

## Trump administration signals strong approach to antitrust enforcement

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As the first month of the Trump administration comes to a close, we provide updates on key developments in Trump 2.0 antitrust enforcement, particularly focused on merger review. Early hints suggest that the Trump administration may be more measured in moving away from the Biden administration's aggressive approach on antitrust than many observers initially anticipated.

In the early days of the second Trump administration, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) (collectively, the Agencies) have expressed support for certain Biden-era merger policy and enforcement actions. It remains to be seen how the Agencies' policies will fully develop, especially as Gail Slater, the next head of the Antitrust Division, and Mark Meador, nominated as the third Republican FTC Commissioner, have yet to be confirmed. Overall, we still expect a generally more pro-business approach to antitrust enforcement consistent with the first Trump administration, including renewed willingness at the Agencies to negotiate remedies with merging parties to resolve deal concerns. There are some early signs, however, that the current administration may take a stronger approach to antitrust enforcement than some may have originally expected, and is not looking to make a dramatic break from the last administration. Below we provide a high-level summary of key actions to date.

### Support for the 2023 merger guidelines

As background, on December 18, 2023, the DOJ and FTC issued the final version of the Biden administration's revised merger guidelines (the Guidelines).<sup>1</sup> The Guidelines introduced several significant changes from the prior 2010 Horizontal Merger Guidelines (the 2010 Guidelines), including:

- The Guidelines lowered the HHI thresholds for creating a presumption of anticompetitive effects from the thresholds in the 2010 Guidelines. In other words, the Agencies may find mergers anticompetitive at lower level of markets shares and concentration.
- The Guidelines tightened the requirements for crediting merger efficiencies and adopted a tone that was somewhat hostile to efficiency claims.
- The Guidelines indicated a heightened focus on serial acquisitions (e.g., roll-ups) and acquisitions of “nascent” competitors, along with a greater concern for the impact of mergers on labor markets.

There were some expectations that the current Trump administration might withdraw the Guidelines and return to the 2010 Guidelines in place during the first Trump administration. On February 18, 2025, however, FTC Chair Ferguson and Acting Assistant Attorney General (Acting AAG) for the DOJ Antitrust Division, Omeed Assefi, announced that the FTC and DOJ, respectively, would continue to apply the Biden-era Guidelines.<sup>2</sup>

This is not entirely unexpected, as Chair Ferguson has previously signaled that he did not think the Guidelines would need to be withdrawn and instead could be reformed.<sup>3</sup> Notably, in his February 18 memo, announcing the decision to retain the Guidelines, Chair Ferguson relied more on the importance of “stability” in enforcement guidance than the specifics of the Guidelines themselves, writing: “A recriminatory cycle of partisan rescissions will not help the economy.” He added: “By and large, the 2023 Merger Guidelines are a restatement of prior iterations of the guidelines, and a

reflection of what can be found in case law. That is good reason to retain them.” He went on to qualify his support somewhat (“That is not to say that the 2023 Merger Guidelines are perfect. No guidelines are perfect”), and noted that he is not ruling out future changes: “If experience teaches that revisions are appropriate, then the agencies can consider revisions as they have done in the past.”<sup>4</sup>

During her confirmation hearing, President Trump’s nominee to lead the DOJ Antitrust Division, Gail Slater, agreed with Chair Ferguson. She echoed a need for stability and the fact that “much of what is in the current merger guidelines simply restates longstanding law.”<sup>5</sup> When asked what her approach would be to investigating consolidation in the healthcare industry, Ms. Slater replied, “I would follow the legal and economic framework described in the 2023 Merger Guidelines. Healthcare competition is a critical priority because of its impacts on patients, caregivers, and our local communities.”<sup>6</sup>

Building on these signals of support for the Guidelines, in the first merger challenge filed by the DOJ under the new Trump administration, seeking to block the merger of Hewlett Packard Enterprise Company and Juniper Networks, Inc., the DOJ complaint specifically relied on the Guidelines (see further discussion of the case below).

It is worth noting that certain provisions of the Guidelines, including the points listed above, do not appear entirely consistent with court precedent (and several courts have similarly disagreed with the FTC and DOJ). Last October, Republican Commissioner Holyoak criticized the Guidelines and indicated a willingness to rescind or revise the guidance, in part because it downplays the role of economics in merger review.<sup>7</sup>

At the same time, the Guidelines are an indication of the range of issues the Agencies may continue to investigate in reviewing mergers, whether they can ultimately form the basis of a successful challenge or not. We will therefore keep a close watch on developments at the Agencies over the coming weeks and months to see how they will review deals and enforce the Guidelines in practice.

## Continuation of Biden-era initiatives

In addition to ongoing support for the 2023 Guidelines, several additional indicators signal continued, strong antitrust enforcement in the Trump administration. These include the following developments:

- **DOJ sues to block the merger of Hewlett Packard Enterprise Company (HPE) and Juniper Networks, Inc. (Juniper).** Shortly after the inauguration, DOJ filed a complaint alleging that the \$14 billion acquisition represents an effort by HPE to avoid competition with an emerging rival (Juniper) by acquiring it instead, and that the deal would combine the second- and third-largest providers of enterprise Wireless Local Area Network (WLAN), leaving 70% of the market in the hands of just two companies (HPE and Cisco Systems, Inc.).<sup>8</sup> This action surprised some and prompted a [WSJ editorial](#) that asked: “Why is Trump letting Biden policy go ahead on antitrust and more?” While this is only one case, the move suggests that the Agencies will still be active in merger enforcement under the new administration, though the complaint was authorized by Acting AAG Assefi, who is likely to be replaced soon. As far as providing signals as to the Agencies’ enforcement posture going forward, in addition to the complaint’s reliance on the Guidelines, it is also worth noting that DOJ elected to challenge the deal despite the fact that it had already been approved by numerous other antitrust enforcement Agencies, including the European Commission and the UK’s Competition and Markets Authority.<sup>9</sup>
- **FTC Chair Ferguson supports new HSR rules.** On February 10, 2025, significant changes to the Hart-Scott-Rodino Act (HSR) Form and Instructions used by parties to notify the Agencies of certain pending mergers and acquisitions went into effect.<sup>10</sup> The new rules require filing parties to provide substantially more documents and information in their submissions, even for transactions that do not pose competitive concerns. There had been some speculation that the new Republican-led FTC might delay or even withdraw the rules. Instead, Chair Ferguson celebrated the new rules, stating that the updates “were long overdue,” lauding them as a “bipartisan consensus” that will allow the Agencies to “find anticompetitive mergers efficiently, while more quickly getting out of the way of deals that will benefit the American people.”<sup>11</sup>
- **No restoration of withdrawn guidelines.** Several long-standing guidelines and policy statements were withdrawn at the end of the Biden administration (e.g., the Health Care policy statements and the Guidelines for Cooperation among Competitors). There has been some speculation that these guidelines might be restored, but the Agencies have not taken action thus far to do so.

It remains to be seen whether the Trump administration will follow the Biden administration on all fronts. For example, during her confirmation hearing last week, Gail Slater indicated a greater willingness to settle concerns with deals through merger remedies than her predecessor, Jonathan Kanter. Ms. Slater testified: “[R]emedies, if done right, if they’re robust, divestitures, for example, can remove any competitive harm from a merger in order to allow it to proceed

in a pro-consumer, pro-competitive manner.”<sup>12</sup> At the same time, she identified priorities that she described as “clear through lines from the tenures of AAG Delrahim, to AAG Kanter, to the antitrust policies of this administration, on issues such as the importance of protecting workers, the risks sometimes presented by vertical mergers and dominant firm acquisitions of nascent competitors, and the critical need to prevent the monopolization of digital markets.”<sup>13</sup>

President Trump’s nominee for the fifth and final FTC Commissioner spot, Mark Meador, will have his first nomination hearing on February 25; the Commission is currently deadlocked on a number of issues with two Democratic and two Republican appointees.<sup>14</sup> In the past, Mr. Meador has expressed an appetite for enforcement with regard to issues like Big Tech and AI, and he supported efforts by DOJ to undo the merger between Live Nation and Ticketmaster during the Biden administration.<sup>15</sup>

## Takeaways

While we generally expect the deal environment to be more hospitable, early signs suggest that the Trump Agencies are not changing course as quickly or as completely as some had predicted. Thus far, the FTC and DOJ have signaled continuation of several Biden-era priorities. Parties should therefore not assume an easy path for significant deals at this point, even if some of the government skepticism toward transactions from the past four years may be diminishing. The expected confirmation of Ms. Slater and Mr. Meador may also have a significant impact on the Agencies’ priorities. We will continue to provide updates on these developments.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

**Arthur J. Burke**

+1 212 450 4352  
+1 650 752 2005  
arthur.burke@davispolk.com

**Ronan P. Harty**

+1 212 450 4870  
ronan.harty@davispolk.com

**Christopher Lynch**

+1 212 450 4034  
christopher.lynch@davispolk.com

**Suzanne Munck af Rosenschold**

+1 202 962 7146  
suzanne.munck@davispolk.com

**Howard Shelanski**

+1 202 962 7060  
howard.shelanski@davispolk.com

**Caroline Ziser Smith**

+1 650 752 2009  
caroline.zisersmith@davispolk.com

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- <sup>1</sup> Merger Guidelines, DOJ and FTC (Dec. 18, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2023\\_merger\\_guidelines\\_final\\_12.18.2023.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf). For an in-depth analysis of the Guidelines, see Davis Polk client update, *DOJ and FTC Release Final Merger Guidelines*, Davis Polk & Wardwell LLP (Dec. 20, 2023); <https://www.davispolk.com/insights/client-update/doj-and-ftc-release-final-merger-guidelines>, and Davis Polk client update, *DOJ and FTC Release Draft Merger Guidelines*, Davis Polk & Wardwell LLP (July 21, 2023), <https://www.davispolk.com/insights/client-update/doj-and-ftc-release-draft-merger-guidelines>.
- <sup>2</sup> Memorandum from Andrew N. Ferguson, Chairman, Federal Trade Commission, to FTC Staff, "Merger Guidelines" (Feb. 18, 2025), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/ferguson-memo-re-merger-guidelines.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-memo-re-merger-guidelines.pdf); Memorandum from Omeed Assefi, Acting Assistant Attorney General, Department of Justice Antitrust Division, to Antitrust Division Staff, "Use of the Antitrust Guidelines" (Feb. 18, 2025), <https://www.ftc.gov/news-events/news/press-releases/2025/02/ftc-chairman-andrew-n-ferguson-announces-ftc-doj-joint-2023-merger-guidelines-are-effect>.
- <sup>3</sup> "A Conversation with FTC Commissioner Andrew Ferguson Hosted by Alden Abbott," Mercatus Center, George Mason University (Jun. 13, 2024), <https://www.mercatus.org/events/2024/06/conversation-ftc-commissioner-andrew-ferguson-hosted-alden-abbott>.
- <sup>4</sup> Memorandum from FTC Chair Ferguson, at 2.
- <sup>5</sup> Abigail Slater, Responses to Written Questions of Senator Peter Welch for Hearing on "Nominations" (Feb. 17, 2025), [https://www.judiciary.senate.gov/imo/media/doc/2025-02-12\\_-\\_qfr\\_responses\\_-\\_slater.pdf](https://www.judiciary.senate.gov/imo/media/doc/2025-02-12_-_qfr_responses_-_slater.pdf).
- <sup>6</sup> Id.
- <sup>7</sup> GOP FTC Commissioner Says She'd Consider Undoing Merger Guidance, Bloomberg Law (Oct. 30, 2024), <https://news.bloomberglaw.com/antitrust/gop-ftc-commissioner-says-she-consider-repealing-merger-rules>.
- <sup>8</sup> Complaint, *U.S. vs. Hewlett Packard Enterprise Co. and Juniper Networks, Inc.*, No. 5:25-cv-00951 (N.D. Cal., Jan. 30, 2025), <https://www.justice.gov/opa/media/1387541/dl>.

- <sup>9</sup> Press Release, “Commission approves acquisition of Juniper by HPE” (Jul. 31, 2024), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_24\\_4101](https://ec.europa.eu/commission/presscorner/detail/en/ip_24_4101); UK Competition and Markets Authority, “Hewlett Packard Enterprise Company / Juniper Networks, Inc. merger inquiry,” <https://www.gov.uk/cma-cases/hewlett-packard-enterprise-company-slash-juniper-networks-inc-merger-inquiry>.
- <sup>10</sup> Final Rule, Premerger Notification; Reporting and Waiting Period Requirements (Final Rule), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p110014hsrfinalrule.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p110014hsrfinalrule.pdf). For a detailed overview of the new requirements, see Davis Polk client update, *U.S. antitrust agencies implement overhaul of HSR filing requirement* (Oct. 11, 2024), <https://www.davispolk.com/insights/client-update/us-antitrust-agencies-implement-overhaul-hsr-filing-requirements>.
- <sup>11</sup> X Post by @AFergusonFTC (Feb. 10, 2025 at 7:10 PM), <https://x.com/AFergusonFTC/status/1889104725624168453?mx=2>.
- <sup>12</sup> Hearing of the U.S. Senate Judiciary Committee, “Nominations” (Feb. 12, 2025), <https://www.judiciary.senate.gov/committee-activity/hearings/02/12/2025/nominations>.
- <sup>13</sup> Abigail Slater, Responses to Written Questions of Senator Maizie K. Hirono for Hearing on “Nominations” (Feb. 17, 2025), [https://www.judiciary.senate.gov/imo/media/doc/2025-02-12\\_-\\_qfr\\_responses\\_-\\_slater.pdf](https://www.judiciary.senate.gov/imo/media/doc/2025-02-12_-_qfr_responses_-_slater.pdf).
- <sup>14</sup> Press Release, “Senate Commerce Announces Nominations Hearing for Michael Kratsios to Lead the Office of Science and Technology Policy and Mark Meador to Serve as a Federal Trade Commissioner” (Feb. 18, 2025), <https://www.commerce.senate.gov/2025/2/senate-commerce-announces-nominations-hearing-for-michael-kratsios-to-lead-the-office-of-science-and-technology-policy-and-mark-meador-to-serve-as-a-federal-trade-commissioner>.
- <sup>15</sup> Davide Mamone, “Mark Meador: the exit interview,” *Global Competition Review* (Jul. 3, 2023), <https://globalcompetitionreview.com/gcr-usa/article/mark-meador-the-exit-interview>. Mark Meador, “Ticketmaster’s ‘Legally Permissible’ Abuse of Monopoly Power Won’t Fly,” *Sportico* (Jul. 18, 2024), <https://www.sportico.com/law/analysis/2024/ticketmasters-abuse-of-monopoly-power-wont-fly-1234789894/>.