

TRUMP 2.0 AND ANTITRUST

*At the close of 2024, **The M&A Lawyer** talked to Aimee DeFilippo and Michael Knight, partners in the Washington, D.C. office of Jones Day, about their expectations as to how antitrust enforcement could change upon the return of Donald Trump to the White House.*

The M&A Lawyer: *The general consensus upon the election of Donald Trump was that the incoming administration will be much more merger-friendly than the Biden administration has been perceived to be. Would you agree that this is a fair assessment? Has the perception of the Biden years as being more strongly devoted to antitrust than the typical administration been borne out by the number of its antitrust enforcement actions? Or is the picture more nuanced?*

Aimee DeFilippo: I think the overall climate for mergers will improve with the Trump administration. Trump administration enforcers are likely to be less willing to closely scrutinize certain types of transactions that have been in the crosshairs of Biden antitrust enforcers (e.g., private equity transactions) and less willing to pursue more novel theories of harm like we saw under Biden (e.g., labor theories, bundling theories). That said, deals in some industries—like Big Tech and healthcare/pharmaceuticals—will likely continue to see scrutiny in the years ahead.

Importantly, I also expect we'll see a return to merger settlements. Under the Biden administration we saw a sharp turn away from divestitures and consent agreements, with the agencies expressing a preference for blocking mergers and acquisitions rather than accepting remedies. I think things will return to a more traditional approach of allowing merger remedies. That doesn't necessarily mean that divestitures will be as common as they were before, but in general the expectation is that Trump administration enforcers will, at a minimum, return to allowing divestitures to fix problematic aspects of a deal.

As for the Biden administration, I think the data show that the number of significant merger investigations and even the number of Second Requests issued did not

dramatically increase under Biden, but we did see broader Second Requests covering a more expansive range of potential theories of harm. Under Trump, we should see a return to a more traditional approach focused on applying well-settled antitrust principles like looking at a transaction's impact on prices and innovation, and relying again on economics to inform the analysis.

Mike Knight: I think Aimee has it right here. Overall, I expect we will see greater emphasis on consumer welfare effects and more traditional theories of harm in analyzing transactions. This means a return to the fundamental antitrust questions that regulators were focused upon for most of the 40 years leading up to 2020: Will mergers lead to higher prices, lower quality of products or services supplied by the merging firms, or less innovation? Of course, that doesn't mean it will be open season for mergers and acquisitions. The FTC and DOJ will continue to be aggressive in enforcing against mergers they believe to be harmful to consumers. And that includes mergers in key segments of the economy such as technology and healthcare/pharmaceuticals.

So, I don't expect the guns to stop firing altogether, but rather that the agencies' collective sights will be more focused on specific types of matters that are more in line with traditional antitrust theory.

MAL: *Are there any early actions that the new DOJ and FTC regimes could take upon assuming power that would be an indication of changing priorities and philosophies? For instance, could the upcoming HSR rules changes be delayed or even revoked?*

Knight: I think it is quite possible that the HSR rule changes could be effectively repealed and/or modified significantly. That would likely be done by the new Congress through the Congressional Review Act, rather than by the agencies themselves. And it would probably happen quickly, before the changes go into effect as scheduled on February 10. There are many who say that HSR rules could use some reform, but I suspect that most envision reforms that are less onerous than the current set of changes which, I should note, are themselves less onerous than the proposed rule changes released in 2023.

DeFilippo: Another big question is what will happen to the 2023 Merger Guidelines. I know some in the antitrust bar expect these guidelines to be immediately rescinded given that those guidelines are considered to be a significant departure from the agencies' previous horizontal and vertical merger guidelines. That said, Commissioner Andrew Ferguson (the incoming FTC chairman) has stated publicly that while he would be open to revising the guidelines, he doesn't think we should get into a cycle of rescinding the guidelines upon every administration change, since doing so will make the guidelines look largely partisan in the eyes of courts. Overall though, I do think the guidelines are unlikely to survive fully intact in the Trump administration.

Knight: I agree with respect to the Merger Guidelines in that I do not foresee rescission, or even wholesale changes, but perhaps some modifications around the edges to the manner in which the Guidelines Statements 1-10 are applied. For example, I could see potential revisions around the levels of market concentration required for the agencies to initially presume anticompetitive harm. But I suspect that the basic Statements themselves will remain intact.

MAL: *Do we have a sense yet of where the incoming administration's priorities will lie, in terms of antitrust enforcement? Particular sectors or types of deals? Any areas that look like they will be more consistent with the outgoing administration?*

DeFilippo: As we previewed earlier, there's likely to be some continuity with Biden administration enforcers in certain key areas. For example, I think the healthcare scrutiny remains, particularly as it relates to PBMs and large insurers. As many have already pointed out, Big Tech will continue to be a focus area as well, both in terms of merger enforcement but also continued antitrust litigation by the agencies. I think the target on the back of private equity buyers, though, will lessen significantly. Since taking over as chair of the FTC, Lina Khan had really increased scrutiny of PE buyers as viable purchasers, questioning whether these buyers have the long-term best interests of the assets in mind or are just looking to take out costs and then flip the assets to another buyer at

a profit. We saw this scrutiny quite a bit in the healthcare industry, and also a focus on whether PE buyers were engaging in serial acquisitions and "roll-up strategies." The scrutiny resulted in a lawsuit (still ongoing), a 6(b) study, and even some Congressional legislation targeting PE buyers of healthcare assets. The two Republican commissioners at the FTC have not signaled a particular skepticism of private equity, and in general I think the PE scrutiny will die down under Trump.

Other rhetoric we heard in the Biden administration—like a focus on standalone labor market theories to block an otherwise non-offensive transaction—should go away as well. But newer areas of focus may emerge under the Trump administration. ESG is one such area, given certain statements by Commissioner Ferguson expressing concerns about potential collusion in this area, and given that the first Trump administration opened an investigation—later dropped—into whether four auto companies illegally coordinated to limit auto emissions. ESG is also an area where the U.S. approach is starting to diverge from that of foreign jurisdictions (particularly the EU). In general, it will be interesting to see whether and how much the antitrust agencies in the Trump administration coordinate with—or clash with—foreign counterpart agencies on ESG or other issues.

Knight: Once again, I agree with Aimee, which I usually find to be an excellent policy. I do think it is important to note, however, that most merger enforcement activity at the antitrust agencies is a matter of "calling balls and strikes." What I mean by this is that, unlike other areas of enforcement, mergers are typically affirmatively presented to the agencies for review. The reviewing agency must then assess whether each given transaction before it presents a competitive threat or not. And these assessments must be made without knowing which other transactions may be presented in the future. In a setting such as this, where enforcers are essentially force-fed their cases, it can be difficult to fully plan future resource allocation with a specific industry in mind. If you try to hold back resources today to preserve them for an unknown future merger in a particular industry of interest, you risk seriously misallocating those resources and becoming a less effective enforcer overall.

Thus, while I suspect that it is correct that the new enforcers will have particular interests in specific industries, we should not expect drastic shifts in resource allocations to those specific industries. The effects are much more likely to be felt at the margins.

MAL: *How do things look in terms of ongoing anti-trust enforcement and litigation? Could the new regimes aim to wind down ongoing investigations and settle cases, for example?*

Knight: I do think we may see a greater willingness to settle certain ongoing/late-stage investigations or litigations, especially to the extent that they do not fit the policy agenda of the Trump administration. Perhaps the most famous example of this (albeit in a non-merger setting) was the [George W.] Bush administration's settlement of the Microsoft litigation initiated by the Clinton administration. As a rule of thumb, the agencies are less willing to settle once litigation has been initiated. But a change of administrations offers an exception to this rule.

DeFilippo: Thinking about ongoing merger litigation, the FTC has its pending case in the mattress industry (a vertical case). But that case has already been to trial, and both Commissioner Ferguson and Commissioner Holyoak voted to bring the complaint, so we should expect that one to continue through to a full decision.

MAL: *Finally, what other possible federal antitrust enforcement trends or actions could M&A lawyers expect to see over the next four years?*

DeFilippo: In my view, it shouldn't take long for some of these changes to be felt. The announcement of nominees to head the agencies has already happened more quickly than it typically does, and with Republican control of the Senate, confirmations could happen quickly too.

Knight: I think we'll learn a lot relatively early on about the new agency heads and their enforcement priorities. Both incoming agency heads are antitrust thinkers, and I expect neither will be shy about making their thoughts, plans, and agendas known to the public quickly. I'll go back to what I stated earlier about a return

of focus on consumer welfare as a "first principle" of antitrust enforcement. If I'm correct about that, then I suspect we'll see a somewhat friendlier enforcement environment, which may spur increased M&A activity. But beware. This will not be a return to Reagan era enforcement, and I expect the agencies to sink their teeth into plenty of matters.

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DELAWARE COURT OF CHANCERY HOLDS STOCKHOLDER VOTE FOLLOWING POST-TRIAL DECISION CANNOT RETROACTIVELY RATIFY A TRANSACTION THAT FAILED ENTIRE FAIRNESS

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On December 2, 2024, Chancellor Kathaleen St. J. McCormick of the Delaware Court of Chancery denied a motion to revise the Court's post-trial decision to rescind a CEO compensation package based on a subsequent stockholder vote to "ratify" the package.¹ In *Tornetta v. Musk*, Chancellor McCormick held that (i) there is no procedural ground for reversing an adverse trial decision based on newly created evidence; (ii) ratification is an affirmative defense that cannot be first raised so late; (iii)