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Bondi and Big Tech: What Trump's Choice for US AG Could Mean for Antitrust Enforcement

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What will antitrust enforcement look like under the second Trump administration? Speculation aside, there are some clues. The results of the 2024 election yielded Republican control in both the White House and Congress albeit with an ever-so slight Republican majority in the House of Representatives. The future of antitrust enforcement is therefore under Republican control for at least the next two years. The last time the Republicans had such control was from 2017 to 2019. Among conservatives, however, there has been a divergence on the role of the antitrust laws. Some prefer a softened approach to antitrust enforcement while others, colloquially referred to as "Khanservatives," agree with the more aggressive antitrust enforcement characteristic of the whole-of-government approach deployed by the Biden administration and Federal Trade Commission Chair Lina Khan. Ultimately, this ideological antitrust split means that the nature of antitrust enforcement under the second Trump administration will largely depend on those officials following President Donald Trump's direction. Top of that list is Trump's choice of Pam Bondi as U.S. attorney general.

Bondi served as the attorney general of Florida between 2011 to 2019, during which time she established a track record that would suggest a Bondi-led Department of Justice (DOJ) that will not shy away from antitrust enforcement efforts assuming it fits in the Trump agenda. During her tenure as Florida AG, Bondi's antitrust efforts were broad-ranging, challenging mergers in health care and among airlines, joining other states in efforts to stop price fixing in the prescription drug and poultry industries, and even securing a settlement with the NFL after it was accused of violating the antitrust laws by enforcing a leaguewide price floor on second-market ticket sales. These areas of focus were significant at the time of Bondi's tenure as Florida AG, and they remain significant now: each has been a hotspot of antitrust activity in the last few years, both in private litigation and cases brought by the federal agencies and state attorneys general. How those issues develop and are addressed going forward will, in large part, depend on Bondi and her to-be-chosen deputy attorney general for antitrust.

A major area of interest, however, has also been antitrust enforcement in the "big tech" space. Over the last four years, the Biden administration pursued aggressive antitrust enforcement in this area, litigating suits against some of the country's largest companies. Ironically, those monopoly cases against Google, Facebook, Amazon and Apple were launched in the first Trump administration. Trump also brought the first vertical merger case in decades against AT&T and Time Warner. To some, a second Trump administration in the wake of the Biden administration's aggressive legacy is reminiscent of the switch from Bill Clinton's administration to the George W. Bush administration, which had major implications in the DOJ's case against Microsoft at the time. Also recall that Vice President-elect JD Vance has praised Khan as doing a good job with antitrust policy. His staff is presently interviewing people to replace Khan as FTC chair.

Therefore, given the first Trump administration's willingness to bring antitrust actions, companies shouldn't expect that the second

Trump administration will abandon the legacy ironically built on by the Biden administration. Bondi's antitrust track record supports this. As Florida AG, Bondi challenged Apple's e-book pricing, Facebook's social media dominance and Google's alleged monopoly over internet searching. This history leaves Bondi primed to continue these efforts in ongoing cases that she would inevitably take over if approved as U.S. attorney general.

Finally, we have the benefit of knowing what Trump did in his first administration using the antitrust laws. In some ways, he did more than most Republican presidents, excluding Nixon who remains the most aggressive chief executive against Corporate America. Trump's first term actually showed more antitrust scrutiny of mergers and filed Sherman Act cases brought against certain industries than was exhibited by the Biden administration despite all the fanfare. The merger investigations and ensuing cases were greater under Trump than under Biden. The significant difference was that the first Trump administration was more willing to work out solutions to merger challenges rather than just block the merger as the Biden administration repeatedly tried. Therefore, there is no reason to see a different course of action taken under the second Trump administration.

However, there are two caveats to heed if Trump's 2024 campaign promises to hold true. Consistent with his buy American and build in America messaging, any merger that involves a foreign company trying to acquire or control an American company can expect a dogfight with the newly constituted Trump DOJ or FTC. In turn, any U.S. company that Trump has outed as building plants overseas and shutting down U.S. plants should expect increased scrutiny for any deal they attempt. Same for retaliatory investigations against those same companies. Nothing new there based on antitrust history, when the steel companies had labor issues in the early 1960s, President John F. Kennedy unleashed his brother Robert Kennedy's DOJ to conduct price fixing investigations of the steel companies to get them in line with the Kennedy administration's view of what was best for labor and consumers. The same may be coming under the second Trump administration that is vowing retaliation against many purportedly out-of-step entities.

Also, it is fairly certain that Trump will, like he did with President Barack Obama's executive orders, clear the books on novel antitrust initiatives as well. This includes the no-poach and noncompete ground swells by Biden's DOJ and the FTC. There will likely be no new merger guidelines or HSR form changes as had been proposed by Biden's antitrust enforcers. Those changes will probably be left to the state attorneys general to continue. It is likely some independent state AGs will do so and the same for renewed state criminal enforcement. However, it will be hard for Trump to claim that states do not have the power to take the antitrust ball further while simultaneously arguing that states' rights govern consumer issues like abortion, education and sexual orientation. As a former state AG, Bondi should be sympathetic to that argument. There is one big red flag. Having run on a platform of lowering consumer prices across the board and giving consumers more choices, the second Trump administration is unlikely to turn a blind eye on blatant price fixing and output controlling criminal and civil antitrust conduct in order to protect wayward and unschooled companies or campaign supporters. Trump will continue to be softer on private equity firm-controlled businesses contrary to the Biden enforcers, but we see no green light for them to run amok. Another exception to watch would be for situations where "national security interests" are claimed to be at stake, like President Harry Truman did in backing off price fixing by energy companies when there was an international fuel crisis. Stay tuned.

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