

# Conspiracy Theories

2025 Edition: Predictions for Cartel Enforcement Under Trump 2.0

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In many ways, criminal antitrust enforcement during President Trump’s first term illustrates what to expect under Trump 2.0. Among other highlights, the Delrahim DOJ obtained indictments and pleas involving public procurement at foreign military bases and launched the Procurement Collusion Strike Force (“PCSF”) to protect taxpayer spending; executives went to trial and were found guilty of collusion involving food and financial services; and the Antitrust Division brought the first criminal cases involving labor-market collusion, pursued investigations involving consumer-facing markets like chicken and healthcare, and implemented policy changes to incentivize investment in antitrust compliance.

**Based on trends during Trump 1.0 and the Biden Administration, here are our theories for Trump 2.0:**

1. The PCSF will continue to gain momentum as part of the Administration’s broader prioritization of protecting the public fisc from fraud, waste, and abuse.
2. The prioritization of international cartel enforcement will continue.
3. The Antitrust Division will focus on consumer-facing markets, particularly those with a broad public impact, like food and healthcare.
4. Labor-market enforcement will continue but will prioritize rare cases without legal complexity and with jury appeal.
5. The Antitrust Division will seek to blunt the effects of the *Brewbaker* decision to protect *per se* enforcement.
6. The Antitrust Division will continue to pursue novel theories of criminal liability to expand its enforcement portfolio.
7. An ounce of prevention will continue to be worth a pound of cure, as prosecutors continue to prioritize incentivizing and rewarding corporate compliance efforts.

Trump 2.0 inherits a full docket of ongoing investigations — a record high of 167 pending investigations to end 2024, which is nearly double the pending investigations when Trump’s first term began in 2017! While we await the Trump Administration’s appointment of its Deputy Assistant Attorney General for Criminal Enforcement, the indications so far point toward continued and aggressive enforcement.

And, looking back, while data are an imperfect and inexact indicator of criminal enforcement, the data include indications that criminal enforcement under Trump was greater in quantity than under Biden:

	Trump (2017-2020)	Biden (2021-2024)
<b>Investigations Initiated</b>	132	215
<b>Cases Filed</b>	88	72
<b>Individuals Charged</b>	92	102
<b>Companies Charged</b>	37	30
<b>Fines &amp; Penalties</b>	\$1,133 million	\$431 million

## 1. Long Live the PCSF

The DOJ announced the formation of the PCSF in 2019 during Trump's first term.<sup>2</sup> It is an interagency partnership to combat antitrust crimes and related schemes in government procurement, grant, and program funding.<sup>3</sup> Since its inception, the PCSF has opened 145 criminal investigations, prosecuted 85 companies and individuals, and obtained 60 convictions.<sup>4</sup>

The PCSF gained momentum and expanded as part of the Biden Administration's whole-of-government approach to competition enforcement.<sup>5</sup>

We expect this momentum to continue during Trump's second term. Two of the Antitrust Division's upcoming criminal trials are PCSF cases.<sup>6</sup> Moreover, the PCSF's mission aligns with the Trump Administration's focus on "sav[ing] taxpayers billions of dollars per year," based on an OECD estimate that "the elimination of bid rigging could help reduce procurement prices by 20 percent or more."<sup>7</sup>

Notably, tying into the PCSF's focus on data analytics, a recent audit by the DOT OIG used machine learning algorithms to identify potential indications of comp bidding in the award of state DOT contracts.<sup>8</sup> Examining six states, the report estimated that over a third of contracts were potentially affected by comp bidding, resulting in \$1.19 billion in higher costs.<sup>9</sup> We expect PCSF's work to continue.

## 2. International Cartels

In contrast to prior enforcement eras, the cartels that the Antitrust Division has uncovered and prosecuted in recent years have skewed domestic. During Trump's first term, only a handful of international cartels were exposed. This included the investigation and prosecution of five South Korean oil companies for conspiring to rig bids and fix prices for defense fuel supply contracts on U.S. military bases in South Korea.<sup>10</sup>

We do not see the lack of international cartel prosecutions during Trump's first term as an indication that they were not an Administration priority. On the contrary, the South Korea fuel supply cartel prosecution represented a major enforcement effort and was among the Administration's highest-priority matters. Likewise, the first Trump Administration celebrated a series of extraditions, indicating that "[t]he Antitrust Division will leave no stone unturned including working with enforcers around the world to bring to justice those who infect international markets with collusion."<sup>11</sup>

Recent announcements indicate the return of coordinated international cartel investigations<sup>12</sup> and the Antitrust Division's intent to "root out collusion that takes on an international dimension."<sup>13</sup> Moreover, the Antitrust Division and the FBI just launched an online portal for information on international fugitives who have been charged with antitrust crimes.<sup>14</sup> With these recent developments, we expect that international conduct and companies will continue to be in prosecutors' sights.

A February 2025 report by the Department of Transportation, Office of Inspector General used machine learning to estimate that "at least a third" of bidding on highway procurements across six states "were potentially affected by complementary bidding."

### 3. Consumer-Facing Cartels

Trump's first term was marked by cartel prosecutions in pocket-book industries like healthcare and food, where investigations involved generic drugs,<sup>15</sup> canned tuna,<sup>16</sup> and chicken.<sup>17</sup>

We expect that enforcement targeting household staples and consumer goods will continue to be a priority for the second Trump Administration. Indeed, in her confirmation hearing, Assistant Attorney General nominee Gail Slater cited “work[ing] to reduce consumer prices” as a “very pressing issue” and an Administration priority.<sup>18</sup>

Looking beyond consumer goods, we expect other markets that were priorities under the first Trump Administration will remain. They include technology, financial services—where the Delrahim DOJ tried a case against a foreign-exchange trader and obtained pleas involving pre-release American Depository Receipts—and commercial construction—where Trump 1.0 alleged collusion involving concrete, commercial flooring, and commercial insulation.

### 4. Labor Turnover?

The first Trump Administration brought the initial criminal cases involving labor markets. Those cases, however, resulted in a string of not-guilty verdicts and a Rule 29 acquittal. Moreover, those cases also illustrate legal and factual hurdles to conviction in labor cases, such as requiring prosecutors to show that the “purpose” of any no-poach conspiracy was market allocation. Prosecutors must prove that any no-poach agreement was not ancillary to a broader collaboration, which has opened the door for defendants to introduce evidence of intent, competitive benefits, and lack of competitive harm that prosecutors typically seek to exclude.

Given that the first labor-market criminal charges were brought during Trump 1.0, we expect that the Antitrust Division will continue to investigate wage-fixing and no-poach agreements during Trump's second term. However, turnover in the Antitrust Division's labor-market enforcement strategy may be in order. We may see the Antitrust Division become more selective in the cases it chooses to pursue: prioritizing wage-fixing over no-poach agreements, avoiding cases that may provide ancillary defenses, and favoring cases with evidence of intent and harm. Prosecutors may also choose to narrow their criminal focus to wage fixing while pursuing no-poach agreements civilly.

The upcoming trial in *United States v. Lopez*—a case that involves wage-fixing allegations and is currently scheduled to begin trial on March 24, 2025<sup>19</sup>—will be telling. Another loss could become another cautionary tale for prosecutors while a win could indicate that prosecutors have found a path—in at least one instance involving wage-fixing, rather than no-poach allegations—of convincing juries to convict.

International cartels will remain a priority, as will investigations involving pocketbook issues.

## 5. Blunting the *Brewbaker* Threat to *Per Se* Enforcement

In 2023, the Fourth Circuit held that *per se* analysis did not apply to bid-rigging allegations where the alleged co-conspirators had a dual-distribution relationship.<sup>20</sup> Rather, “[t]he only restraints that the Supreme Court has held to be *per se* unreasonable are purely horizontal, or, in other words, are agreements between entities who are *only* related as competitors.”<sup>21</sup> The Supreme Court recently declined to review the case.<sup>22</sup> This leaves intact the Fourth Circuit’s ruling that, according to the Antitrust Division, amounts to a “get-out-of-jail-free card” for rivals that opt to distribute a co-conspirator’s products or to sell or subcontract to one another.<sup>23</sup>

We have already begun to see the Antitrust Division’s strategy for blunting *Brewbaker* by forgoing Sherman Act charges in favor of fraud and other violations and avoiding the Fourth Circuit. This past October, the DOJ announced that six defendants had been charged for their roles in schemes to rig bids, defraud the government, and pay bribes and kickbacks in connection with the sale of IT products and services to federal government purchasers.<sup>24</sup> Although the DOJ’s press release describes the conduct as bid rigging, the DOJ instead opted for fraud, money laundering, and bribery charges.<sup>25</sup> In future prosecutions where Sherman Act charges are the only path, the Antitrust Division will likely steer clear of the Fourth Circuit to avoid the unfavorable *Brewbaker* ruling.

## 6. Novel Theories of Criminal Liability

We expect the Antitrust Division to continue to pursue novel theories of collusion.

- **Algorithmic Collusion:** While the Division’s first charges involving algorithmic pricing tools came under the Obama Administration, one executive charged in that investigation was arrested abroad and pled guilty during the Trump Administration. Then-Assistant Attorney General Delrahim celebrated the plea as an illustration of the Division’s “commit[ment] to investigating and prosecuting individuals . . . who collude through new and sophisticated means, including algorithmic pricing software.”<sup>26</sup> While recent investigations into collusion via algorithm have closed without charges,<sup>27</sup> we do not expect the second Trump Administration to abandon their theory that algorithms can facilitate price fixing.
- **ESG:** Likewise, the Trump Administration’s focus on environmental, social, and governance initiatives could also prompt investigations. In that regard, a suit led by the Texas Attorney General on behalf of thirteen states could prove illustrative. It alleges that asset managers coordinated to reduce the supply of coal to promote clean energy goals.<sup>28</sup>
- **Section 2:** Finally, we expect that the Antitrust Division will continue to bring criminal charges under Section 2 of the Sherman Act. There have now been six convictions for violations of Section 2 since its revival by the Biden Administration in March 2022.<sup>29</sup> These indicate the Division’s continued willingness to use Section 2 as a criminal tool, particularly in scenarios involving violent conduct.

Time will tell whether the Fourth Circuit’s *Brewbaker* decision amounts to an aberration or an indication that additional erosion of the *per se* rule is on the horizon.

## 7. Compliance Benefits Continue

In July 2019, the Delrahim DOJ announced a new model for incentivizing corporate compliance by directing prosecutors to consider compliance efforts when making charging decisions.<sup>30</sup>

Among the carrots for investing in compliance is the possibility of a compliance-driven deferred prosecution agreement—rather than a guilty plea and criminal conviction—for a company involved in a cartel. No company has received such a reward thus far, but we suspect that the first may come under the second Trump Administration, making investing in antitrust compliance a continuing and worthy effort.

That's because when the change was announced under the Trump Administration, it was a priority for both the Antitrust Division and the DOJ, and that prioritization continued into the Biden Administration. For example, in announcing the change, AAG Delrahim cited the support of both Deputy Attorneys General Rosenstein and Rosen. And his proverb that “an ounce of prevention is worth a pound of cure” was also used by Biden Administration Deputy Attorney General Monaco announcing additional DOJ actions to incentivize compliance.<sup>31</sup> Now, six years later, we expect the Division to continue to incentivize antitrust compliance efforts.

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