarket chains.

Relying on the 2023 Guidelines, the Oregon federal court issued a preliminary injunction after the FTC demonstrated sufficient competitive harm in the grocery sales markets for multiple geographic locations, even if large wholesalers like Costco or Walmart were included in the markets. *FTC v. Kroger Co.*, No. 3:24-cv-00347 (D. Or. Dec. 10, 2024).

An Oregon state court also issued a permanent injunction, ruling that the deal violated the state's Consumer Protection Act and that state courts possess the power to stop mergers nationally. *Washington v. Kroger*, No. 24-2-00977-9 (King Cnty. Sup. Ct. Dec. 10, 2024). Both judges highlighted the inadequacy of the planned divestiture to C&S Wholesale Grocers, noting C&S's lack of industry sophistication and history of unsuccessful retail ventures.

Other major challenges positing novel theories of harm are still pending in the courts. In July, for instance, the FTC sued to block the \$4 billion vertical merger of Tempur Sealy and Mattress Firm. The FTC's allegations focused on the harms resulting from Tempur Sealy's ability to foreclose rival suppliers from accessing one of the largest retailers in Mattress Firm and reaching downstream customers through brick-and-mortar floor space. *FTC v. Tempur Sealy Int'l Inc.*, No. 4:24-cv-02508 (S.D. Tex. Jul. 2, 2024).

The customer foreclosure theory has been largely unused to challenge vertical mergers in recent decades. The judicial reception for this revival will be revealed with the court's

preliminary injunction ruling, which is scheduled for January 30, 2025.

### **Looking Ahead to 2025.**

Trump's first term and his new FTC and DOJ appointees may shed light on how antitrust enforcement will shift in the new administration. In addition to Commissioner Ferguson's nomination to serve as FTC Chair, Trump has nominated Gail Slater, antitrust advisor to Vice President J.D. Vance and former FTC attorney, as head of the DOJ Antitrust Division, and Mark Meador, a partner at Kressin Meador Powers and former antitrust counsel to Senator Mike Lee (R-Utah), as the fifth FTC Commissioner.

These nominations signal a probable return to the traditional consumer welfare principles that defined antitrust enforcement before the Biden Administration. Commissioner Ferguson has promised to "reverse Lina Khan's anti-business agenda" (FTC Commissioner Andrew N. Ferguson for FTC Chairman (Dec. 11, 2024)), and Commissioner Melissa Holyoak, Commissioner Ferguson's Republican ally, has expressed her interest in revising the 2023 Merger Guidelines to reduce their reliance on what she views as outdated case law. (A Conversation with FTC Commissioner Melissa Holyoak Hosted by Alden Abbot, George Mason University Mercatus Center (Oct. 30, 2024).)

Ferguson and Holyoak have also shown greater openness to traditional remedies, whereas the

agencies under Biden have preferred simply to seek to block deals that they view as anticompetitive.

Nevertheless, it is unlikely that antitrust enforcement will vanish under Trump. During Trump's first term, mergers still faced robust scrutiny. Big Tech firms will also remain under fire—but for different reasons. When announcing the nominations of Slater and Ferguson, Trump expressed his concern with Big Tech's censorship of conservative viewpoints. Ferguson echoed Trump's sentiments, vowing to end Big Tech's "vendetta against competition and free speech." (Andrew Ferguson (@AFergusonFTC), X (Dec. 10, 2024).)

Meador's record also suggests continuing enforcement against Big Tech, specifically Google, as Meador previously drafted a bill targeting the same ad tech business now subject to suit. While Trump has implied that he opposes dismantling Google, Vance has said that he wants to see Google broken up. (Interview with Donald Trump, Economic Club of Chicago (Oct. 15, 2024); Interview with J.D. Vance, Tim Dillon Show (Oct. 26, 2024).) Mr. Meador and Vance represent a populist branch of Trump Republicans, often called "Khanservatives," that have expressed approval of Lina Khan's interventionist antitrust enforcement.

Consistent with the actions taken in his first term, Trump is primed once again to assume a more hawkish antitrust stance than past Republican presidents.