

Competition at a Crossroads:

A Comparative Guide to Recent White House Records on Antimonopoly Policy

Laurel Kilgour
Matt Stoller

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“Now that Ken Frazier of Merck Pharma has resigned from President’s Manufacturing Council, he will have more time to LOWER RIPOFF DRUG PRICES!”

- DONALD TRUMP, 2017

“Capitalism without competition is exploitation.”

- JOE BIDEN, 2021

Since the financial crisis of 2008, Americans have come to realize that we face a monopoly crisis, a set of “Too Big to Fail” corporations in many sectors across our economy that foster a host of problems, from harming small business formation to hiking prices for consumers to fostering shortages in key goods to structuring key avenues for speech. Even excluding concentration trends from prior decades, 75% of U.S. industries became more concentrated between the year 2000 and 2015.¹ Profit margins of large firms are at 70-year highs, and the labor share of income has fallen 10% since 1970, with rent extraction as the culprit.² The number of public corporations has fallen by more than half since the 1990s, largely due to mergers.³

During and after the COVID-19 pandemic, an inflationary spike allowed corporations to reap high profits, leading to increased political support for taking on corporate power, with a majority of voters across party lines supporting measures to reduce consolidation.⁴ One of the most important domestic policy choices the next president will have to make is how to tackle America’s concentration crisis.⁵

In this report, we review the records of the Trump-Pence and Biden-Harris administrations, up through mid-October 2024,⁶ in fighting to halt — and ultimately reverse — this trend. Although a full accounting of each administration’s broader impacts on America’s political economy is beyond the scope of this report, we note that it would require an assessment of monetary, trade, tax, and industrial policies, among others. This report focuses on a specific set of policies relating to antitrust and fair competition, which were implemented by agencies whose budgets are currently a small fraction of others with economy-wide scope. Broadly speaking, we found that the Trump administration made notable progress in initiating a revival of antitrust enforcement by launching monopolization cases against Google and Facebook, but overall struggled to break from four decades of pro-consolidation orthodoxy.

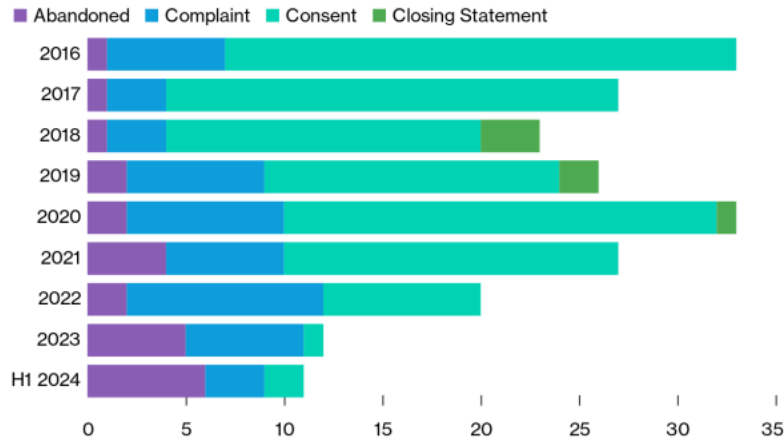
The Biden-Harris administration has had a more aggressive and focused approach. Ideologically, leaders of the Federal Trade Commission and the Antitrust Division of the Department of Justice restored competition policy to its original rich set of aims, moving away from a narrow technocratic approach to one incorporating how competition impacts consumers, workers, and small businesses. To operationalize this new framework, enforcers did three things. First, they addressed rampant consolidation via new merger guidelines and a merger deterrence litigation strategy. Second, they focused on dominant intermediaries, first by restoring monopolization law with the first successful lawsuit in two decades, against Google,⁷ and then by reviving enforcement against unfair methods of competition,⁸ exclusive dealing and tying arrangements,⁹ price discrimination,¹⁰ and kickbacks. Third, they have democratized regulation. The FTC holds public meetings, launched a new open merger examination process, and has incorporated public feedback as a key mechanism for policy formulation. The DOJ and FTC have also helped other agencies solicit more public feedback.

On the enforcement front, Biden-Harris enforcers brought to trial four times as many billion-dollar merger challenges as Trump-Pence or Obama-Biden enforcers did.¹¹ The Biden-Harris

administration also filed two and a half times as many monopolization claims (Apple, Amazon, Meta, Live Nation/Ticketmaster, Google adtech) and won the first major monopolization claim against a Big Tech firm in a generation.

The purple bar in the below chart illustrates the different impacts of the two administrations’ enforcers on the dealmaking climate.¹²

Abandoned Deals Rise as Antitrust Enforcers Avoid Settlements
Six mergers were abandoned in the first half of the year amid US antitrust investigations, a figure surpassing yearly totals from the past decade.



Source: Dechert
Note: Data covers merger investigations that result in a consent order, a complaint challenging the transaction, an official closing statement, or an abandoned tie-up that prompts an agency press release.
Bloomberg Law

Graph Credits: Justin Wise and Mahira Dayal, [“Failed Deals Climb as Antitrust Enforcers Push Aggressive Agenda,” Bloomberg, Sept. 23, 2024](#)

The antitrust enforcers that Biden appointed have not just been bolder in temperament than their predecessors but have also made a concerted effort to review the full extent of their statutory authorities to ensure that they have faithfully applied the laws they are charged with enforcing.

Our recommendations for the next administration include vigorously supporting current antitrust litigation to pursue bold remedies, endorsing congressional proposals to strengthen antitrust laws, undoing problematic mergers, reviving dormant enforcement tools, engaging in a sustained legislative- and executive-branch campaign to break up and regulate dominant corporations across the economy — and making appointments across government aligned with these goals. Effectively tackling America’s concentration crisis requires having the courage to challenge powerful corporate interests. With strong executive backing and this roadmap in hand, key personnel can hit the ground running and continue the fight to restore the promise of America’s free enterprise system through competition policy.

BACKGROUND

AMERICA'S CONCENTRATION CRISIS

For decades, America faced an accelerating crisis that few politicians understood until mid-2016¹³ — shortly before Donald Trump's victory in the presidential election rocked the political establishment. Nearly every sector of an economy that was once dynamic, locally rooted, and competitive was by then dominated by a few distant masters due to unchecked consolidation.¹⁴ This shift was not the consequence of some inevitable economic process but instead reflected policy choices.

Specifically, starting in the 1970s, policymakers abandoned the traditional American skepticism of concentrated power and conflicts of interest, and adopted a view that efficiency should be paramount in guiding value in competition policy.¹⁵ After this radical ideological shift, a wave of mergers across the economy ensued.

Without competitive pressure, dominant corporations charged more for worse-quality products, gained bargaining leverage over suppliers and workers, and even began forbidding employees from changing jobs or starting their own small businesses.¹⁶ Americans also lost trusted local news sources.¹⁷ Policymakers became less responsive to constituent concerns¹⁸ — a trend correlated with an explosion of corporate lobbying fueled by monopoly rents.¹⁹ Voters became more concerned about the corrupting influence of money in politics²⁰ but also felt increasingly powerless to do anything about it. Then the COVID-19 pandemic laid bare another consequence of hyper-consolidation: too many supply chains had single points of failure. Disruptions led to price-gouging or shortages — not only of consumer goods but also of essential medical supplies, and even products such as baby formula.²¹

Prior to the ideological change of the 1970s and 1980s, antitrust law was run through a framework called the structure-conduct-performance paradigm, an industrial organizational model positing that large firms in consolidated markets tend to exploit market power, and should be dissuaded by making it harder for them to acquire rivals or engage in coercive business practices, such as tying or price discrimination.²² Thinkers from what is known as the Chicago School challenged this framework with a legal doctrine known as the “consumer welfare standard,” a term that tethered antitrust law to highly speculative theoretical models from economists. The rationale was that government action was usually harmful, and that any private monopolies will be easily and quickly disrupted by new technologies and the invisible hand of a self-correcting market.²³ Thus, antitrust should be used sparingly, if at all. Although Congress enacted antitrust laws to disperse power,²⁴ the Chicago Schoolers, through administrative choices rather than statutory changes, reduced antitrust to an economist-driven exercise in predicting future price changes rather than a law-driven framework for protecting

competitive market structures. Enforcers turned into dealmakers, bent on greasing the way for unlawful transactions rather than preventing them.²⁵ The ideology failed even on its own terms; retrospective studies found that when enforcers chose not to challenge “mergers that resulted in six or fewer significant competitors prices rose in nearly 95 percent of cases.”²⁶ A stark indicator of how deeply rooted this ideology became in both parties is that the Department of Justice failed to bring any major monopolization cases under either George W. Bush or Barack Obama.²⁷ Corporate America adapted to a world where monopolization was de facto legal.

THE PIVOT IN PROGRESS

Even under the best circumstances, reversing decades of damage to the economy takes more than four years. Efforts to right the ship started to gain traction during the Trump administration. In some ways, his choices facilitated consolidation; notably, judges appointed by Trump have ruled to weaken the Clayton Act and regulatory policy.²⁸ But Trump also broke with a 40-year policy architecture fostering corporate centralization with a series of antitrust suits. In 2017, the Trump Antitrust Division brought the first vertical merger challenge in 40 years, litigating to stop the merger of AT&T and Time Warner.²⁹ In 2020, the Trump administration launched the first big monopolization cases in decades, against Google and Facebook.³⁰

In 2021, under the Biden-Harris administration, the nascent reorientation toward fair competition took deeper root. Notable actions included forming a White House Competition Council within the Executive Office,³¹ issuing an Executive Order on Promoting Competition in the American Economy³² — so that every federal agency would take steps to foster fair competition — increasing the budgets of the Antitrust Division and Federal Trade Commission, passing antitrust legislation in Congress,³³ strengthening merger policy, and appointing strong enforcers who not only continued the Trump administration’s monopolization lawsuits but also launched an onslaught of major new ones.

Both administrations took significant steps to address America’s concentration crisis. President Trump jump-started antitrust agencies plagued by an endemic culture of under-enforcement. President Biden then oversaw more systemic efforts to dislodge the harmful Chicago School ideology from the halls of power. Such a pivot is necessary to support free enterprise among businesses of all sizes. As detailed below, for example, under the Biden-Harris administration more Americans have launched small businesses, and dominant corporations have had to cut prices — while still making sustainable profits — in several industries that have been subject to strong enforcement. The durability of this progress depends on continued executive branch commitment — especially in the face of deep-pocketed lawbreakers fixated on eradicating antitrust law enforcers, whether through constitutional challenges or personnel changes.³⁴

COMPARING THE ANTIMONOPOLY RECORDS OF TRUMP-PENCE AND BIDEN-HARRIS

STAFFING THE ANTITRUST ENFORCEMENT AND OTHER KEY FEDERAL AGENCIES

The heart of antimonopoly policy is strong enforcement and strong regulatory guidance. The pacesetting agencies in this regard are typically the Federal Trade Commission (FTC) and the Department of Justice’s (DOJ) Antitrust Division. In this section, we compare each administration’s key appointments to these agencies and briefly compare appointments to other agencies with competition mandates and powers.

THE TRUMP-PENCE ADMINISTRATION’S ENFORCERS

For the top spot in the DOJ, Trump chose Attorney General William Barr, who, despite having a background in defending large corporations against antitrust cases, vocally favored reining in the outsized power of Big Tech.³⁵ For deputy assistant attorney general for the Antitrust Division, Trump nominated Makan Delrahim, a corporate lawyer and former lobbyist for Big Tech³⁶ and Qualcomm.

Delrahim continued to operationalize a consumer welfare standard-oriented enforcement philosophy.³⁷ In office, with the notable exception of the AT&T-Time Warner case, he often operated as a dealmaker looking to assist consolidation rather than a law enforcer, and aggressively sought to expand the power of firms, like Qualcomm, that profit through patent thickets and offshoring rather than making products themselves. Similar to the way Chicago School ringleader Robert Bork misrepresented the legislative history of the antitrust laws, Delrahim stretched patent law history to advocate what he called a “New Madison” approach to patent rights.³⁸ He systematically deployed amicus briefs to spread this ideology,³⁹ which sought to justify extortionate patent licensing practices in the context of industry standard protocols, such as USB or Bluetooth.⁴⁰

President Trump nominated Joseph Simons to chair the FTC. Simons was not a Chicago School ideologue, and he had even played a role in the government’s antitrust case against Microsoft.⁴¹ While at the FTC, he did not pursue major reforms, but he was the only Republican commissioner to vote in favor of unwinding Facebook’s acquisitions of Instagram and WhatsApp, which was also supported by Democratic commissioners Rohit Chopra and Rebecca Slaughter. Simons also sought to strengthen the FTC’s privacy enforcement powers.⁴² The other two FTC commissioners Trump nominated, corporate lawyers Noah Phillips and Christine

Wilson, were both ideologically devoted to the consumer welfare standard and voted against suing Big Tech.⁴³ All three Republicans voted against rulemaking for “Made in America” and “Made in USA” labeling,⁴⁴ and refused to issue any fines or penalties for violating existing Made-in-USA requirements, even after President Trump issued a “Buy American and Hire American” executive order.⁴⁵ Instead, it was the two Democratic commissioners who argued in their dissenting statements that such deceptive labeling warranted meaningful penalties.⁴⁶ In particular, Rohit Chopra argued that the FTC should resolve Made-in-USA fraud through remedies including “restitution, disgorgement, notice, and admissions of wrongdoing,”⁴⁷ and also pointed to unused legal authority in the North American Free Trade Agreement for requiring offenders to pay over \$40,000 per violation.⁴⁸ But the obstructionism of Phillips and Wilson did not stop with thwarting Made-in-USA enforcement — both even opposed a budget increase for their own agency in the midst of a historic merger wave.⁴⁹

President Trump allowed professor Joshua Wright to run his FTC transition team.⁵⁰ Wright later fell from grace and resigned from George Mason University in 2023 in connection with allegations that he had pressured multiple students into sexual relationships. Investigative reporting by The Wall Street Journal led to a series of articles that exposed not only his personal ethical lapses but also his professional impunity.⁵¹ Under Wright, George Mason University’s Global Antitrust Institute “funneled millions of dollars from Google, Meta, Amazon, and Qualcomm into fancy events in Napa Valley and Hawaii with judges and foreign officials, so much so that it led to an FBI investigation over potential violations of anti-corruption laws.”⁵² Retained by Google’s lobbyist Adam Kovacevich — now CEO of the Big Tech-funded think tank Chamber of Progress — Wright was tremendously influential, not only impacting personnel decisions but also persuading judges and FTC commissioners alike to make enforcement harder. Several of his former colleagues took on staff roles in Trump’s FTC.

Beyond the FTC and DOJ, Trump’s agency appointments often did worse than embrace a failed status quo; they often actively sought to stop their agencies from fulfilling their statutory missions. For example:

- **Consumer Financial Protection Bureau (CFPB):** Trump’s appointments to the CFPB — first Mick Mulvaney and then Kathy Kraninger, who both came from the Office of Budget and Management — quickly tamped down enforcement, returning far less money to consumers and levying slap-on-the-wrist \$1 fines to firms engaged in illegal debt collection.⁵³ With the support of the administration, Kraninger even sided with a lawsuit challenging the constitutional structure of her own agency.⁵⁴
- **Department of Labor:** After Trump’s first labor secretary, Alexander Acosta, resigned due to his mishandling of an investigation against sex trafficker Jeffrey Epstein,⁵⁵ Trump chose Eugene Scalia (son of Supreme Court Justice Antonin Scalia) to serve as his replacement. In addition to pursuing policies that impeded union organizing and dismantling worker protections,⁵⁶ Scalia co-authored an op-ed in The Wall Street

Journal setting out a legal roadmap urging the Supreme Court to kneecap the FTC's authority.⁵⁷

Other appointments embodied, rather than drained, the unethical D.C. “swamp” that Trump had railed against in his campaign. For example:

- **Department of Transportation (DOT)**: For transportation secretary, Trump chose Elaine Chao, a Washington insider who worked as deputy transportation secretary under President George H.W. Bush and labor secretary under George W. Bush — and who happened to be married to Senator Mitch McConnell.⁵⁸ While serving under Trump, she misused her public position for private gain, making her staff run personal errands and help family members run a shipping business.⁵⁹ She also refused to carry out congressional instructions, under the Federal Aviation Administration Reauthorization Act, to review and establish a policy that would require airlines to seat families with their children without incurring additional junk fees.⁶⁰
- **Federal Communications Commission (FCC)**: Trump promoted Obama FCC commissioner Ajit Pai as chair. Pai had previously worked at Verizon and led a majority vote at the FCC to roll back net neutrality rules, waved through a merger between Sprint and T-Mobile that decreased the number of U.S. wireless carriers from four to three, and sought to weaken rules preventing concentration in local media markets.⁶¹
- **Department of Health and Human Services (HHS)**: Trump's first health secretary, Tom Price, resigned after angering Trump with his extravagant use of private jets for government trips.⁶² Trump appointed as his replacement Alex Michael Azar II, then-president of the U.S. division of pharmaceutical company Eli Lilly, who had previously served as HHS general counsel and deputy secretary under George W. Bush.⁶³ Azar defended the Trump administration's decision not to follow through on a campaign promise to allow Medicare to directly negotiate drug prices. Instead, he told a Senate committee that it would be better to partner with pricing middlemen known as pharmacy benefit managers.⁶⁴ HHS did propose a rule to reform an exemption for such prescription-drug middlemen in an anti-kickback statute by requiring more transparency and changing the types of fees that would be exempted.⁶⁵ However, the rule stopped short of ending the most abusive practices, and in any event was never finalized. Unlike other appointees, Azar did not focus on reducing the power of his own agency.⁶⁶ Notably, Azar — whose father had kidney disease — drove adoption of an executive order addressing the dialysis duopoly, encouraging more at-home dialysis and kidney transplants.⁶⁷ The move was hailed by one patient group as the “largest shift in American kidney policy in 50 years,” which brought “long-overdue innovations in kidney diagnostics, drugs, and devices.”⁶⁸ Azar also attempted to address skyrocketing hospital prices by imposing transparency requirements. Unfortunately, the rules have not been effective, with many hospitals gaming or simply ignoring the requirements.⁶⁹ In addition, Azar expanded the privatization of Medicare.⁷⁰

- **U.S. Department of Agriculture:** When Sonny Perdue became secretary of the U.S. Department of Agriculture, he had already been fined for ethics violations as governor of Georgia.⁷¹ Perdue promptly confirmed fears that he would be a “company man” by withdrawing rules to strengthen a law that had been proposed in the waning days of the Obama administration.⁷² Then USDA dissolved the agency in charge of enforcing the Packers and Stockyards Act — often called the “Farmer and Rancher Bill of Rights” — and reallocated its duties, with a slashed budget, to a marketing-oriented branch of USDA.⁷³
- **Department of Defense:** Immediately before serving as Secretary of Defense, retired Marine Corps General James Mattis had served on the board of defense contractor General Dynamics — a position he resumed after resigning from the Department of Defense due to disagreements with Trump.⁷⁴ He was succeeded by Mark Esper, who had previously worked as a deputy assistant secretary at the Pentagon under the George W. Bush administration, as chief of staff of the Heritage Foundation, and as COO of an aerospace industry association.⁷⁵ Both Mattis and Esper failed to reverse the pro-consolidation mindset that had dominated military procurement ever since Clinton’s defense secretary held a “Last Supper” with top defense contractors in 1993 and told them to “consolidate or evaporate,” which resulted in a reduction in the number of prime contractors from 16 to six and quadrupled subcontractor mergers.⁷⁶ For instance, in 2018, the Trump administration allowed the merger of Northrop Grumman and Orbital-ATK, which fostered market power in rockets, leading to dramatic cost overruns in rebuilding the nuclear triad.⁷⁷

THE BIDEN-HARRIS ADMINISTRATION’S ENFORCERS

President Biden’s successes in reorienting economic policy stem from the recognition that addressing concentrated economic power need to be a cabinet-level priority. Appointees such as Bharat Ramamurti as deputy director at the National Economic Council and Tim Wu as a White House special assistant for technology and competition policy drove the adoption of a coherent “whole-of-government” approach to fair competition policy. When Biden announced an executive order to implement this approach, which included the creation of a White House Competition Council as well as dozens of competition mandates for specific federal agencies, he cited Franklin Delano Roosevelt’s call for an economic bill of rights that would guarantee “the right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies.”⁷⁸

The Biden-Harris administration made waves by appointing strong enforcers to the DOJ and the FTC. President Biden’s head of the DOJ, Merrick Garland, was — at least initially — not as vocal as his predecessor in supporting strong antitrust enforcement with respect to Big Tech.⁷⁹ But President Biden’s choice for chief of the Antitrust Division, Jonathan Kanter, not only had extensive antitrust litigation experience, including against Big Tech firms,⁸⁰ but had

been speaking out for years about the flaws of the consumer welfare standard and the need to reinvigorate enforcement.⁸¹

For FTC chair, President Biden chose Lina Khan, a leading thinker in the antimonopoly movement, already renowned for her academic scholarship, with unusually deep experience conducting factual investigations into market realities, both as a journalist and as a House Judiciary Committee staffer.⁸² For the other Democratic FTC commissioner slots, Biden renominated FTC Commissioner Rebecca Slaughter, known for her consumer protection work,⁸³ and appointed Alvaro Bedoya, known for his privacy expertise.⁸⁴

As discussed below, enforcers from both agencies not only continued cases initiated under Trump but also brought ambitious new cases. Importantly, they also discarded the failed “consumer welfare standard” ideology and applied the full scope of statutory language and Supreme Court precedents.⁸⁵

Anti-monopoly leaders extended into a few other federal regulatory agencies.

- **Consumer Financial Protection Bureau:** Biden appointed former FTC Commissioner Rohit Chopra as director of the CFPB.⁸⁶ According to one news profile, the Great Financial Crisis persuaded Chopra that “[t]here’s just no question that the way in which financial firms have long been overseen was a failure.”⁸⁷ Thus, at both the FTC and CFPB, Chopra focused on ensuring that agencies use the full scope of their legal authority. As discussed below, Chopra has paired vigorous enforcement with rulemaking that promotes fair competition and innovation in consumer financial services.
- **Department of Labor:** The first labor secretary Biden appointed, former Boston mayor Marty Walsh, initiated rulemaking to prevent misclassification of employees as independent contractors but also brokered an end to a dispute between freight railways and rail unions that was criticized as weak.⁸⁸ Walsh stepped down early in his term to run the National Hockey League Players’ Association. Biden then promoted Deputy Secretary Julie Su to serve as acting secretary in 2021.⁸⁹ Su has been praised for her role in brokering a strong deal for longshoremen to avert a port strike in October 2024.⁹⁰
- **Department of Transportation:** Biden’s transportation secretary, Pete Buttigieg, was also praised for contributing to that negotiation process. After a slow start, typified by token fines for airlines that refused to fulfill their legal obligations to issue ticket refunds,⁹¹ Buttigieg brought on a chief competition officer who had deep experience at the FTC,⁹² revived the Department of Transportation’s merger challenge authority,⁹³ imposed stronger route protections and other guarantees as merger conditions,⁹⁴ partnered with states to strengthen oversight,⁹⁵ and proposed new rules such as stopping airlines from charging extra for families to sit together.⁹⁶
- **FCC:** Biden promoted Democratic FCC Commissioner Jessica Rosenworcel to chair. Although this choice was viewed skeptically by progressives because of a record

that included opposing an FCC proposal to make the cable set-top box industry more competitive,⁹⁷ as chair, Rosenworcel has taken some significant actions, such as administratively challenging a \$5.4 billion acquisition of broadcasting conglomerate Tegna by hedge fund Standard General (backed by private equity titan Apollo) — which led to abandonment of the deal.⁹⁸ The FCC also implemented a new law imposing caps on exorbitant phone and video call rates for prisoners and their families.⁹⁹

- **Department of Health and Human Services:** Despite a promising antitrust enforcement record as California attorney general, Xavier Becerra has been less active in addressing competition issues in his role as HHS secretary.¹⁰⁰ In some instances he has focused more on making broken systems transparent rather than fixing them.¹⁰¹ Most steps that HHS took to begin studying the impact of concentration on health care were not taken alone but with the guidance of the FTC and DOJ.¹⁰² HHS implemented a new law to introduce competitive bidding for management of the country’s organ transplant system, which had been monopolized by the same provider for decades, resulting in a lack of accountability and patient deaths.¹⁰³ In September 2024, it announced the first ever multi-vendor contract awards for the Organ Procurement and Transplantation Network and made its board of directors independent from the nonprofit that had mismanaged the system.¹⁰⁴ Consistent with the Biden administration’s campaign against junk fees, Centers for Medicare & Medicaid Services issued a new rule protecting consumers against junk insurance.¹⁰⁵ The creation of a chief competition officer role within HHS in December 2023 also raises the possibility of more reforms during the remainder of the term.¹⁰⁶
- **Department of Agriculture:** Biden’s pick for secretary of agriculture was met with widespread criticism. Tom Vilsack had previously served as Obama’s secretary of agriculture and bore responsibility for policies that fueled exploitation and devastated farmers.¹⁰⁷ Moreover, he spent his time between public service stints as an industry lobbyist. Nonetheless, after joining the Biden-Harris administration, Vilsack hired a senior advisor on fair and competitive markets.¹⁰⁸ Biden’s 2021 executive order on competition instructed the USDA to reinvigorate enforcement of the Packers and Stockyards Act. But it took the USDA until 2024 to propose rules to fix overly narrow interpretations of the Packers and Stockyards Act¹⁰⁹ as well as rules that would prohibit meatpackers from docking chicken growers below their contractual base pay¹¹⁰ and require fairer benchmarks for formula pricing agreements regarding fed-cattle.¹¹¹ The USDA has also strengthened rules to ensure the accuracy of “Product of USA” meat labeling,¹⁷⁹ introduced a tool to assist small and disadvantaged entities in finding federal procurement opportunities,¹¹² and designated \$15 million to support enforcement coordination with state attorneys general.¹¹³ Nonetheless, aspects of USDA culture remain inconsistent with the executive order on competition, as exemplified by a senior USDA economist who testified in support of a sugar industry merger and openly touted her ties to the industry, even as the DOJ sought to block the deal.¹¹⁴

- **Department of Defense:** Biden’s secretary of defense, Lloyd J. Austin III, had a four-decade career in the Army, which included serving as commanding general overseeing all combat operations in Iraq, after which he served on the Boards of Raytheon Technologies, Nucor, and Tenet Healthcare.¹¹⁵ One significant positive development during his term was the Pentagon’s cancellation of a Trump-era process that would have awarded \$10 billion to a single cloud vendor for 10 years.¹¹⁶ In its place, the Pentagon introduced a multi-vendor contract that would last only three years with optional extensions, thereby enhancing both competition and oversight.¹¹⁷ Another is that the DOD will become more aware of consolidation going forward, because Congress added provisions in the National Defense Authorization Act requiring merging parties involved in large transactions to notify the DOD in advance. Yet overall, the DOD has not recovered from the pro-consolidation mindset of Clinton’s Last Supper and has not prioritized understanding the extent to which consolidation threatens American defense. A government study revealed that DOD reviews only 10% of M&A transactions in the defense base per year because it devotes only a few staffers to reviewing them.¹¹⁸ Senators from both parties have expressed concern that DOD’s insufficient review process jeopardizes national security.¹¹⁹

AGENCY ACTIONS — AND INACTIONS

TRUMP-PENCE ADMINISTRATION

THE GOOD

The signature achievement of the Trump administration’s antitrust enforcers was breaking a multi-decade enforcement dry spell. When President Trump took office, the DOJ had not brought a single major monopolization case in the two decades that had elapsed since the Microsoft case in the 1990s,¹²⁰ even though Big Tech firms made 1,000 acquisitions in the 10-year period between 2008 and 2018.¹²¹ In late 2020, toward the end of the Trump administration, the FTC filed an antitrust complaint against Facebook to challenge Facebook’s strategy of buying out emerging competitors (particularly Instagram and WhatsApp) to maintain market dominance, as well as other anti-competitive practices.¹²² The DOJ brought its own antitrust action to challenge Google’s monopoly over general search markets, which Google maintains in part by paying browser companies and mobile-phone makers to be preinstalled as the default search engine — essentially bribing Apple not to launch its own competing search engine.¹²³ These major cases continued into the Biden era.¹²⁴ The Facebook case is still pending, and in August 2024 a judge ruled that Google engaged in illegal anti-competitive practices to maintain its search monopoly.¹²⁵

Trump-era FTC leaders also authorized a retrospective study of the hundreds of acquisitions by Big Tech that had never been challenged, to learn from the failures of both the George W. Bush administration (when Google cemented its adtech monopoly by acquiring DoubleClick) and the Obama administration (when Facebook acquired Instagram and WhatsApp).¹²⁶ That study was ultimately completed early in the Biden administration.¹²⁷ Trump's FTC also brought a monopolization case against Surescripts, an online prescription delivery service that dominated its market through kickbacks.¹²⁸ Unfortunately, enforcers lost the ability to seek monetary relief due to an unfavorable Supreme Court decision about the scope of the FTC's authority.¹²⁹ The case continued under the Biden administration and concluded with a settlement that required Surescripts to remove anti-competitive contractual terms and end employee noncompete agreements.¹³⁰

One of the Trump administration's signature achievements was reviving long-forgotten approaches to industrial policy when responding to the COVID-19 pandemic.¹³¹ Changes in trade law and the consolidation of buying power in the hands of group purchasing organizations had driven critical supply chains offshore, and the moves to combat that involved aggressive public structuring of markets.¹³² In March 2020, President Trump invoked the Defense Production Act to facilitate production and distribution of medical supplies, including personal protective equipment, test kits, drug products, and medical gases.¹³³

Two months later, President Trump launched Operation Warp Speed. This partnership between the U.S. Department of Defense and HHS accelerated America's response to the COVID-19 pandemic by leveraging the government's capacity to directly create and structure markets. Vaccines typically take five to 10 years to develop, but Operation Warp Speed delivered the first doses by the end of 2020.¹³⁴ Operation Warp Speed harnessed preexisting medical science, including key public research supported by the National Institutes of Health (NIH),¹³⁵ and brought it across the finish line with private sector incentives to deliver a successful vaccine, including handing out multiple contracts to incentivize competition among vaccine developers. At the same time, the government nearly eliminated risks for these firms by not only providing billions of dollars up front for production but also making massive purchase order commitments early on.¹³⁶ This enabled manufacturers to scale their production capacity while vaccine candidates were still undergoing tests, rather than waiting until testing was finished.¹³⁷ Officials also actively troubleshooted problems for large manufacturers.¹³⁸

THE BAD

Other than initiating marquee monopolization cases and challenging Big Tech, the Trump administration's legal strategies largely stayed within the consumer welfare orthodoxy that had hamstrung enforcement. Although Trump's DOJ followed through on his campaign-trail promise to challenge AT&T's \$85 billion acquisition of Time Warner, the DOJ lost in court because enforcers acquiesced to the narrow constraints of the consumer welfare standard rather than fighting for statutory rigor. In affirming the loss, the appeals court indicated that the government

might have won by pursuing a different strategy.¹³⁹ After the merger, AT&T raised prices for both consumers and competitors,¹⁴⁰ discontinued its cheapest cable offerings,¹⁴¹ and reduced content quality.¹⁴² AT&T also cut 77,000 jobs — equivalent to the entire workforce of former competitor T-Mobile.¹⁴³ The merger harmed everyone but the CEOs and dealmakers, who earned hefty bonuses. Just a few years later, AT&T sold off Time Warner at a heavy discount.¹⁴⁴

The DOJ's avoidable loss led to a mega-merger spree not only in the media but in other industries as well.¹⁴⁵ Disney's purchase of 21st Century Fox sailed through with only mild concessions, and President Trump personally called Rupert Murdoch to congratulate him on the deal, even though the transaction enabled Disney to place onerous terms on movie theaters, reduce consumer choice, double down on wage suppression practices, and lay off thousands of workers.¹⁴⁶ The loss also likely discouraged the DOJ from mounting a serious challenge to the merger between Sprint and T-Mobile (then the third- and fourth-largest mobile carriers in the country), even though internal text messages between top Sprint executives admitted the merger would result in price hikes.¹⁴⁷ Instead, Makan Delrahim played dealmaker, personally coordinating meetings between executives to get a deal done.¹⁴⁸ The result was worse customer service, increased prices, and mass layoffs.¹⁴⁹ In 2024, T-Mobile lost an appeal of an order certifying a class of consumers who brought an antitrust lawsuit over the Sprint acquisition.¹⁵⁰

Similarly, although the DOJ issued a “second request” to investigate Google's acquisition of Fitbit, a wearable fitness tracking device company, the DOJ never challenged the deal despite concerns about how Google would leverage user data for advertising purposes.¹⁵¹ Legal observers speculated that the DOJ may have had difficulty shoehorning a data-centric case into restrictive market definition-focused case law from the consumer welfare standard era.¹⁵² Since then, Google has been able to profit from that data while degrading product quality.¹⁵³

Trump's FTC also made some poor choices. The FTC voted to close an investigation into Essilor and Luxottica, two of the largest companies in the optical industry, despite concerns expressed by the American Antitrust Institute, smaller rivals, and optometrist groups.¹⁵⁴ Within a year, the merged entity had hiked prices by 1,000%.¹⁵⁵ Although Trump's FTC levied a record-breaking \$5 billion fine against Facebook for illegally sharing user data without consent in connection with the Cambridge Analytica scandal (violating a 2012 FTC consent decree),¹⁵⁶ the seemingly impressive figure amounted to only 9% of a single year's revenue for Facebook — and its market cap actually rose by \$6 billion by the end of the day the fine was announced.¹⁵⁷ The order also imposed various data restrictions and internal bureaucratic requirements.¹⁵⁸ But just like the original Obama-era consent decree, the measures were too weak to solve the problem. Facebook again violated the revised decree, and in 2023 Biden's FTC proposed additional changes to strengthen Facebook's privacy practices, especially with respect to minors.¹⁵⁹

In other instances, the Trump administration's approach appeared to be hamstrung by conflicts of interest. Notably, although the FTC continued litigating an antitrust case against semiconductor patent licensing entity Qualcomm filed just before President Trump took office,¹⁶⁰

the case was torpedoed by the Trump administration's own DOJ, which took the unprecedented step of filing an amicus brief opposing the FTC's case,¹⁶¹ and by the U.S. Department of Defense, which likewise opposed enforcement without explaining how Qualcomm's patent-licensing tactics assist national security.¹⁶²

The Trump administration also inherited, but failed to fix, problems from the Obama era. The 2010 merger of Live Nation and Ticketmaster combined the nation's largest concert promoter, venue operator, and artist manager with the nation's largest ticketing service.¹⁶³ Although the merged firm repeatedly violated the weak consent decree through anti-competitive practices — such as threatening venues with losing access to lucrative concerts if they did not use Ticketmaster for sales — the Trump administration did not take the opportunity to implement stronger remedies, instead levying slap-on-the-wrist fines and requiring Live Nation to build an internal “compliance” bureaucracy.¹⁶⁴

In some instances, the Trump administration's enforcers proactively perpetuated Chicago School ideology. For example, in 2017 the DOJ and FTC sided with the Chamber of Commerce by filing a joint amicus brief opposing a Seattle law that would have strengthened labor rights for Uber and Lyft drivers.¹⁶⁵

In the defense industry, the Trump administration doubled down on a Clintonian strategy of actively promoting industry consolidation. Although Trump pushed back against Raytheon's purchase of United Technologies in 2020, the merger was eventually approved by his own DOJ thanks to the dealmaking mentality of his enforcers.¹⁶⁶ Several other deals further consolidated rocket engines, radio production, and major defense contractors.¹⁶⁷ Weak consent decrees were quickly violated.¹⁶⁸ In another instance, the Department of Defense announced a major initiative to modernize the U.S. military's information technology systems — but structured the bidding as single winner-take-all contract worth \$10 billion over ten years.¹⁶⁹ If awarded to Amazon, as early observers expected, it would have cemented Amazon's leading cloud position into a permanent monopoly, squashing nascent cloud competitors.¹⁷⁰ President Trump criticized that choice, prompting a controversial switch to Microsoft.¹⁷¹ But the real problem was the single-sourced structure. Under pressure, the Department of Defense put the deal on hold, and under the Biden administration, it pivoted to a shorter, multi-vendor contract instead.¹⁷²

Although the country's number of banks had shrunk from 15,000 in 1990¹⁷³ to just over 5,000 in 2016,¹⁷⁴ Trump's antitrust enforcers failed to deny any bank mergers. As a result, by 2020, America had 700 fewer banks.¹⁷⁵ Similarly, neither the DOJ nor the FTC sued to block a single merger in the food and agriculture sector during Trump's tenure; as a result there were various deals that turbocharged a trend toward consolidation, including the Big Six agricultural biotech firms merging into a Big Three, fertilizer combinations that led to price hikes of 60%-70%, and more.¹⁷⁶ The U.S. Department of Agriculture, meanwhile, formalized the previous two administrations' disregard for the Packers & Stockyards Act by making cuts to the agency in charge of enforcing it and proposing rules that would have practically nullified it.

Despite the success of Operation Warp Speed, there were also gaps in the Trump administration’s industrial policy response to the pandemic. For example, even though Pfizer and Moderna made windfall profits built in part on public research breakthroughs, government funding, and guaranteed purchase orders, the government failed to negotiate contractual terms that would ensure reasonable prices in the long run. Pfizer and Moderna tripled the price of booster shots within a few years.¹⁷⁷ In addition, there were missed coordination opportunities. In April 2020 President Trump took the position that “the Federal Government is merely a back-up for state governments,”¹⁷⁸ leaving states to scramble to form regional alliances and reallocate federal supplies that were not reaching under-resourced hot spots.¹⁷⁹ Moreover, without an institutional equivalent to the “Smaller War Plants Corporation” — which facilitated government procurement from small businesses during World War II¹⁸⁰ — the Trump administration was largely unable to coordinate with smaller manufacturers that had production capacity to spare, which could have rebooted domestic supply chains in a more durable way.¹⁸¹ West Virginia’s remarkably fast distribution of the COVID-19 vaccine, which was achieved by partnering with independent pharmacies rather than large chains, hints at the unrealized potential of proactively reaching out to local, independent businesses in times of crisis.¹⁸²

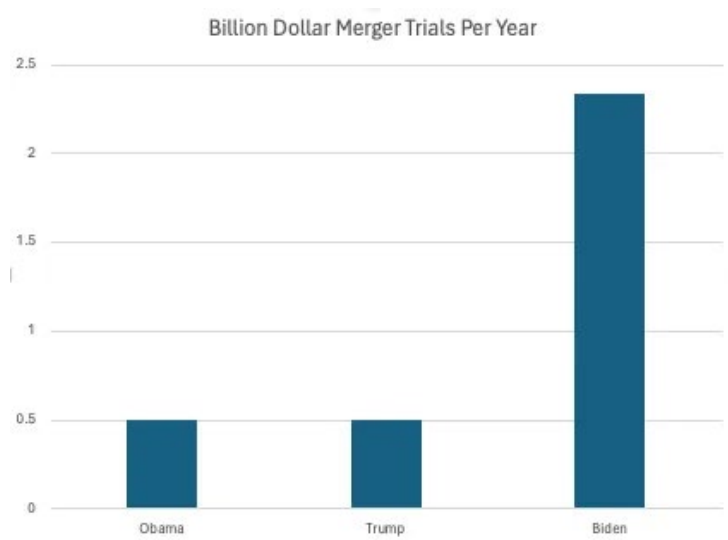
Moreover, as noted above, Trump’s appointments to agencies beyond the FTC and DOJ often not only failed to advance fair competition goals but even challenged the authority of their agencies to use longstanding statutory powers.

BIDEN-HARRIS ADMINISTRATION

FTC/DOJ ENFORCEMENT: THE GOOD

The Biden-Harris administration's enforcement priorities centered on the high prices caused by extractive monopolies and new forms of collusion. For instance, the Department of Justice brought groundbreaking cases against algorithmic price-setting among landlords in rental markets; price-fixing and merger cases in vegetables, poultry, turkey and pork markets; and extractive price-setting among generic pharmaceutical producers.¹⁸³ The Federal Trade Commission is suing to stop the largest proposed supermarket merger in U.S. history,¹⁸⁴ which would hike food prices, as well as taking action to bring down the cost of inhalers and EpiPen-style auto-injectors.¹⁸⁵

Statistics indicate that the Biden-Harris administration's antitrust enforcers have been four times bolder than their predecessors in challenging the billion-dollar merger transactions that have the biggest potential economic impacts.¹⁸⁶



As noted above, the agencies continued to litigate the antitrust cases against Facebook and Google launched under the Trump administration. The Facebook case is still pending, but the DOJ won the Google search monopoly case¹⁸⁷ and is now litigating the scope of remedies that will open up markets for general search and general search text ads.¹⁸⁸

The Biden administration also launched other major antitrust cases against Big Tech companies, including another case against Google (targeting its adtech monopoly, which Google leverages to take 30 cents out of every dollar spent on online advertising and to kneecap news publishers),¹⁸⁹ Amazon (two cases: one targeting anti-competitive practices against sellers and another to target deceptive interface designs for Prime enrollment and cancellation), and Apple (for monopolizing smartphone markets through practices that lock in consumers and keep prices high).¹⁹⁰ The

DOJ's requested remedies include structural relief, which might take the form of spinning off conflicted business units into separate companies.¹⁹¹

The Biden administration's antitrust enforcers have also achieved major victories, such as:

- Blocking Simon & Schuster's planned merger with Penguin Random House, which would have slashed pay for writers.¹⁹² This win, in the first case to block a merger solely based on labor harms, unlocked new ways to protect workers in future cases.
- Winning the first criminal monopolization case in 50 years, against a paving contractor that colluded with a competitor to unlawfully carve up regional markets.¹⁹³
- Winning the first-ever criminal case against employers that used "no-poach" agreements to stop caregivers for special needs children from finding better jobs.¹⁹⁴
- Winning a unanimous Fifth Circuit ruling that established critical precedent recognizing vertical merger harms and ultimately spurred abandonment of a deal that would have increased prices and decreased quality of cancer detection tests.¹⁹⁵
- Stopping a collusive deal between airlines.¹⁹⁶

The agencies also thwarted collusion by forcing dozens of board resignations via Section 8 of the Clayton Act¹⁹⁷ and by forbidding oil executives who colluded with OPEC to fix gas prices — which cost the average family \$3,000 and caused 27% of all inflationary increases in 2021 — from serving on corporate boards.¹⁹⁸ Many other illegal deals — including a billion-dollar shipping merger that would have imperiled supply chain resiliency¹⁹⁹ — have been abandoned due to newly credible enforcement pressure.²⁰⁰

Ongoing efforts in other high-profile matters include:²⁰¹

- Suing to break up Live Nation-Ticketmaster after an investigation revealed that the merged entertainment behemoth had repeatedly violated a previous consent decree by abusing its market power through exclusionary contracts that harm smaller rivals and fans.²⁰²
- Suing to stop price-fixing schemes by software firms to hike rent and rig agricultural markets, because using algorithms to coordinate collusion is just as illegal as if the transactions were intermediated by "a guy named Bob."²⁰³
- Suing Visa for inflating the cost of debit card transactions across the economy for both businesses and consumers by boxing out rival platforms through bribes and threats.²⁰⁴
- Launching inquiries into the managed care industry²⁰⁵ and serial health care acquisitions by private equity firms²⁰⁶ — timely topics given polling reflecting Americans' deep concerns about rising health care costs.²⁰⁷

Antitrust enforcers have also cracked down on health care conglomerates and lowered drug prices. The FTC is lowering prices on essential medication — including insulin and inhalers, to \$35 per month²⁰⁸ — by targeting Big Pharma's anti-competitive practices.²⁰⁹ In September 2024,

the FTC sued prescription-drug middlemen for orchestrating a “rebate” kickback scheme that artificially inflated the price of insulin.²¹⁰ The lawsuit is expected to have far-reaching impact, as the Big Three pharmaceutical benefit managers — Caremark Rx, Express Scripts (ESI), and OptumRx — together administer about 80% of all prescriptions in the United States. In a statement, the FTC indicated that “drug manufacturers like Eli Lilly, Novo Nordisk, and Sanofi” may be targeted next for their role in inflating drug prices.

FTC/DOJ ENFORCEMENT: THE BAD

There were, however, some high-profile losses as well.²¹¹ Unlike under Trump, these were not due to enforcers adhering to the old consumer welfare orthodoxy. For example, Biden’s DOJ lost several big jury trials involving wage-fixing and no-poach agreements, which focused on labor rather than consumer theories of harm.²¹² The FTC lost a case against Facebook (Meta) that sought to block its acquisition of Within Unlimited, a startup that offers subscription-based virtual reality fitness services.²¹³ Although the court credited the viability of FTC’s theory that a monopolist violates antitrust law when it is an actual or perceived potential competitor in a new market (virtual reality), the court found that the evidence presented was insufficient to satisfy the theory. And the FTC unsuccessfully sought to block Microsoft’s acquisition of Activision, maker of blockbuster game series such as Call of Duty, in a \$69 billion deal — the largest video game deal in history.²¹⁴ Although the FTC brought forth evidence of Microsoft’s history of withholding content from rivals, and the harm that would likely result to consumers, Judge Jacqueline Scott Corley, who did not recuse herself even though her son works for Microsoft, denied the FTC’s motion for an injunction to forestall the merger until the FTC’s in-house adjudicative proceedings ran their course.²¹⁵ Although the FTC appealed to correct the legal errors in the opinion, Microsoft was able to close the acquisition.²¹⁶ Microsoft then announced plans to lay off 1,900 people in its video game division²¹⁷ and announced a 17% year-over-year price increase for a game subscription while discontinuing a cheaper product.²¹⁸ In July 2024, Microsoft board member Reid Hoffman went on CNN to publicly urge the firing of FTC Chair Lina Khan in the midst of coordinating a Silicon Valley fundraising tour for presidential candidate Kamala Harris.²¹⁹

Aside from losses, the agencies have not always fulfilled their strategic goals. The Federal Trade Commission has not yet brought a Robinson-Patman Act challenge on price discrimination, and the Antitrust Division’s merger challenge activity, which was initially robust, has tapered off in 2024.

More fundamentally, the main challenge of the Biden-Harris era — inflation — saw a split within the administration. In 2022, there was ample evidence on investor calls that CEOs were attempting to collude with rivals to decrease capacity and raise prices.²²⁰ However, despite this evidence, the White House Council of Economic Advisors and the Federal Reserve opposed blaming higher prices on corporate concentration, which restricted the ability of enforcers to

bring litigation based on invitation-to-collude theories.²²¹ Evidence of collusion in oil markets came out in 2024,²²² but it was too late to change litigation strategies.

FTC/DOJ RULEMAKING: THE GOOD

One of the most significant policymaking achievements of the Biden-Harris administration's DOJ and FTC was jointly releasing new merger guidelines in 2023.²²³ Although this guidance is nonbinding, it has historically been relied upon by courts — and it puts merging parties on notice regarding the agencies' enforcement priorities. The new guidelines are strongly rooted in case law and reflect extensive public and academic input about market realities. Significantly, in 2024 the DOJ also withdrew the lax 1995 Bank Merger Guidelines, explaining that the 2023 Merger Guidelines apply across industries, including banking.²²⁴ This is consistent with Supreme Court case law recognizing that “concentration in banking accelerates concentration generally.”²²⁵ The DOJ and FTC also adopted an updated reporting form to implement the Hart-Scott-Rodino Act to focus premerger information collection on more relevant information that will enable faster decision-making about mergers, along with a portal to accept public comments on specific mergers.²²⁶ The form was approved on a unanimous, bipartisan basis by FTC Commissioners.

The FTC also pursued significant rulemaking efforts. Closing the loop on Rohit Chopra's Trump-era work on labeling, in 2021 the FTC issued rules adding teeth to “Made in USA” truth-in-labeling requirements by authorizing penalties for violations.²²⁷ In April 2024, the FTC banned noncompete agreements,²²⁸ which trap over 30 million workers.²²⁹ This ban was expected to reduce health care costs by \$194 billion, result in over 8,500 new businesses, increase innovation, and boost wages by about \$488 billion over the next decade.²³⁰ Although a Texas judge has purported to set aside the ban on a nationwide basis, the FTC will likely appeal and is expected to continue targeting such agreements on a case-by-case basis.²³¹ In October 2024, after gathering 16,000 public comments, the FTC announced a final “click-to-cancel” rule requiring companies to make cancelling gym memberships, cable subscriptions, and other auto-renewal programs as easy as signing up for them.²³²

The FTC and DOJ also jointly submitted comments encouraging the U.S. Patent and Trademark Office to revise patent procedures to cut down on low-quality patents that block competition,²³³ and the FTC also issued warning letters to pharmaceutical companies that improperly take advantage of FDA patent-listing procedures to block generic products.²³⁴ The FTC, DOJ, and Department of Transportation have worked to lower airline prices²³⁵ through antitrust enforcement²³⁶ and rulemakings²³⁷ that have led to more flights and routes, and allow more low-cost carriers to compete.

FTC/DOJ RULEMAKING: THE BAD

Some agency rules, such as the FTC’s ban on noncompete clauses, which enable workers to switch jobs without fear of reprisal, have been challenged by corporate interests and stalled by judges who are hostile to the administrative state.²³⁸ These challenges often attack not only the substance of the rules but the very structure of the FTC and its ability to govern through its statutory rulemaking authority.²³⁹

OTHER AGENCIES: THE GOOD

As noted above, a variety of agencies have made some progress to comply with the Biden White House’s executive order on competition. In particular, the CFPB has pursued a wide portfolio of consumer protection and antimonopoly work.²⁴⁰ When Rohit Chopra assumed leadership of the agency, it had never used certain legal authority expressly granted to it by Congress in 2010 in the wake of the financial crisis. Under Director Chopra, the CFPB finally used this authority to finalize an “open banking” rule to enable consumers to more easily switch to financial providers and stimulate competition to lower prices on loans and other fees and improve customer service in payments, credit, and banking markets.²⁴¹ Another notable focus has been pricing practices that are “really about cheating [rather] than competing.”²⁴² Chopra reportedly coined the phrase “junk fees” to denote the practice of companies tacking on opaque, mandatory fees that are often not disclosed until the very end of a transaction and often offer no “convenience” that is not already inherent in the product or service being sold. Such efforts garner widespread support in public polling.²⁴³ Related initiatives include reducing consumer penalties that are disproportionate to any cost imposed on banks. The CFPB has also taken action against credit card late fees,²⁴⁴ overdraft fees,²⁴⁵ and mortgage fees²⁴⁶ — which are predicted to save consumers over \$20 billion per year.²⁴⁷ The CFPB also eliminated nearly \$50 billion in medical debt, which unfairly lowered credit scores for 15 million Americans, and will ban medical debt on credit reporting moving forward.²⁴⁸ Enforcement actions against banks have also returned hundreds of millions of dollars to account holders for legal violations.²⁴⁹

Other agencies have also started to make progress. The DOT has rediscovered its authority to challenge mergers that do not meet a “public interest” standard²⁵⁰ and is engaging in consumer-friendly rulemaking.²⁵¹ The FCC, too, challenged a major merger.²⁵² In 2021 the USDA adopted a policy for stronger enforcement of the Packers and Stockyards Act and engaged in rulemaking to ensure that meat processors cannot use their market dominance to abuse farmers and ranchers through unfair and deceptive practices and undue preferences.²⁵³ In 2024, the USDA tackled the exploitative “tournament” system by proposing a rule to prohibit meatpackers from docking chicken grower compensation below their contractual base pay.²⁵⁴ The USDA also strengthened rules to make sure “Product of USA” meat labels accurately reflect the origin of the meat.²⁵⁵

OTHER AGENCIES: THE BAD

Despite these wins and the Biden-Harris administration's whole-of-government approach to fair competition policy, in practice some agencies have continued to hold fast to the pro-consolidation status quo.²⁵⁶ Notable examples include the HHS, which oversees America's broken health care system, and the Office of the Comptroller of the Currency, which supervises the federal banking system (nearly 1,100 entities ranging from community banks to the largest Too Big to Fail banks).²⁵⁷ Consolidation in the health care system is accelerating in part due to perverse incentives in the Affordable Care Act.²⁵⁸ Case-by-case antitrust enforcement has halted some deals,²⁵⁹ but scarce resources have meant that it is difficult to keep pace with the tide of consolidation. Meanwhile, HHS leaders have done little in the way of systemic reform. More vigorous enforcement of antitrust laws in the banking sector is especially critical to provide small businesses with access to capital,²⁶⁰ prevent the "Too Big to Fail" banking risks that ruined lives during the Great Financial Crisis, and otherwise ensure the stability of the economy.²⁶¹ Yet unconfirmed Acting Comptroller Michael Hsu has embraced a dealmaker mentality and blessed multiple bank mergers despite opposition from public interest groups, other bank regulators, and his own agency's staff.²⁶² During the venture capitalist-driven bank run of March 2023, Hsu approved the sale of First Republic to JPMorgan, circumventing the Riegle-Neal national deposit cap and inflating the size of the nation's largest bank by \$200 billion.²⁶³ The following year, in "the culmination of a pattern of oversight failures," Hsu approved NYCB's acquisition of \$38 billion of the collapsed Signature Bank's assets, compounding risk and contributing to NYCB's own near-collapse, which required a billion-dollar private equity-led rescue infusion.²⁶⁴

Other agencies are starting to study their own blind spots but have not yet made meaningful changes. In October 2023, the Government Accountability Office (GAO) issued a report that found the DOD reviews only about 40 of 400 M&A transactions per year because they only have a handful of staffers devoted to such reviews.²⁶⁵ Failure to consider competition often imperils other important policy goals. Notably, one of the Biden-Harris administration's signature accomplishments — the CHIPS Act, to boost domestic semiconductor production — is at risk of falling short of its potential due to unchallenged chokepoints and anti-competitive practices.²⁶⁶

In addition, some agency rules — such as the Federal Communications Commission's open internet (or "net neutrality") rules, the CFPB's ban on excessive credit card late fees, and DOT's ban on hidden junk fees — have been challenged by corporate interests.²⁶⁷

Contravening the whole-of-government philosophy, sometimes agencies even work at cross-purposes to oppose the efforts of enforcers to promote competition. The DOD derailed the FTC's initially successful attempt to prevent an acquisition of Aerojet Rocketdyne.²⁶⁸ As a result of missed opportunities under both Trump and Biden, the cost of modernizing the nuclear missile arsenal ballooned over 80% from a 2020 cost estimate, to a total price tag of nearly \$141 billion.²⁶⁹ Even other parts of the DOJ have undermined the Biden-Harris administration's progress. For example, Deputy Attorney General Lisa Monaco, the second-ranking leader in the DOJ — who

has significant personal conflicts of interest²⁷⁰ — forced adoption of a “Safe Harbor Policy” that immunizes acquirers who discover during diligence that a target company potentially criminally violated the Sherman Act.²⁷¹

RECOMMENDATIONS

Addressing America’s monopoly crisis has only just begun. Following through on legal enforcement and reorienting policy takes time. The below recommendations highlight priorities for the next administration to build on early successes and fill critical gaps.

DOUBLE DOWN ON A WHOLE-OF-GOVERNMENT APPROACH TO FAIR COMPETITION POLICY

Redoubling executive branch commitment to a whole-of-government approach to fair competition is essential to develop lasting solutions to America’s crisis of concentrated economic power.²⁷² The next administration should review President Biden’s executive order as a checklist to identify which actions still need to be undertaken and which agencies need stronger, more aligned leadership.

SUPPORT ONGOING ANTITRUST ENFORCEMENT ACTIONS AND RULEMAKING

The next administration should strongly back existing agency investigations,²⁷³ the 2023 Merger Guidelines,²⁷⁴ efforts to end collusive board seat overlaps between competitors,²⁷⁵ and antitrust cases. Indeed, some lawsuits — such as the Google search case — are in the critical phase of determining how to foster competition in markets closed through anti-competitive behavior.²⁷⁶ It would be a mistake for the next administration to water down remedies²⁷⁷ and repeat the failed approach of European regulators.²⁷⁸

The next administration’s support must extend to supporting vigorous remedies that solve the underlying incentives and firm structures that lead monopolies to abuse their dominant positions. It should support revival of dormant legal authorities, such as Section 3 of the Clayton Act and the Robinson-Patman Act, which prohibit exclusive dealing and tying arrangements, price discrimination, and kickbacks — major problems perpetuated by firms ranging from grocery chains to pharmaceutical benefit managers.²⁷⁹ It should also encourage agencies to conduct retrospective studies of consent decrees and seek stronger relief when monopolists violate weak consent decrees leftover from past administrations.

In addition, the next administration should defend agency administrative proceedings and rulemaking, including the FTC’s ban on noncompete agreements — which implicates broader

questions about the ability of a single court to vacate agency rules nationwide²⁸⁰ — and support the FTC’s democratized rulemaking process, which includes public participation in meetings and public comments on proposed rules.²⁸¹ Fortunately, the Supreme Court’s elimination of Chevron deference has limited impact on much of the FTC’s work for the simple reason that the FTC has historically rarely relied on that doctrine.²⁸² The next administration should vigorously defend the FTC in lawsuits challenging its substantive rulemaking authority.²⁸³

RESTORE FTC AND DOJ ANTITRUST DIVISION BUDGETS

The next administration should also advocate boosting agency budgets. The FTC and DOJ Antitrust Division together have about 1,000 attorneys plus a similar number of non-attorney staffers (paralegals, technologists, economists, etc.) — smaller than some big law firms.²⁸⁴ Their combined budget of \$845 million is a single-digit percentage of other agencies with economy-wide scope, such as the Department of Commerce or the Treasury.²⁸⁵ At a minimum, funding for the FTC and DOJ Antitrust Division should be immediately restored to (inflation-adjusted) 1979 levels, but considering that the economy has grown by a factor of 10 since then,²⁸⁶ a more appropriate increase would reflect that growth too.²⁸⁷

Federal agencies that have independent antitrust enforcement authority, such as the Department of Transportation and the Federal Communications Commission, should initiate their own actions to block or unwind harmful mergers. Other federal agencies — including, importantly, the Department of Defense²⁸⁸ — have a critical role to play in studying consolidation issues and coordinating with the FTC and DOJ to identify and prioritize enforcement opportunities.

APPOINT AGENCY LEADS AND NOMINATE JUDICIAL CANDIDATES WHO SUPPORT ACCESS TO MARKETS AND DO NOT HAVE CONFLICTS OF INTEREST

For those who wish to restore the promise of American fair enterprise, the most important danger to avoid during this inflection point is falling back on failed habits due to expediency or familiar social connections. Even the most well-intentioned members of the old guard from the Clinton and Obama administrations and the antitrust establishment tend to be incrementalist in nature because they remain rooted in an old and limited frame of reference. Potential agency leaders should be vetted for their commitment to a genuine shift in ideological approach, grounded in empirical evidence and market realities rather than abstract economic theory.

Beyond retaining effective enforcers already in place, the next administration should prioritize appointing leaders who will reorient:

- Banking agencies to vigorously enforce existing laws restricting bank mergers, as well as revising bank merger guidelines.²⁸⁹ Stopping the proposed merger between Capital One and Discover should be a high priority.²⁹⁰

- HHS to rein in health care consolidation and price-gouging middlemen such as pharmaceutical benefit managers.²⁹¹
- The Department of Defense to eschew single-source procurement contracts and more aggressively screen and weigh in against harmful mergers. Just as importantly, the defense agency must stop leveraging “national security” excuses to block antitrust enforcers, because overreliance on “national champions” undermines national security.²⁹²
- The Department of Agriculture to expand enforcement of the Packers and Stockyards Act and take other actions to address the extreme concentration in food industries.²⁹³

The next presidential transition team should undertake a thorough review to identify similar leadership gaps in other federal agencies as well, and question potential judicial nominees about their views and understanding of antitrust law.

ENCOURAGE AND SUPPORT CONGRESS TO STRENGTHEN ANTITRUST LAWS, REVERSE BAD JUDICIAL DECISIONS, RESUME OVERSIGHT OF THE JUDICIARY, AND ADDRESS CORPORATE POWER IN MAJOR SPENDING LEGISLATION²⁹⁴

The next administration should encourage Congress to strengthen antitrust laws. There are a variety of good bills from both sides of the aisle — including some bills targeting Big Tech that had sufficient bipartisan support and would likely have been signed into law but for Senator Chuck Schumer’s maneuvering to prevent a floor vote.²⁹⁵ Worthwhile ideas include:

- Legislatively overruling the judge-made consumer welfare standard²⁹⁶ and cases such as *Verizon Communications Inc. v. Law Offices of Curtis Trinko, LLP*, 540 U.S. 398 (2004), which hamstring antitrust enforcement.²⁹⁷
- Adopting bright-line and per se standards for merger challenges to ensure clear, objective standards to guide judges, boardrooms, and dealmakers and to ban all mergers that exceed certain thresholds, thereby preventing hyper-consolidation of the economy.²⁹⁸
- Introducing structural separation requirements — similar to what Glass-Steagall did to separate commercial banking from investment banking in the wake of the 1929 stock market crash — to other industries, for example, by ending conflicts of interest in digital advertising markets and on dominant platforms;²⁹⁹ preventing Big Tech companies from becoming banks;³⁰⁰ reinstating the Paramount Consent Decrees to prevent major studios from owning movie theaters;³⁰¹ and banning health care insurers from owning medical providers, pharmacies, and intermediaries.³⁰²
- Banning self-preferencing by dominant platforms and adopting traditional nondiscrimination principles for both dominant platforms and internet providers.³⁰³

- Making housing more affordable by breaking up homebuilding cartels dominated by middlemen,³⁰⁴ banning algorithmic rent-fixing,³⁰⁵ and stopping Wall Street from buying up single-family homes.³⁰⁶
- Rebalancing bargaining power between dominant platforms and news publishers.³⁰⁷
- Banning surveillance advertising.³⁰⁸
- Strengthening laws against predatory pricing.³⁰⁹
- Stopping private equity firms from looting hospitals and ruining professions.³¹⁰
- Banning race-to-the-bottom tax giveaways to dominant corporations.³¹¹
- Enacting a national right-to-repair law to guarantee that farmers, ranchers, and all consumers have the right to repair their own devices and equipment.³¹²
- Enacting a no-fault monopolization law.³¹³
- Closing loopholes that incentivize mergers through tax breaks.³¹⁴

The next administration should also urge Congress to ensure that major spending legislation includes conditions to end stock manipulation that redirects profits away from productive uses, address other practices that consolidate power, and stop shielding bad actors from the consequences of exploitative business models.³¹⁵

In addition, the next administration should encourage Congress to remove barriers to private enforcement. Legislation should ban mandatory pre-dispute arbitration clauses, class action waivers, forum selection clauses, confessions of judgment, unilateral modification clauses, and other coercive contractual terms. Such provisions prevent consumers, workers, and small businesses from having their day in court. The new Congress should overrule judge-made hurdles that unfairly deprive plaintiffs of basic discovery and dismiss antitrust cases too early.³¹⁶

Finally, the next administration should encourage Congress to reclaim its traditional role of writing the rules of federal procedure to prevent judicial overreach, to require that the judiciary provide remote public access to most court proceedings (as they did during the pandemic),³¹⁷ to stop charging for access to filings on court dockets,³¹⁸ and to otherwise enact measures to ensure that the press and the public can generally follow cases of interest in real time.

CONCLUSION

The next administration has a tremendous opportunity to set America's course for a generation, establishing a new bipartisan consensus — just as New Dealers did (for the better) starting in the 1930s and the neoliberals did (for the worse) starting in the late 1970s. The next administration must take bold steps to foster an economy that strengthens local democratic self-governance, protects consumers, and provides fair opportunities for success for businesses of all sizes.

ENDNOTES

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