

# The Fate of the “Last Gasp” of the Biden FTC: Will Its Legacy Survive the Trump Administration?

A photograph of a modern building's curved glass facade, showing multiple stories and windows, set against a light blue sky.

4 MIN READ

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In the days leading up to President Trump's inauguration, the Biden FTC rushed to initiate major lawsuits and to tie a bow on various antitrust policy efforts. In a series of dissenting statements, the minority Republican Commissioners condemned the rush to action as “shatter[ing] norms,” an “insult to the Commission, its staff, and the rule of law,” and a “senseless waste of Commission resources” by an FTC leadership that “has no future.”

Once officially designated as Chair of the FTC on January 20, Andrew N. Ferguson vowed to “end the previous administration's assault on the American way of life” and “usher in a new Golden Age for American businesses, workers, and consumers.”

Do Chair Ferguson's ominous warnings foretell the fate of the Biden FTC's legacy? Although the harsh criticism of the Biden FTC may signal the demise of certain initiatives, bipartisan antitrust policy priorities in areas such as merger enforcement, healthcare and workers, suggest that at least some of the Biden FTC's final actions will endure.

Below, we predict the chance of survival of each of the Biden FTC's last-minute efforts once there is a Republican majority at the FTC.

Click the text or “+” below to see our take on each effort.

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# Gun-Jumping Enforcement

On January 7, the FTC secured a record \$5.6 million civil penalty to settle allegations that the merging parties jumped the gun on agency clearance in USA v. XCL Resources Holdings, LLC.

## Chance of Surviving Trump FTC: High

The Trump FTC will likely continue to scrutinize illegal gun-jumping as a historically bipartisan issue. Commissioners Ferguson and Holyoak voted to accept the settlement.

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# Report on Pharmaceutical Benefits Managers

On January 14, the FTC published a second interim staff report on pharmacy benefit managers' price markups for critical drugs. The report claimed that the "Big 3" PBMs dramatically marked up numerous specialty generic drugs dispensed at their affiliated pharmacies.

## Chance of Surviving Trump FTC: High

The Trump FTC will likely continue to focus on health care and study the PBM industry. Although Commissioner Ferguson's concurring statement (joined by Commissioner Holyoak) criticized the Biden FTC for issuing the report "on its way out the door," it previewed that the FTC "still has more work to do" on this study.

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# Deere Right-to-Repair Suit

On January 15, the FTC, along with the Illinois and Minnesota Attorneys General, sued Deere & Company alleging that Deere illegally restricted farmers' ability to repair their own equipment and blocked them from freely using independent repair providers.

## Chance of Surviving Trump FTC: Low

The Trump FTC will likely abandon this suit, particularly given Commissioner Ferguson's dissenting statement (joined by Commissioner Holyoak) criticizing the suit as "the result of brazen partisanship."

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# Antitrust Guidelines for Business Activities Affecting Workers

On January 16, the FTC and DOJ issued updated antitrust guidelines for business activities affecting workers. The updated guidelines replace the 2016 Antitrust Guidance for Human Resource Professionals.

## **Chance of Surviving Trump FTC: Medium**

The Trump FTC will likely maintain some form of the updated Guidelines, as they largely echo the bipartisan 2016 HR Guidance. Although Commissioner Ferguson (joined by Commissioner Holyoak) dissented from the FTC vote to issue the updated Guidelines, he did not discuss their substance, and instead took the opportunity to criticize the “lame-duck” Biden FTC. Areas for potential pull-back include guidelines about employment restrictions in franchise arrangements and a lack of standards for information exchanges.

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# Pepsi Robinson Patman Act Suit

On January 17, the FTC sued PepsiCo, Inc. for allegedly violating the Robinson Patman Act by giving one favored big-box retailer customer promotional payments and other key benefits, while denying those same benefits to its competitors.

## **Chance of Surviving Trump FTC: Low**

The Trump FTC will likely abandon this suit. Both Republican Commissioners dissented: Commissioner Ferguson criticized the suit as “a cynical attempt to tie the hands of the incoming Trump Administration” and Commissioner Holyoak called the complaint “the worst case I have seen in my time at the Commission.”

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# Exxon-Pioneer Settlement

On January 17, the FTC approved a final consent order resolving antitrust concerns over Exxon's acquisition of oil producer Pioneer Natural Resources. The order prohibits Exxon from appointing former Pioneer CEO Scott Sheffield to the Exxon board.

## Chance of Surviving Trump FTC: Low

Commissioner Holyoak's dissenting statement (joined by Commissioner Ferguson) criticized the consent order as "the Majority's pre-inauguration swan song" and contrary to the public interest: "As the new administration replaces the old . . . the continuing viability of this order should be scrutinized." The dissent sympathized with Sheffield, who is now suing the FTC for banning him from the Exxon board.

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# Welsh Carson Settlement

On January 17, the FTC secured a settlement with Welsh Carson—the PE sponsor of US Anesthesia Partners—to resolve allegations that Welsh Carson engaged in a roll-up strategy of Texas anesthesia practices through acquisitions by its portfolio company USAP in violation of Section 7.

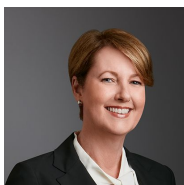
## Chance of Surviving Trump FTC: High, but with a caveat

While unlikely to roll back the settlement, the Trump FTC will likely moderate the Biden Administration's overt hostility to private equity. Commissioner Ferguson's concurring statement (joined by Commissioner Holyoak) characterized the settlement as a standard approach to Section 7 liability when a company has engaged in serial acquisitions that led to increased prices. But his statement does not address the settlement's very broad restrictions on future acquisitions nationwide and the context of Welsh Carson having been dismissed from the FTC's District Court litigation due to its current minority stake.

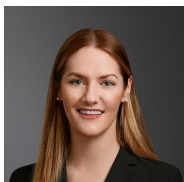
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