

# The next four years: antitrust enforcement on an upward trajectory

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1. Despite the tumult of 2020—the pandemic, racial tensions, and a divisive presidential election—antitrust remains a central focus in the United States. But while some Democratic presidential candidates, such as Elizabeth Warren and Amy Klobuchar, made antitrust a major element of their platforms, the Biden campaign was relatively low-key on the subject. So, looking into the crystal ball, what can we expect from the Biden administration in the antitrust arena? Certainly, the administration is being encouraged to take a revitalized approach to competition policy and enforcement, and to devote resources to the passage of new legislation, agency appropriations, appointing leadership focused on deterrence, and adopting a “whole government” approach.<sup>1</sup> But will the administration heed these calls to action, or adopt a more middle-of-the-road and incremental approach to change?

## I. Agency leadership

2. First of all, do not expect immediate and dramatic changes in the approach of the antitrust agencies on January 20, 2021. Change starts at the top, and the process for installing new Biden-appointed leadership in the antitrust agencies could take time. Following Biden’s inauguration there will likely be a delay during which candidates for key antitrust leadership posts—the assistant attorney general for the Antitrust Division and any new commissioner of the Federal Trade Commission—are identified, nominated and confirmed by the Senate.

3. These delays can be extensive: in the first year of the Trump administration, it took over nine months to confirm the current Assistant Attorney General for Antitrust, Makan Delrahim. AAG Delrahim has indicated his intention to resign at the end of 2020, which will leave the leadership of the Antitrust Division in the hands of one of the existing (Republican-appointed) deputies. While the administration can make appointments to posts that do not require Senate confirmation (such as Deputy Assistant Attorneys General), that has not been the traditional approach. During the transition period, business usually continues as before the election, with little turnover at the staff level and the front office maintaining the status quo.

4. Over at the FTC, the transition also will proceed at a measured pace. Even if the current Chairman, Joe Simons, resigns (as is the practice), the Commission will be left with two Democratic commissioners and two Republicans until a new commissioner can be appointed. And while we are unlikely to end up in the odd situation that occurred early in the Trump administration when there were only two sitting commissioners, the prospect of a 2-2 deadlock over whether to bring enforcement action is a real one for any case that pushes the boundaries of the prevailing approach—and based on the positions of the two Democratic commissioners over the last few years, there could be several opportunities for this to play out.

5. Given the current national focus on antitrust, it is likely that the Biden administration will try to move quickly—and certainly faster than the Trump administration did—to appoint to key antitrust leadership posts. The announcement of nominees for key posts such as Attorney General and other top Department of Justice posts even prior to the January 20 inauguration augur’s swifter action. Even so, it is probable that Biden will nominate fairly centrist candidates to the DOJ and FTC posts, given his more moderate positions throughout the campaign.

<sup>1</sup> *Restoring Competition in the United States*, Transition Report of the Washington Center for Equitable Growth, November 19, 2020, available at <https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states>. The report was authored by Bill Baer (who currently serves on the Biden transition team), former Antitrust Division Deputy Assistant Attorneys General Jonathan Baker, Fiona Scott Morton, Carl Shapiro, and Nancy Rose, former Antitrust Counsel for Senator Amy Klobuchar Michael Kades, and academic Tim Wu.

## II. Agency enforcement

6. Given the possible pace of leadership change, as well as the continuing service and commitment of agency career staff, we are unlikely to see a dramatic change in the agencies' approach to enforcement in the near term. But, despite claims to the contrary, that approach has not been lax over the Trump years. Contrary to the stereotype that the agencies are more pro-business and less interventionist under Republican leadership, both agencies have been very active in bringing cases, several the culmination of active investigations that were ongoing throughout the Trump years. In 2020 alone, in addition to several merger consent decrees, the FTC has brought a record-breaking 11 cases, more than double the number filed in each of the prior three years, and bringing the agency's total over the last four years to 22 versus 12 cases brought in the four years of the Obama administration.<sup>2</sup> While such enforcement activity is to some extent a function of the matters that come before the agency, it does indicate a strong institutional commitment to investing resources in investigating and aggressively pursuing cases.

7. At both agencies, it is likely that there will be an increased focus on consummated mergers—with the potential for post-consummation challenges seeking to unwind deals. The July 2020 Biden-Sanders Unity Task Force Recommendations called for a review of all merger clearances from the Trump years to “*assess those that have created highly concentrated markets, demonstrably caused harm to workers, raised prices, exacerbated racial inequality or reduced competition*” and to “[t]ake steps to hold these companies accountable and derive policies to repair the damage done to working people and to reverse the impact on racial inequity.”<sup>3</sup> Consistent with the increased work that such a project would entail as well as a general commitment to heightened antitrust enforcement, members of Biden's transition team have called on the administration to significantly expand funding for the antitrust agencies.

8. The healthcare and pharmaceutical industries stand out for greater focus. The Unity Platform vowed to “*vigorously use antitrust laws to fight against mega-mergers in the hospital, insurance, and pharmaceutical industries that would raise prices for patients by undermining market competition.*”<sup>4</sup> Through the Trump years, the FTC has been a very active enforcer in hospital mergers and DOJ has pursued antitrust enforcement actions in several healthcare markets as well as closely reviewing numerous health insurer mergers. Enforcement may be heightened going forward, perhaps less as a result of a policy shift and more from increased activity.

2 Hat tip to Kevin Hahn for his FTC case count on LinkedIn (December 8, 2020).

3 Biden-Sanders Unity Task Force Recommendations, July 2020, at 74, available at <https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf> (the “Unity Platform”).

4 Ibid. at 33, 90.

Post-pandemic pressures on the healthcare system, which have raised concerns about the supply chain for key hospital equipment, as well as putting providers under strain from disrupted operations, will lead to an even closer focus on the industry. The industry expects to see greater merger activity, as well as non-merger collaborations, between healthcare providers and companies at all levels of the healthcare delivery system, which will likely to attract close reviews, and potentially greater risks of challenge. In relation to conduct cases, the DOJ has signaled that it will take a strong position against anticompetitive conduct in healthcare markets, as evidenced in its criminal prosecution of the operators of oncology centers in Florida for market-allocation agreements.<sup>5</sup> The Trump-era activity of the current Democratic FTC Commissioners—Rohit Chopra and Rebecca Slaughter—suggest that more aggressive antitrust enforcement in the pharmaceutical industry is on the cards. Commissioners Chopra and Slaughter have issued several dissenting opinions relating to proposed FTC merger consent decrees, notably in pharmaceutical company mergers, where they believe that the prevailing FTC approach of analyzing markets by individual products and permitting mergers to go ahead with narrow divestitures is “*myopic and misses (. . .) the fundamental elements of how firms compete in this industry.*”<sup>6</sup> They would have the FTC look more broadly at overall concentration levels in the pharmaceutical industry, and the potential for coordinated conduct and collusion. This is consistent with general positions in the Biden platform that the FTC use antitrust authority to challenge mergers that lessen generic competition.<sup>7</sup>

10. Commissioners Chopra and Slaughter also have advocated for more aggressive use of the FTC's powers under Section 5 of the FTC Act (prohibiting “*unfair methods of competition*”) to address “unreasonable” price increases for off-patent pharmaceutical drugs and biologics, rejecting concerns with the dangers of interfering with market pricing mechanisms.<sup>8</sup> And, under a Democrat-led FTC, we may see broader application of Section 5 beyond the pharmaceutical context. Commissioner Chopra and other academic commentators have called for the FTC to utilize its administrative rulemaking authority to develop overarching standards for what is an “*unfair method of competition*” and make it easier for the agency to take enforcement actions against a broader array of practices than it does today. And, depending on the outcome of an upcoming Supreme Court decision on the FTC's

5 “Leading Cancer Treatment Center Admits to Antitrust Crime and Agrees to Pay \$100 Million Criminal Penalty,” DOJ Press Release, April 30, 2020, available at <https://www.justice.gov/opa/pr/leading-cancer-treatment-center-admits-antitrust-crime-and-agrees-pay-100-million-criminal>.

6 Statement of Commissioner Rohit Chopra, joined by Commissioner Rebecca Kelly Slaughter, *In the Matter of Pfizer Inc. / Mylan N.V.*, October 30, 2020, available at [https://www.ftc.gov/system/files/documents/public\\_statements/1582382/191\\_0182\\_pfizer-mylan\\_-\\_dissenting\\_statement\\_of\\_comms\\_chopra\\_and\\_slaughter\\_1.pdf](https://www.ftc.gov/system/files/documents/public_statements/1582382/191_0182_pfizer-mylan_-_dissenting_statement_of_comms_chopra_and_slaughter_1.pdf).

7 Unity Platform, at 94.

8 Statement of Commissioners Rohit Chopra and Rebecca Kelly Slaughter, Federal Trade Commission Report on the Use of Section 5 to Address Off-Patent Pharmaceutical Price Spikes, June 24, 2019.

authority to obtain monetary equitable relief under Section 13(b) of the FTC Act, we may see the Democrats propose new legislation to codify or strengthen the FTC’s authority to seek financial relief against companies accused of anticompetitive conduct.<sup>9</sup>

11. Another area in which Commissioners Chopra and Slaughter have foreshadowed a different approach is vertical mergers. When the FTC and DOJ issued new joint vertical merger guidelines in June 2020,<sup>10</sup> Commissioners Chopra and Slaughter each dissented, raising concerns that the guidelines overemphasized the benefits of vertical transactions and did not adequately address various theories of harm or remedies. Since the election, in December 2020, the Commissioners issued a brief statement cautioning against “*relying on the [guidelines] as an indication of how the FTC will act upon past, present, and future transactions,*” noting that they “*look forward to turning the page on the era of lax oversight and to beginning to investigate, analyze, and enforce the antitrust laws against vertical mergers with vigor.*”<sup>11</sup>

12. One area the Biden Unity Platform expressly identified for antitrust attention is labor markets, calling out non-compete clauses and “no-poaching” agreements (agreements not to solicit each other’s employees).<sup>12</sup> Again, this would continue the agencies’ existing commitment to maintaining competition in labor markets demonstrated by the joint 2016 Antitrust Guidance for Human Resource Professionals, and ongoing “no-poach” enforcement activity through the Trump administration. Following the 2016 guidance, the DOJ had intimated that several criminal cases were in the works, but it took several years for the right candidate to emerge. In fact, the DOJ very recently issued its first criminal indictment in a no-poach case—against the former owner of a North Texas physical therapist staffing company for conspiring with competitors to suppress wages for physical therapists,<sup>13</sup> and in January 2021 brought a second action against the operators of outpatient medical facilities for an alleged agreement not to solicit each other’s senior executives.<sup>14</sup> Historically criminal antitrust enforcement activity - such as against price-fixing cartels - has remained fairly consistent as administrations change, and we can expect to see ongoing investigations and criminal enforcement in this area, particularly in the healthcare space, which has long been a focus of civil enforcement for anticompetitive labor practices.

9 AMG Capital Management, LLC v. Federal Trade Commission, Supreme Court Docket No. 19-508, on appeal from the 9th Circuit.

10 U.S. Department of Justice and the Federal Trade Commission Vertical Merger Guidelines, June 30, 2020, available at <https://www.justice.gov/atr/page/file/1290686/download>.

11 Joint Dissenting Statement of Commissioners Rohit Chopra and Rebecca Kelly Slaughter Regarding the Vertical Merger Commentary, December 22, 2020, available at [https://www.ftc.gov/system/files/documents/public\\_statements/1585062/p181201chopraslaughtervmcdissent.pdf](https://www.ftc.gov/system/files/documents/public_statements/1585062/p181201chopraslaughtervmcdissent.pdf).

12 <https://joebiden.com/empowerworkers>.

13 Former Owner of Health Care Staffing Company Indicted for Wage Fixing, DOJ Press Release, December 10, 2020, available at <https://www.justice.gov/opa/pr/former-owner-health-care-staffing-company-indicted-wage-fixing>.

14 U.S. v. Surgical Care Affiliates, Case No. 3:21-cr-00011-L, N.D.Tex., Indictment, January 5, 2021.

## III. Legislative change

13. There has been ongoing debate in the U.S. around the purpose and goals of antitrust policy in the light of what some perceive as burgeoning concentration in industries key to our economy—airlines, agriculture, healthcare and pharmaceuticals, technology, and many others. Does the “consumer welfare” standard, with its modern focus on the value that scale and efficiency can bring to consumers, truly reflect the vision of the Sherman Act? Or have years of judicial interpretation of the Sherman Act’s admittedly terse prohibitions landed us in the wrong place, where broader interests such as fairness in labor markets are neglected? The Unity Platform suggests that Biden may fall in the latter camp,<sup>15</sup> although his resumé as a lawmaker who prided himself on brokering bipartisan consensus on major issues suggests that the Biden administration will take a more middle-road approach.

14. Even during the Trump administration these questions were hotly debated and the bipartisan concerns about concentration were reflected in Senate hearings and reports (from both sides of the aisle), as well as ongoing agency investigations, principally focused on the tech space. During the Biden administration, there is likely to be a wide range of legislative proposals to strengthen the antitrust laws. The report of the Democrat-led Senate Antitrust Subcommittee on its investigation of competition in digital markets<sup>16</sup> included proposals for a far-reaching overhaul of the antitrust laws; however, such bold proposals may be limited by the Democrats’ very narrow majority in the Senate. Several Democratic lawmakers have separately introduced legislation aimed at strengthening antitrust enforcement in specific ways. For example, Senator Klobuchar’s latest proposal, the Anticompetitive Exclusionary Conduct Prevention Act,<sup>17</sup> seeks to ease antitrust enforcement in concentrated industries by shifting the burden of proof to “*powerful companies that have a market share of greater than 50% or that otherwise have substantial market power,*” requiring them to prove that allegedly exclusionary conduct would not present an “*appreciable risk of harming competition.*”<sup>18</sup> More incremental approaches along these lines may find more middle ground with Senate Republicans.

15 Unity Platform, at 67, proposing to “Charge antitrust regulators with systematically incorporating broader criteria into their analytical considerations, including in particular the impact of corporate consolidation on the labor market, underserved communities, and racial equity.”

16 Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, October 2020, available at [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf).

17 S.3426, 116th Cong. § 4(a) (as reported by S. Comm. on the Judiciary, Mar. 10, 2020), available at <https://www.congress.gov/bill/116th-congress/senate-bill/3426/text>.

18 Klobuchar Introduces Legislation to Deter Anticompetitive Abuses, [klobuchar.senate.gov](https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=E59886E1-12EE-48A5-94F5-044658A75513), March 10, 2020, available at <https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=E59886E1-12EE-48A5-94F5-044658A75513>.

## IV. Conclusion

**15.** While the Biden campaign policies on antitrust contain references to a strong commitment to vigorous antitrust enforcement in key sectors of the economy, it is not clear how much of a shake-up will actually take place as agency leadership transitions. The Trump administration got off to a slow start on antitrust, but both federal agencies are now very active in merger enforcement, as well as conduct and monopolization cases, and this level of activity is likely to continue into the new year and beyond. What remains to be seen is the extent to which new leadership will push the boundaries of the current approach, and if the new administration will invest additional resources to allow the agencies to expand their enforcement agenda.

**16.** Significant shifts can most readily be predicted at the FTC, where the views and positions of the existing Democratic commissioners have already been broadcast through their speeches and dissenting statements. With Democratic commissioners in the majority, we can expect the agency to be more aggressive in merger and conduct enforcement across the board. And we may see attempts to change the antitrust enforcement playing field with regulatory initiatives, which will no doubt be controversial and hotly contested, and potentially new antitrust legislation. In any event, antitrust enforcement in the Biden administration will be assertive and enthusiastic. ■