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### Insight Into the Upcoming Trump Administration's Antitrust Policy



With the nomination of Commissioner Andrew Ferguson as chair of the Federal Trade Commission (FTC or Commission) and Gail Slater to helm the U.S. Department of Justice's (DOJ) Antitrust Division, the second Trump administration's antitrust policy is coming into focus.<sup>[1]</sup>

Both individuals come from the Republican party's populist wing, which has expressed skepticism of big tech and other large companies—a departure from past Republican antitrust enforcers. But the question on everyone's mind has been what this means for enforcement and business.

*Punchbowl News* uncovered the most [detailed insight](#) into that important question: Commissioner Ferguson's pitch to President-elect Donald Trump for his appointment as FTC chair, which contained Commissioner Ferguson's policy objectives and enforcement priorities. While the FTC chair has only one of five votes on the Commission, the chair has immense power to shape the agency's policy agenda, allocate agency resources, and direct staff to investigate certain conduct or companies, as demonstrated by current Chair Lina Khan's tenure. This, likewise, is a useful predictor for how Gail Slater will lead DOJ's Antitrust Division. Slater, as illustrated by her past positions in the Trump orbit, also hails from the Republican party's populist wing. Prior to her nomination to lead DOJ's Antitrust Division, she served as JD Vance's policy advisor and an advisor on big tech policy on the first Trump administration's National Economic Council. Both positions suggest her antitrust policy will hew closely to Commissioner Ferguson's and be more populist than those of past Republican administrations. In a seeming confirmation of this prediction, President-elect Trump's [announcement of her appointment](#) stated, in part, "Big Tech has run wild for years, stifling competition in our most innovative sector and, as we all know, using its market power to crack down on the rights of so many Americans, as well as those of Little Tech!"

Commissioner Ferguson's pitch covers many topics, but two things are clear. First, predictions of the persistence of "Khanservative" antitrust policy—one which continues Chair Khan's aggressive enforcement agenda—in the second Trump administration appear to be incorrect. Second, Commissioner Ferguson's FTC is poised to

advance President-elect Trump's populist policy objectives and will potentially take direction from the White House on enforcement.

## **The FTC Will Depart From the Past Four Years**

Despite his populist tendencies and seeming departure from the Republican party's economic policies of the last 40 years, Commissioner Ferguson indicates that he is disinclined to follow Chair Khan's agenda. Indeed, the first point in his policy objectives is a commitment to "reverse Lina Khan's anti-business agenda." In the arena of antitrust, Commissioner Ferguson proposes several mechanisms to accomplish this goal, including:

- Repealing "burdensome regulations," which most likely include the rule against noncompete clauses and the "click to cancel" rule.
- Stopping the FTC's "war on mergers" and focusing resources on "mergers that harm competition and hinder innovation," which suggests the agency will reduce merger enforcement, cease its focus on labor markets in mergers, and be more receptive to settlements and consent decrees. Commissioner Ferguson's FTC is also less likely to pursue prior approval orders in settlements, which require the settling company to proactively receive approval for related mergers regardless of whether they meet HSR filing thresholds. It is also possible the FTC will scale back the upcoming HSR form changes or reinstate early termination before any changes go into effect.
- Reversing course on artificial intelligence (AI) and "[e]nd[ing] the FTC's attempt to become an AI regulator"—suggesting the FTC is less likely to use antitrust enforcement as a means of regulating the emerging technology than the agency has under Chair Khan.

Commissioner Ferguson, in addition, takes direct aim at several of Chair Khan's policy initiatives, which should come as no surprise to political observers, and closely tracks the rhetoric of Trump's campaign. He promises to end "politically motivated investigations" and "all initiatives investigating so-called disinformation, hate speech, or AI bias," and to not investigate conduct "under lawless disparate impact discrimination theories."

## **A Politicized FTC, but a Different Brand of Politics**

Despite Commissioner Ferguson's plans to reverse Chair Khan's policies, the upcoming FTC is poised to continue her tradition in at least one aspect—advancing novel and seemingly political policy objectives. These include, "fight[ing] wokeness," "protect[ing] freedom of speech," and ostensibly advantaging American companies. Specifically, the document promises that Ferguson's FTC will:

- "Prosecute collusion on DEI [diversity, equity, and inclusion], ESG [environmental, social, and governance], and advertiser boycotts." Many of these initiatives can involve coordination between competitors, such as agreements to move an entire industry to carbon-neutral. Federal antitrust authorities have not acted against this behavior, and Chair Khan was unlikely to devote agency resources to these investigations, but Commissioner Ferguson appears poised to change course and investigate this conduct.
- Combat big tech by focusing antitrust enforcement on "companies engaged in unlawful censorship" and pursue "structural and behavioral legal remedies . . . to make sure large platforms treat all Americans fairly"—likely references to allegations of anti-conservative bias on social media platforms.
- "Support strong American companies that can beat foreign competitors," which represents a significant departure from traditional consumer welfare-driven antitrust policy that focuses on price, output, and impacts on consumers rather than companies.
- "Fight back against the trans agenda," and investigate healthcare providers who "deceptively pushed gender confusion, puberty blockers, hormone replacement, and sex-change surgeries." Investigating providers for how they treat patients would be perhaps the most significant departure from past agency

practice and, if pursued, positions the FTC on the front lines of the culture war.

Commissioner Ferguson also seemingly signals that he will take guidance from the White House on enforcement actions and refers to the FTC as a “so-called independent agenc[y].” He likewise promises to “terminate uncooperative bureaucrats,” and “tak[e] on entrenched left-winged ideologues at the FTC.” Whether these statements will turn into tangible results—such as changing leadership in the various FTC divisions or limiting the use of the agency’s Part 3 administrative proceedings, which has been widely criticized by Republicans and allows the FTC to bring cases in its administrative court rather than federal court, remains to be seen.

## **What Can Businesses Expect?**

Despite Commissioner Ferguson’s stated desire to make the FTC more business-friendly, there are several industries that should expect continued scrutiny. Indeed, he specifically calls out “holding big tech accountable” and combatting “big tech monopolies.” Neither commitment is surprising, and large tech companies—particularly social media and other social platforms—should be on the lookout for how the FTC investigates and enforces his complaints about “censorship.” As this document has a strong political lens, companies in industries with high public scrutiny—such as healthcare providers, insurers, pharmaceutical manufacturers, and medical device companies—as well as foreign corporations should proactively prepare for agency scrutiny. Similarly, companies utilizing ESG policies or investment strategies and companies that are outspoken on DEI should prepare for increased scrutiny in these areas.

This document illuminates what Trump’s FTC and DOJ are likely to look like—agencies who are ready, willing, and able to investigate the administration’s perceived opponents and take on right-wing policy objectives. Businesses should prepare for this new reality. As with any paradigm shift, however, new opportunities will present themselves. The stated goal of ending the “war on mergers,” should mean that merger investigations are shorter, settlements and structural remedies are more likely, and companies can reevaluate potential deals they shelved during Chair Khan’s tenure. American companies, or companies with a large American manufacturing base, may also find the antitrust agencies more receptive to their interests and willing to entertain arguments that previously would not have found purchase. Likewise, larger companies, private equity buyers, companies utilizing AI, and cryptocurrency companies are also less likely to face assumptions that their transactions are inherently suspect.

## **Endnote**

[1] Gail Slater will need Senate confirmation; however, as Commissioner Ferguson has already been confirmed as to the FTC, he will not need to go through the confirmation process and should immediately take charge of the agency.

## **Authors**

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