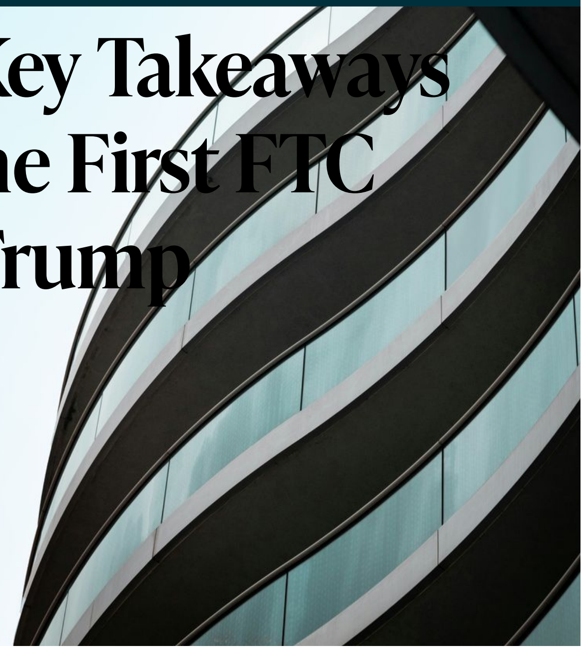
axinn

GTCR / Surmodics: Four Key Takeaways for M&A Antitrust from the First FTC Merger Challenge Under Trump



7 MIN READ

March 11, 2025, 3:05 PM
By: Lisl J. Dunlop, James K. Hunsberger, Jeny M. Maier, Laviana Z. Alharmoosh, Leandra Ipiña

In the FTC's first merger challenge of the new administration, the FTC voted 4-0 last week to challenge the proposed acquisition of Surmodics by private equity firm GTCR BC Holdings ("GTCR"). As the Trump administration's sweeping changes ripple across the government, the signs so far suggest a less dramatic shift in the antitrust realm, with Trump officials and nominees voicing plans to pursue an ambitious antitrust agenda on a number of fronts.

The FTC's GTCR/Surmodics challenge provides four key takeaways for the FTC's merger antitrust enforcement in the Trump administration:

1. The FTC will continue using the 2023 Merger Guidelines as the framework for its merger review analysis. Just last month, Chairman Ferguson made clear that the Biden-era 2023 Merger Guidelines—reflecting the last administration's aggressive merger enforcement policy—remain "in effect" at the FTC. The GTCR/Surmodics complaint cites the Merger Guidelines in support of its challenge and appears to reflect largely traditional antitrust theories.

2. The healthcare industry remains an area of heightened focus for enforcement.

3. Some cases may seek to impose a remedy requiring the companies to obtain the FTC's "prior approval" for future dealmaking, a favored policy of the Biden-era FTC.

4. While the Democratic Commissioners continue to raise concerns about the involvement of private equity firms in healthcare markets, the Trump FTC appears more likely to focus on the competitive effects of specific deals, not on the type of companies involved.

In short, even amid major regulatory shifts by the Trump administration in other areas, the FTC's challenge against GTCR/Surmodics and other recent moves by both the FTC and DOJ may signal continuity rather than disruption in antitrust enforcement.

#1: Continued use of 2023 Merger Guidelines and strong enforcement under traditional antitrust theories.

In its administrative complaint, the FTC claims the GTCR/Surmodics transaction would eliminate direct competition between the two largest market participants by combining Surmodics (the largest provider of outsourced hydrophilic coatings in the United States) and Biocoat, Inc. (the second-largest provider of hydrophilic coatings, in which GTCR currently holds a majority stake). Hydrophilic coatings are a specialized coating applied to interventional medical devices that are inserted in tight spaces, such as blood vessels, within the human body. The FTC claims the merger would substantially reduce competitive pressure and potentially lead to higher prices, diminished quality, and reduced innovation in hydrophilic coatings and associated services.

Based on the allegations in the redacted complaint (which Surmodics disputes), the FTC's challenge appears to reflect largely traditional merger analysis based on established antitrust principles:

First, the FTC invokes the structural presumption from the 2023 Merger Guidelines, alleging that the transaction is presumptively illegal based on the combined market shares of the merging companies and the resulting market concentration (as measured by the Herfindahl-Hirschman Index ("HHI")). The complaint alleges that Surmodics and Biocoat are the top two of four large manufacturers of outsourced hydrophilic coatings and, if completed, the transaction would grant GTCR control over more than 50% of the U.S. market for outsourced hydrophilic coatings, resulting in a post-merger HHI exceeding 3,500 and a change in HHI of over 1,000. These levels substantially surpass the concentration thresholds in the 2023 Merger Guidelines (30% for combined market share and 1,800 for HHI, with change in HHI above 100), but would also have exceeded the higher thresholds in earlier versions of the agencies' Horizontal Merger Guidelines.

Second, the FTC relies heavily on ordinary course business documents (including internal communications, board presentations, and strategic plans) to emphasize the alleged closeness of competition between Surmodics and Biocoat. The FTC's complaint also references purported evidence of specific competitive interactions between the parties, including direct bidding against each other to win OEM business. These have been common features of merger challenges for many years preceding the Biden FTC.

Third, the FTC claims high barriers to entry, including substantial regulatory requirements, lengthy research and development timelines, and demanding customer qualification processes that allegedly create significant hurdles for potential new entrants. The FTC alleges it could take four to seven years on average for a new entrant to begin generating revenue and achieve meaningful market presence.

Lastly, the FTC alleges that industry participants—including customers and competitors—have voiced concerns about the acquisition. For example, the complaint references purported customer testimony to the effect that competition between the parties has led them to offer higher-quality products at better terms.

#2: Continued focus on the healthcare industry.

The healthcare industry continues to be a focus for regulators. We can expect antitrust enforcers, regardless of party affiliation, to continue to closely scrutinize and challenge transactions perceived as having potentially harmful effects on prices, customer choice, quality, or innovation in the healthcare space. In a separate statement on GTCR/Surmodics, Democratic Commissioners Slaughter and Bedoya emphasized the importance of challenging consolidation in healthcare markets where "not just money but lives are on the line."

Other incoming agency leaders have also indicated that healthcare remains an area of focus. For example, incoming FTC Commissioner Mark Meador, who previously worked in the FTC's Healthcare Division, stated during his confirmation hearing, "competition will be maintained so that all healthcare providers feel that need to continue to provide better quality services to patients." Likewise, in the questionnaire for her confirmation hearing, DOJ Antitrust AAG nominee Gail Slater identified healthcare as among the "key industries" for the DOJ to "prioritize" because of its "impact [on] the day-to-day lives of the American people," and stated, "[h]ealthcare competition is a critical priority because of its impacts on patients, caregivers, and our local communities."

#3: Some cases may still seek to impose a remedy requiring the companies to obtain the FTC's "prior approval" for future dealmaking.

In a bit of a surprise for FTC watchers, the FTC's complaint seeks so-called "prior approval" requirements on any future transactions involving GTCR or Surmodics in the relevant market (outsourced hydrophilic coatings). In 2021, the Khan FTC, by a 3-2 vote, adopted a controversial and burdensome "prior approval" policy, which announced a return to the pre-1995 practice of including provisions in merger enforcement orders that require parties to obtain the FTC's prior approval before closing future transactions in designated markets. At the time, the policy was strongly opposed by then-Republican Commissioners Wilson and Phillips who, in dissent, described the policy as "yet another gratuitous tax on M&A activity" that "impose[s] substantial costs and uncertainty on future transactions."

While the future of the policy under the Ferguson FTC remains to be seen—in particular, it is not clear whether the Ferguson FTC will impose this remedy in settled cases like the Khan FTC, as opposed to seeking such a remedy in a litigated enforcement action—it may reflect the current leadership's pro-enforcement approach in general and in the healthcare industry in particular.

#4: While the Democratic Commissioners continue to focus on the involvement of private equity firms in M&A, the Trump FTC appears more likely to focus on the competitive effects of specific deals without regard to the type of companies involved.

It does not appear that the FTC's new leadership will highlight enforcement against private equity firms, in contrast to the prior administration's heavy scrutiny of private equity-backed consolidation and "roll-up" strategies. The FTC's administrative complaint in GTCR/Surmodics does not reference private equity roll-ups or discuss GTCR's status as a private equity firm as a separate basis for antitrust concerns, focusing instead on the alleged competitive effects of combining GTCR's portfolio company with Surmodics.

The two Democratic Commissioners sought to highlight GTCR's status as a private equity investor. In a separate statement accompanying their vote to approve the complaint, Commissioners Slaughter and Bedoya positioned the challenge as targeting a private equity roll-up acquisition, which is "part of a widespread and problematic playbook in our economy," particularly in healthcare where it can "come at substantial cost to the market and to consumers." Although the Republican Commissioners did not issue a statement, the language of the complaint (voted out by all four sitting Commissioners) and their prior statements suggest that they would not agree.

To date, the Republican FTC Commissioners have not indicated any intention or desire to specifically target private equity transactions as an area of enforcement focus. To the contrary, as now-Chairman Ferguson explained in his concurring statement in the US Anesthesia Partners/Guardian Anesthesia settlement (which Commissioner Holyoak joined), "[t]hat [the acquirer] Welsh Carson is a private equity firm is irrelevant; the antitrust analysis would be the same if Welsh Carson were, for example, an individual or institutional investor." Chairman Ferguson's statements suggest that the FTC may not single out transactions involving private equity firms, but will continue to aggressively enforce the antitrust laws to stop deals that harm competition, regardless of the parties to the deal.

Related People

Lisl J. Dunlop
James K. Hunsberger
Jeny M. Maier
Laviana Z. Alharmoosh
Leandra Ipiña

Related Services

Antitrust

To subscribe to our publications, click here.

TAGS

regulatory

News & Insights

- CompLaw Antitrust West Coast Conference 2025
  SPEAKING ENGAGEMENT **ANTITRUST**
- ABA 73rd Annual Section of Antitrust Law Spring Meeting
  SPEAKING ENGAGEMENT **ANTITRUST**
- 17th Annual Practitioners' Think Tank on ITC Litigation & Enforcement
  SPEAKING ENGAGEMENT **INTELLECTUAL PROPERTY**
- Antitrust Enforcement Trends and Policies in 2025: Unfair Competition, Merger Policies, Premerger Procedures
  WEBINAR **ANTITRUST**

- CompLaw Nordic 2025

  SPEAKING ENGAGEMENT **ANTITRUST**

- Key Questions for Navigating the Changing Competition Landscape in the Nordics and EU

  AXINN VIEWPOINTS **ANTITRUST**

- GCR Live Cartels: 2025

  SPEAKING ENGAGEMENT **ANTITRUST**

- CERAWeek 2025

  EVENT **ANTITRUST**

- Growing Role of Texas In Driving US Antitrust Policy

  AXINN VIEWPOINTS **ANTITRUST**

- Wynn v. The Associated Press, et al.: A Recent Petition for a Writ of Certiorari Highlights Challenges to New York Times v. Sullivan and Anti-SLAPP Laws

  AXINN VIEWPOINTS **LITIGATION & TRIALS**