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Insights

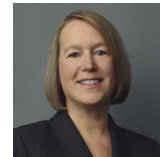
New Chair, New Direction? The FTC's Uncertain Future

The recent change in administration has brought significant shifts in the Federal Trade Commission (FTC), with new leadership and a renewed focus on key areas. Here, we outline the main topics discussed during Eimer Stahl's recent panel discussion on the new FTC, providing insights into the new direction under Chair Ferguson.

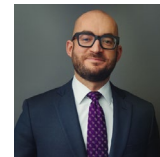
Shifting Approaches to Antitrust Enforcement

The Republican Commissioners—now the only two members of the Commission—have criticized some of the Biden administration's antitrust enforcement. This is especially true when the Commissioners felt that the FTC was overstepping its authority, largely by using novel and unorthodox legal theories or bringing enforcement actions on scant evidence. The Republican Commissioners favor traditional approaches to regulation and limitation on agency authority, including their own. More, the Commissioners believe that a traditional approach will provide stability and predictability for the business community.

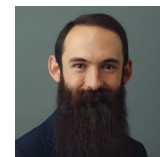
Three key areas of focus for the new FTC are **merger enforcement**, **artificial intelligence**, and **censorship by "Big Tech."** We take each in turn and discuss other areas to watch, including executive oversight and the Robinson-Patman Act.



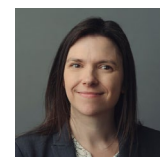
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Merger Enforcement and the 2023 Merger Guidelines

The FTC's approach to mergers is expected to change under the new administration. The Republican Commissioners have criticized the previous Democratic approach and signaled a focus on improving the merger review process to make it **more predictable** for businesses. As part of this focus on predictability and stability, however, the Commission **likely will not overhaul the 2023 Merger Guidelines**.

The new Commission intends to **get out of the way** of mergers. Based on their statements, the new FTC will likely start with the premise that mergers can be competitively beneficial, including by promoting innovation or greater efficiencies. The FTC will try to move expeditiously through the merger-review process, including by using **early termination** for quick approvals. And the new FTC is unlikely to continue using **“close at your own risk” warnings**. As Chair Ferguson recently said, “If we think there's an enforcement problem, we're going to act. And if we think there isn't, we're going to get out of the way.” And, when the FTC does believe there is a problem, they are likely to show greater acceptance towards **divestiture remedies** for mergers to allow them to move forward.

Although its approach to merger enforcement is likely to change, the FTC is unlikely to do away with the **2023 Merger Guidelines** put out by the Biden FTC. These guidelines, while not binding, can be considered persuasive authority by courts reviewing a merger. Chair Ferguson recently issued an official memo to FTC staff that the 2023 Merger Guidelines are in effect and will serve as the framework for the FTC's merger-review process. In Chair Ferguson's view, the guidelines generally reflect accepted antitrust principles, and maintaining them provides certainty and stability for businesses. Similarly, Mark Meador, whose confirmation to the Commission is pending, agrees that the 2023 Merger Guidelines generally contain restatements of accepted law, and that keeping them in place provides predictability for businesses. And although Commissioner Holyoak has been critical of the Guidelines, it is unlikely that they are in danger of full rescission—although there may be some tweaks down the road. But, for the time being, it seems that the 2023 guidelines are here to stay in their current form.

Big Tech and Censorship: A New Enforcement Priority

President Trump and the FTC have made clear that censorship by “Big Tech” will be a priority. In particular, the new FTC will likely investigate social media bans and “shadowbanning,” advertiser pressure to deplatform

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content, and potential collusion among tech companies in content moderation. The FTC has already issued a Request for Information, asking for public comment on the practices of social-media platforms regarding content moderation. This suggests that the FTC is gathering evidence of specific examples by specific companies that may lead to more formal investigations and potentially enforcement actions.

The Commissioners have suggested that Big Tech censorship practices could be subject to FTC enforcement under **both consumer protection and antitrust laws**. Under consumer protection laws, Commissioner Holyoak and Chair Ferguson have both suggested that these platforms may be violating their terms of service or otherwise deceiving customers in their deplatforming practices. And, in the antitrust context, collusion between the tech companies or advertisers could be actionable, that the ability to deplatform users could demonstrate market power, and censorship could have anticompetitive effects, including a degradation in the quality of the product.

Constitutional Issues and Executive Oversight

The new FTC will take a different position on constitutional issues and executive oversight. In particular, the Commissioners support direct executive oversight by the President and believe that they should be terminable at-will. Chair Ferguson has also expressed that dual-layer tenure protections for the FTC's administrative law judge's violates Article II of the Constitution as well. Given the Commissioners' position on this issue, it may not make much of a difference whether the Supreme Court's decision in *Humphrey's Executor*—which upheld the for-cause removal protections for FTC Commissioners—is ultimately overruled. In all events, we can likely expect to see the new FTC functioning more **like a cabinet agency**. Therefore, businesses should likely concern themselves less with antitrust committees from the ABA and FTC press releases, and more with developments from the White House itself.

The Revival of the Robinson-Patman Act?

At the eleventh hour of the Biden administration, the FTC approved two actions enforcing the Robinson-Patman Act, a rarely enforced law prohibiting price discrimination. The FTC's enforcement of the Act has been largely dormant for decades due to the Act's conflict with modern antitrust principles. While the Republican Commissioners dissented from the filing of the actions, both acknowl-

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edged their legal obligation to enforce existing laws in appropriate circumstances. In other words, the Commissioners will not refuse to enforce the Act, but will be discerning about whether and when to invoke it.

What Businesses Should Expect

The FTC is not abandoning everything from the Biden era, but its focus is shifting. Mergers will face less unpredictability, but will still be scrutinized. The FTC is moving towards a “wait and see” approach to AI. Big tech companies can expect heightened scrutiny over censorship and deplatforming. And the President will likely have much greater influence over the FTC than in the past.

In all, the FTC will continue enforcement, but likely under a more traditional approach. Indeed, the new FTC has already taken a step in that direction, approving its first enforcement action challenging a private equity firm’s acquisition of a medical-coatings provider, which would have given the firm control over the two largest such providers.

We will closely monitor developments as the FTC charts its new (but perhaps familiar) course and will keep our clients informed of impacts to their businesses.

The FTC will continue enforcement, but will likely return to a more traditional approach, with a focus on stability and predictability for businesses.