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FTC Focus: M&A Approvals A Year After Trump's Election

Law360 on **November 10, 2025**

This article is part of a monthly column that considers the significance of recent Federal Trade Commission announcements about antitrust issues. This installment checks in on the Trump FTC's progress on merger enforcement on the one-year anniversary of his electoral victory.

Merger Enforcement's Biggest Filing Change in Decades

Even as broader rules remain in place, merger enforcement has changed under the second Trump administration, and leadership under FTC Chairman Andrew Ferguson has meant a thoughtful and practical approach.

While the prior administration's significant changes to the Hart-Scott-Rodino reporting requirements have been left intact in the interest of continuity and good governance, the agency is using the expanded reporting to triage out more deals, grant early termination of HSR waiting period where appropriate, and zero in on the truly problematic.

Changes to the reporting process, finalized on Oct. 10, 2024, went live just weeks into the new administration. The revisions expand the scope of disclosure, imposing broad narrative and data requirements relating to competitive overlaps, supply-relationships, and ownership and governance on filing parties.

New Era, New Enforcement Tactics

The $36 billion Mars Inc.-Kellanova Co. deal, which saw the confectionery conglomerate take over the maker of Pringles, was given the green light by the FTC on June 25, after an investigation revealed that the transaction did not raise anticompetitive concerns sufficient to intervene.

In allowing the chip and candy merger to go through, Daniel Guarnera, director of the FTC's Bureau of Competition, said in a June 25 statement, the commission "cares deeply about any competition concerns that affect American consumers, including food products."

However, the Trump administration has indicated that it does not aim to slow down benign transactions, even larger ones. In the statement, Guarnera expressed his belief that once the FTC is confident a merger does not violate American law, its "job is to get out of the way" and let the deal go through.

Litigation Remedies Are Back in Vogue

The Trump administration has also brought with it a new appetite for remedies such as divestiture to allow parties to avoid litigation and get their deals closed.

For example, on Oct. 16, the agency approved a final order requiring Synopsys Inc. and Ansys Inc. to divest assets connected to a $35 billion merger between the software and electronic design companies.

Prior to the finalization of the order, the FTC alleged competitive harm in three critical software tool markets.

The May 28 administrative complaint warned that resulting concentration in the markets for optical software tools, photonic software tools and register transfer level power consumption analysis tools would lead to higher prices and less innovation, potentially harming consumers who might pay more for products that do not advance as quickly as they otherwise would.

Given the potential for consumer harm in these markets, and the parties' desire to avoid costly and time-consuming litigation, a consent order was issued whereby certain optics, photonic and register transfer level assets were divested, allowing the merger to proceed.

The Synopsys-Ansys consent order is emblematic of a change in priorities in Washington. In a May 28 statement on the merger, Ferguson criticized what he considers to be the Biden administration's "hostility to settlements in merger cases."

Companies hoping to avoid litigation through a divestiture remedy, though, should be prepared to present real-world solutions that unambiguously eliminate competitive harm.

In the same statement criticizing Biden-era hostility to such remedies, the new FTC boss was clear that "the Commission [should not] ordinarily accept a structural remedy unless it involves the sale of a standalone or discrete business, or something very close to it."

Other FTC personnel have echoed this sentiment. At a recent antitrust law symposium hosted at George Washington University, Lisa DeMarchi Sleigh, the deputy assistant director of the FTC's Merger Division, stated that the commission "can't just accept any remedy."

Unlike private litigants, the FTC cannot "just split the baby," Sleigh said in a question-and-answer session at the antitrust law event. Rather, "any remedy to an illegal merger or acquisition should successfully prevent the transaction's anticompetitive aspects" in their entirety.

Not All Is New

For certain, there has been continuation in enforcement priorities. For example, labor markets will continue to be a priority under Ferguson.

To that end, on Feb. 26, the agency announced the creation a joint labor task force to "prioritize rooting out and prosecuting" deceptive, unfair and anticompetitive labor market practices, explicitly tying this to the FTC's dual mandate to protect consumers "in their roles as workers."

The Trump-appointed chairman similarly expressed approval of the Biden-era merger guidelines that have governed the commission and DOJ's merger review since 2023.

In a Feb. 18 statement, Ferguson unequivocally confirmed that the revised guidelines "are in effect and are the framework for this agency's merger review analysis," emphasizing that "stability is good for the enforcement agencies" and that guideline rewrites should be undertaken sparingly.

Substantively, keeping the 2023 merger guidelines in place preserves the agencies' emphasis on structural presumptions in highly concentrated markets, entrenchment of dominant positions, potential competition, serial acquisitions and the effects of mergers on labor markets.

This administration's commitment to prior guidelines is more than mere rhetoric. The DOJ's Jan. 30 complaint over the Hewlett Packard Enterprise Co-Juniper Networks Inc. merger, filed in the U.S. District Court for the Northern District of California, invoked the concentration thresholds referenced in the guidelines, underscoring the agencies' continued reliance on their analytic lodestar.

The DOJ's Hewlett Packard complaint described the proposed merger as presumptively unlawful, as it threatens competition by leaving just two companies — Hewlett Packard and Cisco Systems Inc. — in control of "over 70 percent of the [commercial wireless networking solutions] market." These allegations were supported by references to the 2023 guidelines' thresholds for what constitutes a presumptively unlawful merger.

While the complaint underscored continued reliance on existing analytical frameworks, its conclusion displayed the new administration's more cooperative approach to case resolution.

In June, the DOJ reached a settlement with the parties, allowing Hewlett's $14 billion all-cash acquisition of Juniper Networks to go through, on the condition that Hewlett divest its Instant On wireless networking business and Juniper license the artificial intelligence source code it uses in its wireless local area network products.

This settlement highlights that antitrust enforcers in the new administration mean it when they say they will stand out of the way of any deals where the competition concerns are credibly resolved.

Going Forward

On balance, while the prior theories of harm remain constant at the FTC, case selection and the willingness to accept market-based solutions are key. What is different in 2025 are the tools used:

- A more robust HSR reporting regime to ensure substantial disclosure from a deal's outset;
- The return of early termination recognizing that significant front-end disclosure brings the ability to evaluate a proposed merger's anticompetitive effects — or lack thereof — more expeditiously; and
- The returning embrace of divestiture and other case-specific remedies where these remedies can cure a deal's competition problems and avoid costly and time-consuming litigation.

The success of deals under today's enforcement landscape turns on developing a solid case for the transaction, engaging with customers for buy-in where necessary, and preparing credible solutions early.

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