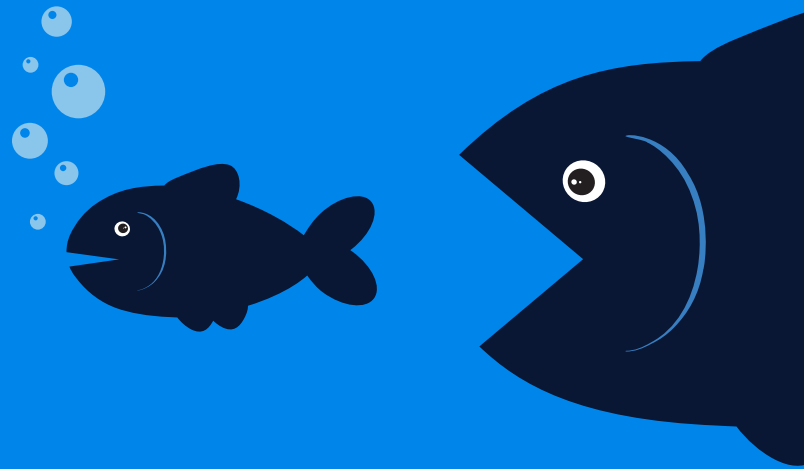


U.S. Election: What's at stake for M&A and antitrust policy?



In the Loop

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Key Insights

- Joe Biden's stepped-up effort to curb anticompetitive mergers and business practices was a departure from the past 45-plus years.
- Who the next president chooses to oversee antitrust enforcement will influence whether the agencies take an aggressive tack or opt to moderate their actions.
- Federal policy is only part of the puzzle. The outlooks for interest rates and the economy also play important roles in determining the level of M&A activity.



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The Biden administration's effort to crack down on unfair business practices marked a paradigm shift from the approach that generally had held sway for more than 45 years.

Will the Department of Justice (DoJ) and Federal Trade Commission (FTC) continue their assertive antitrust enforcement after the U.S. election?

This thorny question is important for markets. A string of abandoned mergers and acquisitions (M&A) and high-profile lawsuits for alleged anticompetitive behaviors have created uncertainty for the companies involved—and those companies that could find themselves in regulators' sights.

Whoever becomes president—whether it's Democrat Kamala Harris or Republican Donald Trump—has the potential to shape the focus and forcefulness of antitrust policy.

How Biden inaugurated a stricter approach to antitrust

Early in his presidency, Joe Biden issued an executive order calling on federal regulators to take a stronger approach to enforcing antitrust laws.

FTC Chair Lina Khan and DoJ Antitrust Division chief Jonathan Kanter have heeded this directive, seeking to curb what they view as excessive industry consolidation and to expand the grounds for antitrust action:

- **Not settling:** Regulators have been disinclined to approve problematic M&A transactions by accepting concessions, such as divesting some parts of the acquired business. These settlements are viewed with skepticism.

- **New M&A rules:** Revamped DoJ and FTC guidelines require much more detail about proposed transactions and flag deals that would boost the combined companies' market share to more than 30%.
- **Testing the limits:** Antitrust enforcement typically has been based on consumer welfare, which often focuses on the risk of unfair price increases. Recent lawsuits have sought to expand this standard, arguing, for example, that certain M&A transactions would harm workers and creators by reducing competition for labor.
- **Study hour:** Regulators have used their authority to study and publicize areas of possible concern, including private equity's forays into health care and issues that might arise in the technology stack for artificial intelligence.
- **On task:** Antitrust enforcers have formed task forces with other agencies, including one focused on potential competition issues in the health care sector.

Stepped-up oversight has contributed to M&A weakness

So far, the percentage of M&A transactions that Biden's regulators have flagged for potential antitrust issues has been in range with historical norms from past Democratic and Republican administrations.

Treatment of criticized deals, however, has changed. The number of abandoned M&A transactions has increased significantly.

Companies gave up on more than 20 proposed mergers because of competition concerns that the DoJ raised during Kanter's first two and a half years heading the agency's Antitrust Division.¹

And the prospect of regulatory scrutiny appears to have been a deterrent, stemming the number of potentially problematic deals making it to regulators for review.

Party views on antitrust have blurred, but historical biases are likely to hold

The Republican Party traditionally has taken a lighter touch when it comes to regulation.

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The number of abandoned M&A transactions has increased significantly.

However, the populist instincts of former President Trump and his running mate, Ohio Senator J.D. Vance, have raised questions about whether a win for their ticket would be as friendly to business interests as previous Republican administrations. The media has made much of Vance and other high-profile Republicans' respect for FTC Chair Lina Khan's efforts to challenge the dominant tech companies. These affinities could have their limits, given Trump's stated penchant for deregulation.

That said, the FTC and the DoJ would likely focus on addressing anticompetitive practices in health care and concerns

¹ Source: U.S. Department of Justice, "Assistant Attorney General Jonathan Kanter Delivers Remarks for the Fordham Competition Law Institute's 51st Annual Conference on International Antitrust Law and Policy," September 12, 2024.

The U.S. election and antitrust oversight: What to watch



A win by Harris:

Personnel is policy: Intense scrutiny of M&A and lawsuits that go beyond the traditional concept of consumer welfare would likely continue if Biden's antitrust chiefs remain in their roles. New appointees could open the door for a shift in approach.

Big tech: Skepticism toward M&A involving mega-cap technology and consumer internet companies is likely to persist. Antitrust lawsuits against these companies should progress. Regulatory headwinds remain for the group, with an emphasis on concerns about market concentration.



A win by Trump:

Big tech: Skepticism toward M&A involving mega-cap technology and consumer internet companies is likely to persist. Antitrust lawsuits against these companies should progress. Regulatory headwinds remain for the group amid Republican concerns about free speech and censorship.

Potential M&A thaw: A changeover of antitrust regulators could ease the path for some deal approvals. Larger transactions in highly consolidated industries would still likely face challenges.

Trade risks: Following through with the aggressive tariffs mentioned on the campaign trail could incline foreign governments to nix or delay acquisitions pursued by U.S. firms.

about the concentration power among the dominant consumer internet companies regardless of whether Trump or Harris is in the White House.

Less is known about Harris's views on antitrust enforcement. However, her campaign's emphasis on fighting to lower costs for families seems to align with the Biden administration's antitrust initiatives.

Post-election developments will shape the outlook for M&A and antitrust

History tells us that enforcement of antitrust laws and challenges to large M&A will happen regardless of which party is in the White House.

However, who the next president chooses to helm the FTC and the DoJ's Antitrust Division will influence whether the agencies take an aggressive tack or opt to moderate their actions. These personnel decisions bear watching.

At the same time, regulatory policy and federal oversight are only parts of the puzzle.

Some states have become increasingly proactive in seeking to restrict anticompetitive business practices. The judiciary also has a say. Decisions in antitrust cases that go to court are important in establishing legal precedents. And CEOs' confidence in the outlook for interest rates and the economy plays a significant role in determining the level of M&A activity.

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