



# Rematch 2024: What The Election Means For Antitrust And The Next Four Years

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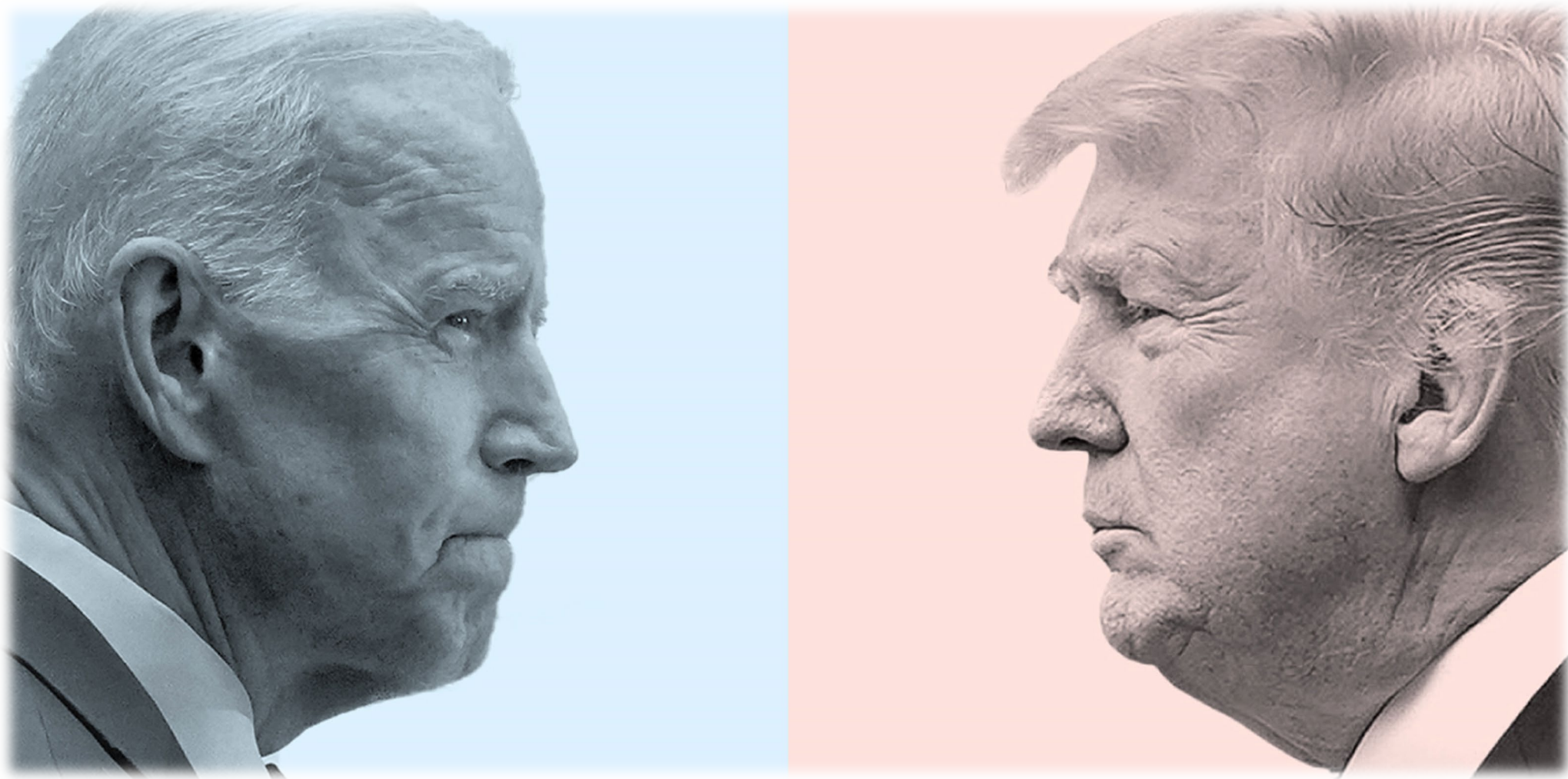
Antitrust Insights  
Webinar Series

June 26, 2024

Proskauer»

# Rematch 2024

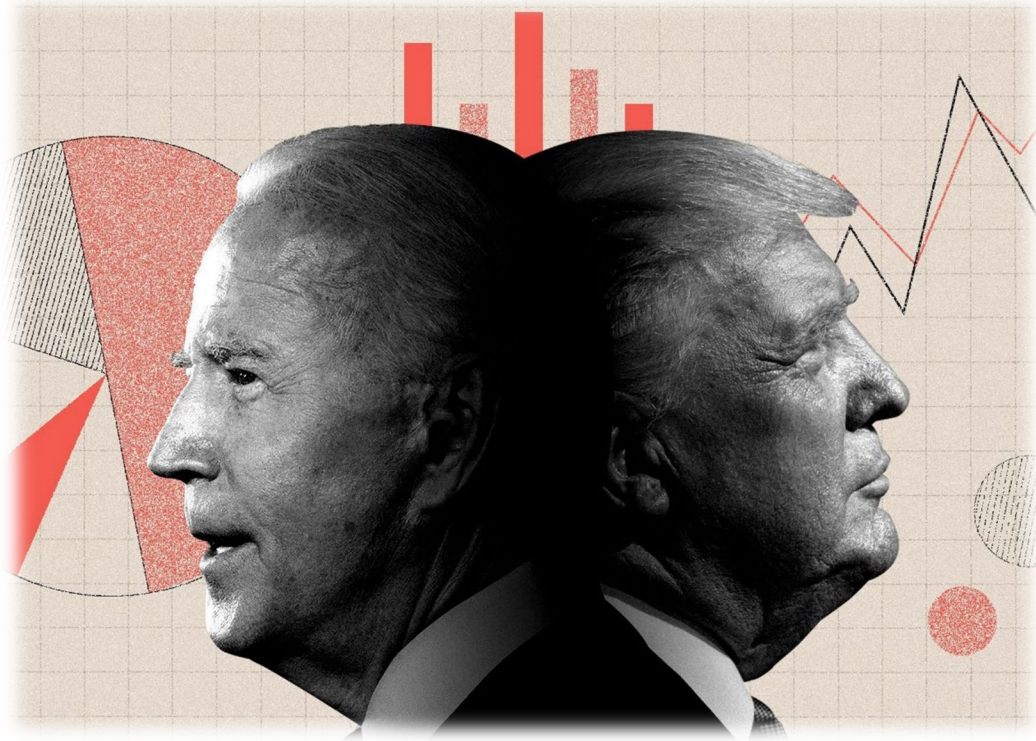
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# Rematch 2024

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- Mergers
- Non-Competes & No Poach Agreements
- Healthcare
- Private Equity
- Consumer Welfare Standard
- Criminal Monopolization
- Robinson Patman
- AI & Big Tech



# Biden's Antitrust Revolution...

mlex

## Rescinding US FTC's 2015 policy on enforcement restores agency mission, says Chair Khan

1 Jul 2021 | 20:08 GMT | Official Statement

MLex Summary: US Federal Trade Commission Chair Lina M. Khan, joined by Commissioners Rebecca Kelly Slaughter and Rohit Chhokra, issued a statement in

## FTC Votes to Broaden Enforcement Power

Repeal of 2015 policy limiting the agency discretion to act could lead to Big Tech cases

was aimed at returning the agency to the original mandate of Congress—based on the Fair Trade Commission Act of 1914—of policing unfair competition practices that aren't covered by other laws. "In practice the 2015 statement has doubled down on the

the agency from policing other anticompetitive behaviors. Thursday's vote would give the FTC wider latitude to police, for example, predatory pricing aimed at rival businesses. The tech industry strenuously opposed the move, given



mlex

## US FTC rescinds 2015 policy that limited enforcement ability under FTC Act

1 Jul 2021 | 19:58 GMT | Official Statement

MLex Summary: The US Federal Trade Commission rescinded a 2015 antitrust

### REVIEW & OUTLOOK

## Lina Khan's Power Grab at the FTC

Independent federal agencies have power over American life that the Founders never imagined, and that reign is about to expand with a vengeance in the Biden era. Witness the unprecedented power grab engineered last week at the Federal Trade Commission by the new chair,

writes fondly of railroad regulation, of all things, which was repudiated by Congress after demonstrable failure. She wants to apply the Robinson-Patman Act of 1936 to Amazon and other giants. That price discrimination law was long ago diminished by the courts with hardly a word of objec-

The new Chair snatches unilateral authority and drops Obama standards.

mlex

## Authorizing compulsory process by US FTC staff will streamline investigations in face of 'merger boom,' says Chair Khan

1 Jul 2021 | 20:46 GMT | Official Statement

MLex Summary: US Federal Trade Commission Chair Lina M. Khan said the authorization of investigations by the agency into key enforcement priorities

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## Streamlined Section 18 rulemaking breaks self-imposed red tape that has created uncertainty, delay, says Commissioner Slaughter

1 Jul 2021 | 20:55 GMT | Official Statement

MLex Summary: US Federal Trade Commissioner Rebecca Kelly Slaughter was joined by Chair Lina M. Khan and Commissioner Rohit Chhokra in a statement

mlex

## US FTC authorizes investigations into key enforcement priorities

1 Jul 2021 | 21:02 GMT | Official Statement

MLex Summary: The US Federal Trade Commission voted to approve a series of resolutions authorizing investigations into key enforcement priorities for the

mlex

## US FTC distances itself from consumer welfare standard on party line vote

1 Jul 2021 | 20:06 GMT | Insight

By Dave Perera and Michael Acton

The US Federal Trade Commission's first open meeting under chair Lina Khan saw parties of party line votes to distance the agency from the consumer welfare

### TECHNOLOGY

## New FTC Chair Lina Khan Wants To Redefine Monopoly Power For The Age Of Big Tech

July 1, 2021 - 11:45 AM ET



SHANNON BOND

CAPITAL ACCOUNT | By Greg Ip

## Latest Antitrust Approach Has Its Own Risks

then law student Lina Khan wrote in a now famous law journal article in 2007. For decades that's how courts and regulators interpreted antitrust laws, regularly ruling against mergers and business practices such which required a plurality of declining business startups and subordinated investment all suggest monopoly power is growing again. Meanwhile, Mr. Biden's election has coincided with the

mlex

## US Senator Klobuchar encouraged by FTC steps to use full legal authority on competition

1 Jul 2021 | 19:52 GMT | Official Statement

MLex Summary: US Senator Klobuchar said she's encouraged by the Federal Trade

KEYWORDS | CHRISTOPHER MIMS

## What a Big Tech Breakup Could Mean for You

re competition, yes, but fewer of the conveniences we take for granted

As momentum builds to enact the Amazon Every one of the House's proposed forms from giving their own services and more will go back to

## US FTC votes to update rulemaking procedures, sets stage for stronger deterrence of corporate misconduct

1 Jul 2021 | 20:37 GMT | Official Statement

MLex Summary: The US Federal Trade Commission approved changes to its rules to streamline rulemaking procedures and modernize the way it issues trade regulation under




# Biden's Executive Order on Antitrust



JULY 09, 2021

## Executive Order on Promoting Competition in the American Economy

### Justice Department Celebrates the One-Year Anniversary of the Executive Order on Competition

Today, the Justice Department recognized the first anniversary of the President's [Executive Order on Promoting Competition in the American Economy](#) , and celebrated the Antitrust Division's most productive year of interagency competition policy engagement in recent history. The Executive Order underscored that competition is a cornerstone of the American economy, and called for a whole-of-government response to "excessive market concentration threaten[ing] basic economic liberties [and] democratic accountability."



# Sweeping Executive Order Targets Big Business



## Executive Order on Promoting Competition in the American Economy

JULY 09, 2021 • PRESIDENTIAL ACTIONS

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to promote the interests of workers, businesses, and consumers, I hereby order as follows:

Section 1. Policy. It is the policy of the United States to promote competition in the American economy and to ensure that the benefits of an open economy and widening racial, ethnic, and gender equity are realized for all Americans. For this purpose, it is necessary to vigorously enforce antitrust laws, to revise guidelines for the review of corporate mergers, acquisitions, and other business combinations, and to engage in rulemaking to ensure that the benefits of an open economy and widening racial, ethnic, and gender equity are realized for all Americans.

### Vigorously Enforce

Section 2. Antitrust. The Department of Justice shall take prompt and effective action to enforce the antitrust laws of the United States. The Department shall ensure that the antitrust laws are enforced in a consistent and effective manner, and shall take prompt and effective action to address any anticompetitive behavior by any person or entity. The Department shall also ensure that the antitrust laws are enforced in a manner that is consistent with the principles of federalism and the separation of powers.

### Revise Guidelines

Section 3. Guidelines. The Department of Justice shall revise the guidelines for the review of corporate mergers, acquisitions, and other business combinations. The revised guidelines shall take into account the interests of workers, businesses, and consumers, and shall ensure that the benefits of an open economy and widening racial, ethnic, and gender equity are realized for all Americans.

### Engage in Rulemaking

Section 4. Rulemaking. The Department of Justice shall engage in rulemaking to ensure that the benefits of an open economy and widening racial, ethnic, and gender equity are realized for all Americans. The Department shall ensure that the rulemaking process is transparent and that the public has an opportunity to comment on the proposed rules.

Nascent Competitor Acquisitions  
Data Aggregation  
User surveillance  
Repair markets  
Tying  
Serial mergers  
Labor markets  
Dominant intermediaries  
Barriers to Switching  
Shipping  
Non-Compete Clauses

Power of Corporate Employers  
freedom to switch jobs  
foreign-ownership  
Small businesses  
Hidden Fees  
Occupational Licensing  
Financial  
Patent misuse  
Real Estate Markets  
Network effects  
Prescription Drugs Prices  
Net Neutrality  
Farmers  
Telecom



# Everything Changed

POLITICS | POLICY

## FTC Bans Noncompete Agreements That Restrict Job Switching

Move sets up high-stakes legal clash with business groups over the agency's power

## *U.S. Clears Way for Antitrust Inquiries of Nvidia, Microsoft and OpenAI*

The Justice Department and the Federal Trade Commission agreed to divide responsibility for investigating three major players in the artificial intelligence industry.

# Biden administration steps up antitrust enforcement

December 18, 2023, 9:30 AM EST

## Biden Antitrust Enforcers Set New Record for Merger Challenges

## FTC's Khan and DOJ's Kanter Beat Back Deals at Fastest Clip in Decades

- FTC, DOJ filed 50 enforcement actions to fix, block deals
- 2022 marked second-highest ever volume of mergers reported

June 17, 2024 | Law.com

## The Real Impact of the Biden Era on M&A

"Changes in the merger review process has undoubtedly increased the cost and resource burden on merging parties," write Elizabeth Suarez, Kaylynn Moss and Terry Calvani.

# Trump Could Change It Back

- Some overlap in goals, but Trump's administration focused on *deregulation*



FORBES > BUSINESS > POLICY

## Status Report: What Regulations Did The Trump Administration Eliminate In 2020?

So: at the end of year four of Trump's one-in, two-out program, bookmarking the president's term in office, here is a summary showing where things stand with apples-to-apples, significant-rule comparisons for fiscal years 2017-20.

Significant Actions	2017	2018	2019	2020	Total
Regulatory	3	14	35	45	97
Deregulatory*	66	57	59	58	240
Claimed Ratio:					
Rule Out/In	22 to 1	4 to 1	1.7 to 1	1.3 to 1	2.5 to 1
*These 66 rules in 2017 were not all deemed significant					

Trump Executive Order 13771, roundup of rules out to rules in, 2017-2020. CLYDE WAYNE CREWS JR.





# Who's Who and Who May Be Out

# FTC Chair



**Lina Khan's rise was heralded as an antitrust revolution. Now she has to pull it off**

**v.**

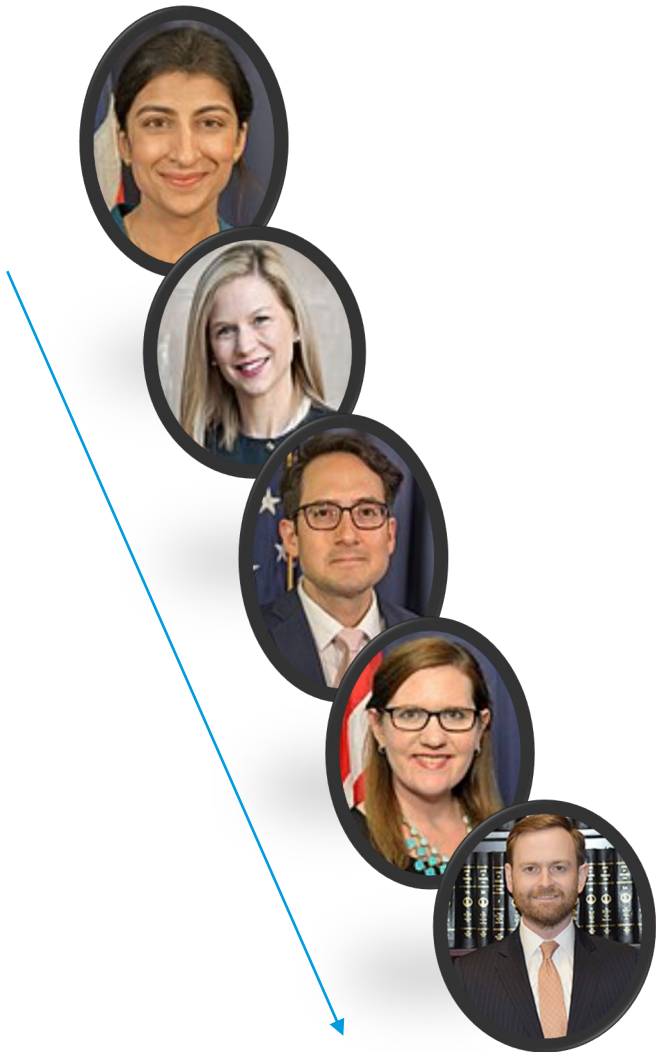


**Trump aides interviewing replacement for embattled FTC chair**

Joe Simons has come under White House pressure for resisting the president's fight against alleged political bias in social media.



# Staggered Terms for Commissioners



Lina Khan (Chair)	Democratic	June 15, 2021	September 26, 2024
Rebecca Slaughter	Democratic	May 2, 2018	September 26, 2029
Alvaro Bedoya	Democratic	May 16, 2022	September 26, 2026
Melissa Holyoak	Republican	March 25, 2024	September 26, 2025
Andrew Ferguson	Republican	April 2, 2024	September 26, 2030

# DOJ Leadership

- Very likely to remain



v.

- Unclear who would replace



**Donald Trump wants to control the Justice Department and FBI. His allies have a plan**

“Trump's promises to remodel the Justice Department have been well documented, but less attention has been given to identifying the specific measures his allies and advisers are advocating.”





# Track Records, Compared

## FTC Chair Lina Khan defends her track record when it comes to blocking mergers and doesn't subscribe to Amazon Prime

Under her leadership, Khan said the FTC has brought 11 cases against mergers and in five instances, the companies abandoned their plans after the agency filed suit. There were 14 deals that were dropped during the FTC's investigation, she added.

"Big picture, of course the two cases that we lost we would've wanted to win, but we're quite pleased overall with our efforts," Khan said on stage.

## DOJ antitrust chief touts blocked mergers

[Kanter] also touted the deterrence effect that increased antitrust enforcement is having in sectors considering further consolidation.

"Look no further than the 20-plus mergers abandoned in response to the antitrust division's concerns in just the last two-and-a-half years," he said.

## FTC's Khan and DOJ's Kanter Beat Back Deals at Fastest Clip in Decades

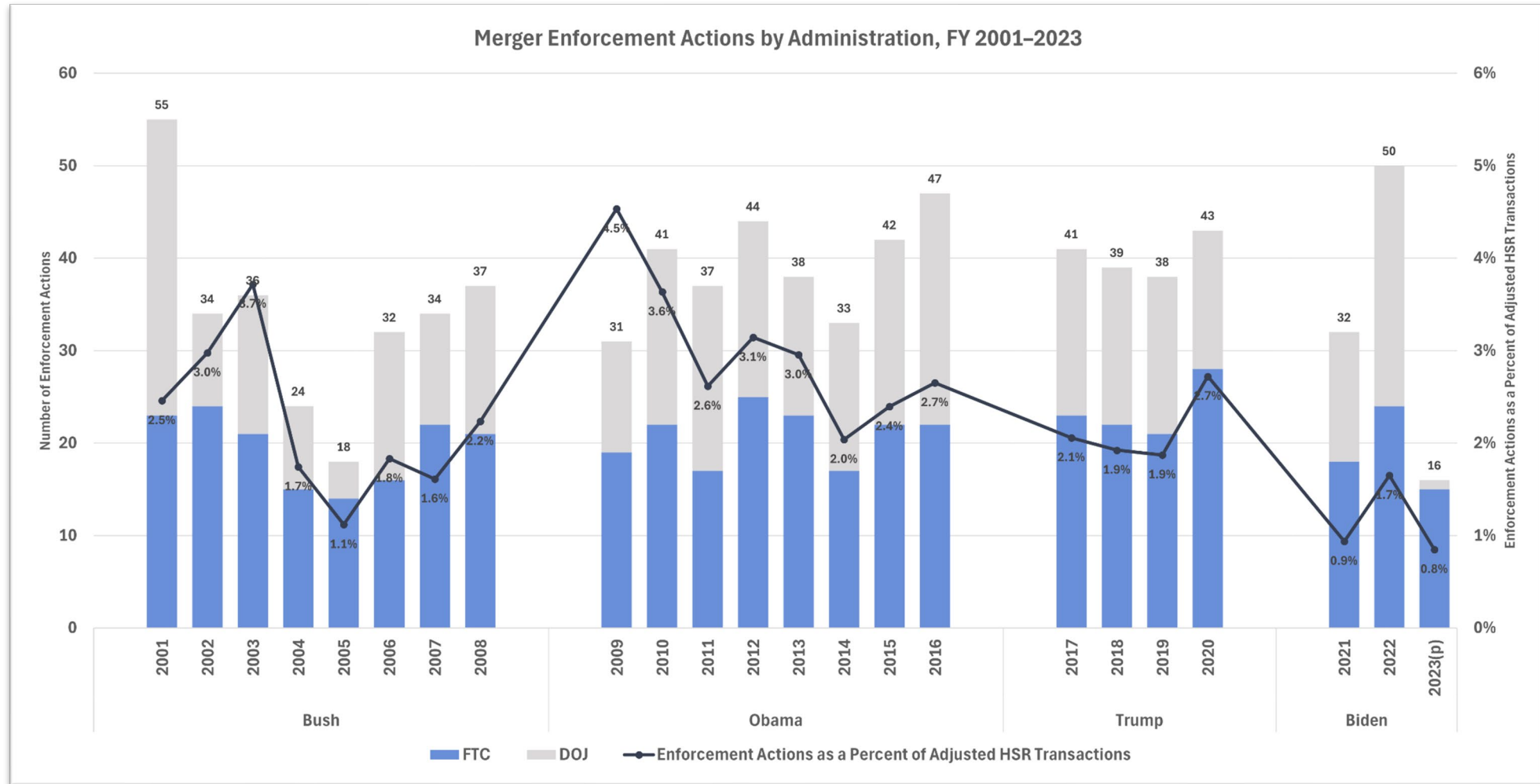
- FTC, DOJ filed 50 enforcement actions to fix, block deals
- 2022 marked second-highest ever volume of mergers reported



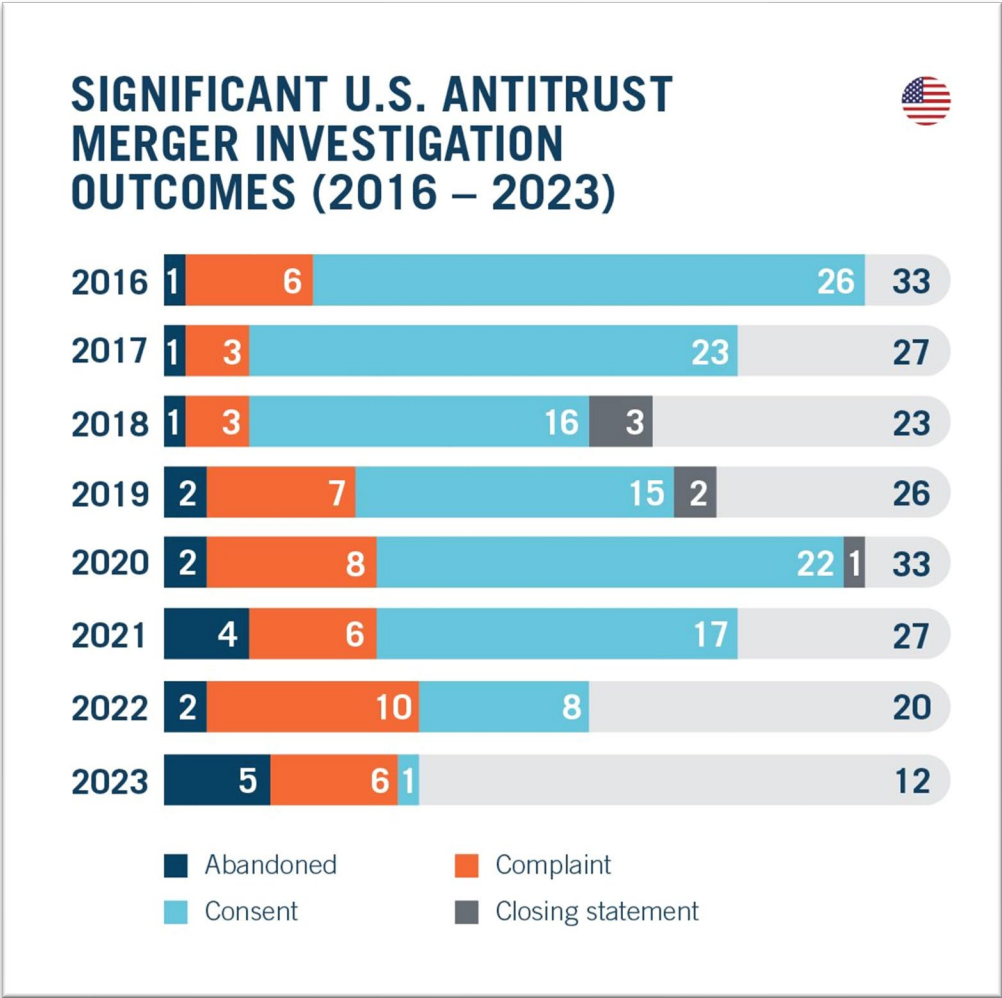
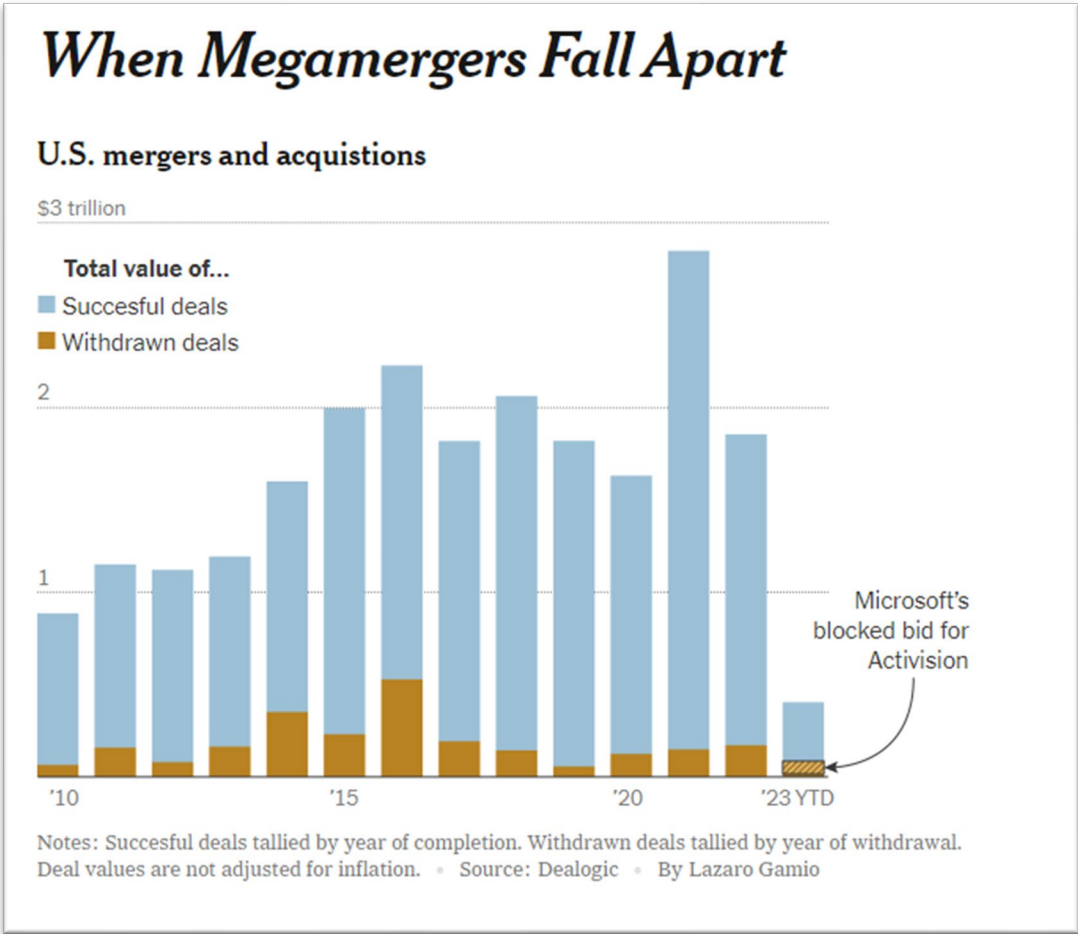


# What Do the Numbers Show?

## *Merger Enforcement is ... Down?*



# What Do the Numbers Show: *Merger Successes and Outcomes*





# What Do the Numbers Show: *Do Statistics Lie?*



## Assessing the state of affairs in FTC/DOJ merger enforcement



These challenges and the strict scrutiny antitrust environment in Washington are having a deterrent effect on transactions. Corporate development teams, CEOs, and boards are viewing antitrust as a key element that must be factored into their acquisition strategies, rather than treating antitrust as an afterthought. Who wants a headline on a busted deal, especially if there is a meaningful termination fee involved?



# Merger Guidelines



# What Trump Did: Tweak Around the Edges, Presumes Mergers are Beneficial

DOJ updates merger remedies guidelines for first time in nearly a decade

## Vertical Merger Guidelines



U.S. Department of Justice  
&  
The Federal Trade Commission  
June 30, 2020

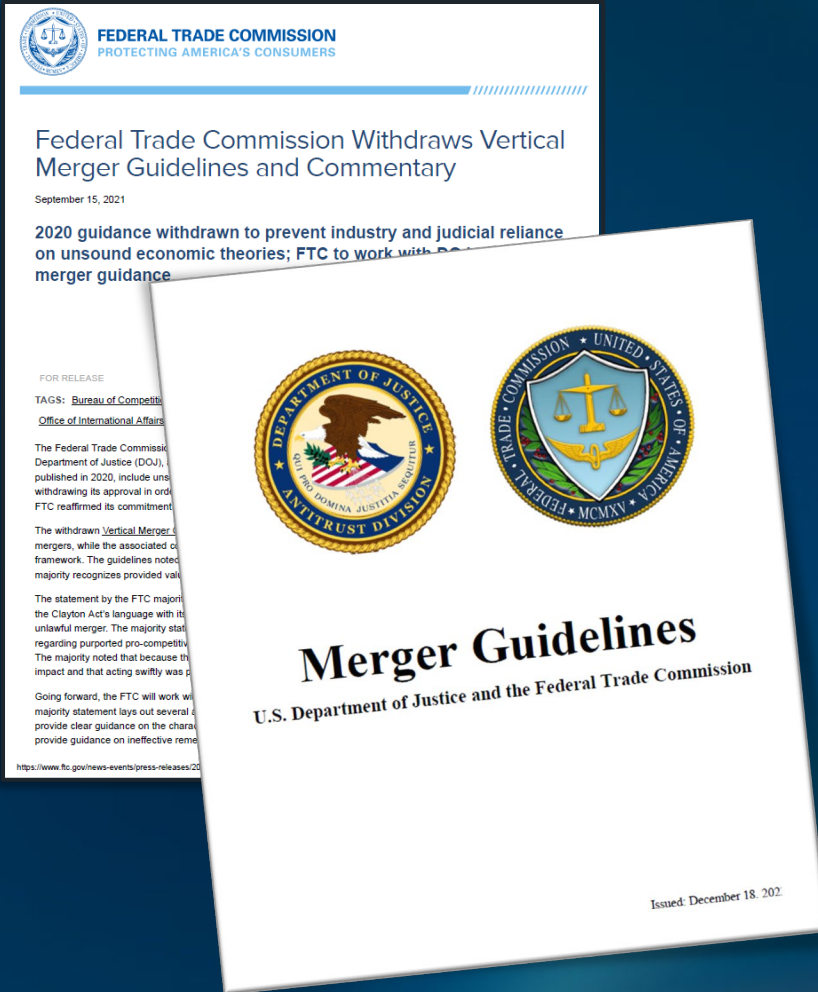
- “Vertical mergers often benefit consumers through the ***elimination of double marginalization***, which tends to lessen the risks of competitive harm.”
- ***The elimination of double marginalization is not a production, research and development, or procurement efficiency***; it arises directly from the alignment of economic incentives between the merging firms. “
- “***The Agencies do not reject the merger specificity of the elimination of double marginalization solely because it could theoretically be achieved but for the merger***, if such practices are not reflected in documentary evidence.”

# What Biden Did: Revoke and Overhaul

Biden Administration Finalizes  
Sweeping Overhaul of Merger Rules

Joe Biden, trustbuster

- Presumption of illegality
- Heightened scrutiny for “dominant” firms
- Heightened scrutiny “pattern” of mergers
- Market definition: “flexible” approach
- Private equity focus
- Economic analysis



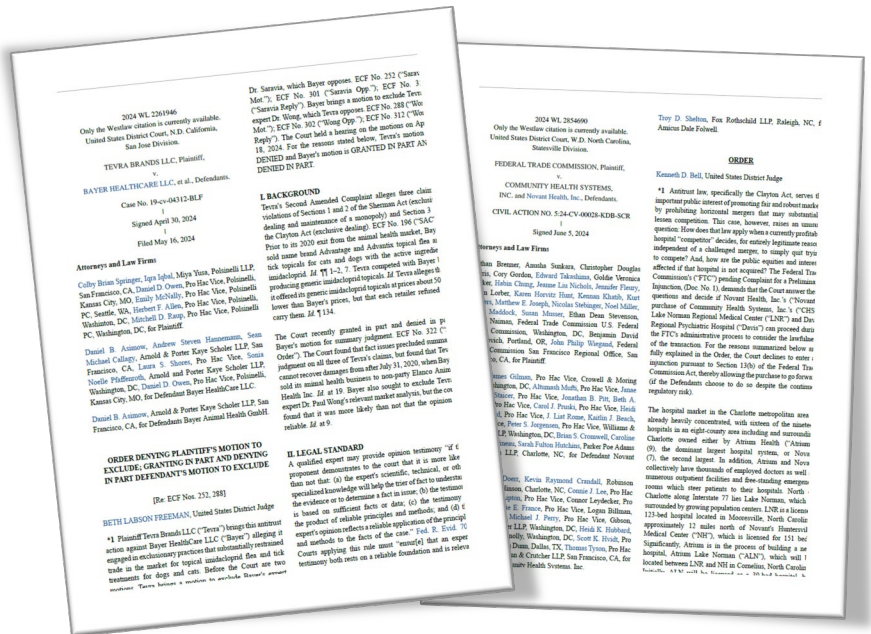


# What Could Trump Do?

- Rescind 2023 Guidelines on Day 1
- Revert to Prior Versions
- New versions cited by two judges in recent weeks -- may become entrenched

## Bipartisan Effort Under Way to Hobble Biden's Antitrust Policies

Reps. Thomas Massie (R-KY) and Lou Correa (D-CA) are teaming up to undercut one of the most obscure yet critical moves against corporate power.



# What Could Biden Do?



Test cases to establish the new guidelines' legitimacy

Focus on mergers in certain industries, such as the private equity or labor market

Focus on horizontal mergers that will result in a combined market share of 30% or more

Investigations under Section 5 when the facts do not rise to a violation of the more rigorous standards of Section 7 of the Clayton Act



# Non-Compete & No Poach



# Non-Competes: The Ban

POLITICS | POLICY

## FTC Bans Noncompete Agreements That Restrict Job Switching

Move sets up high-stakes legal clash with business groups over the agency's power

By *Dave Michaels* and *Lindsay Ellis*

Updated April 23, 2024 5:07 pm ET

### Banning noncompetes:

Good for workers, businesses, and the economy



The FTC estimates that banning noncompetes will mean

- **More innovation:** an average of 17,000-29,000 more patents each year
- **More startups:** a 2.7% increase in new firm formation - that's 8,500+ new businesses per year
- **Higher earnings:** typical workers earn \$524 more per year

Who's affected?



An estimated  
**18%**  
of U.S. workers  
are covered by  
noncompetes.

That's 30 million people.



# Non-Competes: What Could Trump Do?



## FTC is sued by business groups over its ban on noncompete agreements, which may delay enforcement

By [Jeanne Sahadi](#), CNN

🕒 3 minute read · Updated 9:45 AM EDT, Fri April 26, 2024

## Election might decide fate of FTC noncompetes ban

If the FTC's ban on noncompete agreements survives legal challenges, it might still face problems should there be an administration change following the 2024 presidential election.

By [Makenzie Holland](#), Senior News Writer

Published: 26 Apr 2024

# No Poach Agreements: Expect Little Change



## FTC and DOJ Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation

Guidance Helps Protect Workers Against Anticompetitive Conduct and Puts Firms on Notice that DOJ Will Proceed Criminally Against Naked Wage Fixing and No-Poaching Agreements

October 20, 2016





# Trump DOJ's Extremely Aggressive Stance



## ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS

DEPARTMENT OF JUSTICE  
ANTITRUST DIVISION

FEDERAL TRADE COMMISSION

OCTOBER 2016

This document is intended to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws. The Department of Justice Antitrust Division (DOJ or Division) and Federal Trade Commission (FTC) (collectively, the federal antitrust agencies) jointly enforce the U.S. antitrust laws, which apply to competition among firms to hire employees. An agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual firm decision-making with regard to wages, salaries, or benefits; terms of employment; or even job opportunities. HR professionals often are in the best position to ensure that their companies' hiring practices comply with the antitrust laws. In particular, HR professionals can implement safeguards to prevent inappropriate discussions or agreements with other firms seeking to hire the same employees.

“Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements.”

“These types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct.”



# Healthcare

# Task Force on Health Care Monopolies and Collusion (HCMC)

June 13, 2024, 9:05 AM UTC

Health-Care Collusion Task Force Sets  
Stage for DOJ Enforcement

Assistant Attorney General  
Jonathan Kanter Announces Task  
Force on Health Care Monopolies  
and Collusion

**New DOJ Task Force to Target  
'Multisided Giants' in Healthcare**



*“[T]he task force will identify and root out monopolies and collusive practices that increase costs, decrease quality and create single points of failure in the health care industry.”*

– Assistant Attorney General Kanter



# Guidelines – and Safe Harbors – Withdrawn



## Axing Health-Care Antitrust Safety Zones Will Impact Transactions

Announcing the change, Jonathan Kanter, the Antitrust Division's top official, criticized the policies as outdated in light of changes in the health-care landscape, saying they were "overly permissive" on subjects like sharing information.

"The safety zones were written at a time when information was shared in manila envelopes and through fax machines. Today, data is shared, analyzed, and used in ways that would be unrecognizable decades ago. We must account for these changes as we consider how best to enforce the antitrust laws."

**-Principal Deputy Assistant Attorney General Doha Mekki**



# What Would Trump Do?

- Continued focus.

“The [FTC] initiated **three challenges** of hospital mergers during this period (the fourth example noted above was initiated during the Trump administration) **and allowed 54 to proceed** without taking public action. By contrast, the FTC challenged a total **of three hospital mergers over the four years of the Trump administration, while permitting 375 to go through unchallenged.**”

**President Donald J. Trump Is Taking Action to Lower Drug Costs and Ensure That Americans Have Access to Life-saving Medications**

**Congress Didn't Act on Prescription Drug Prices. So President Trump Did.**

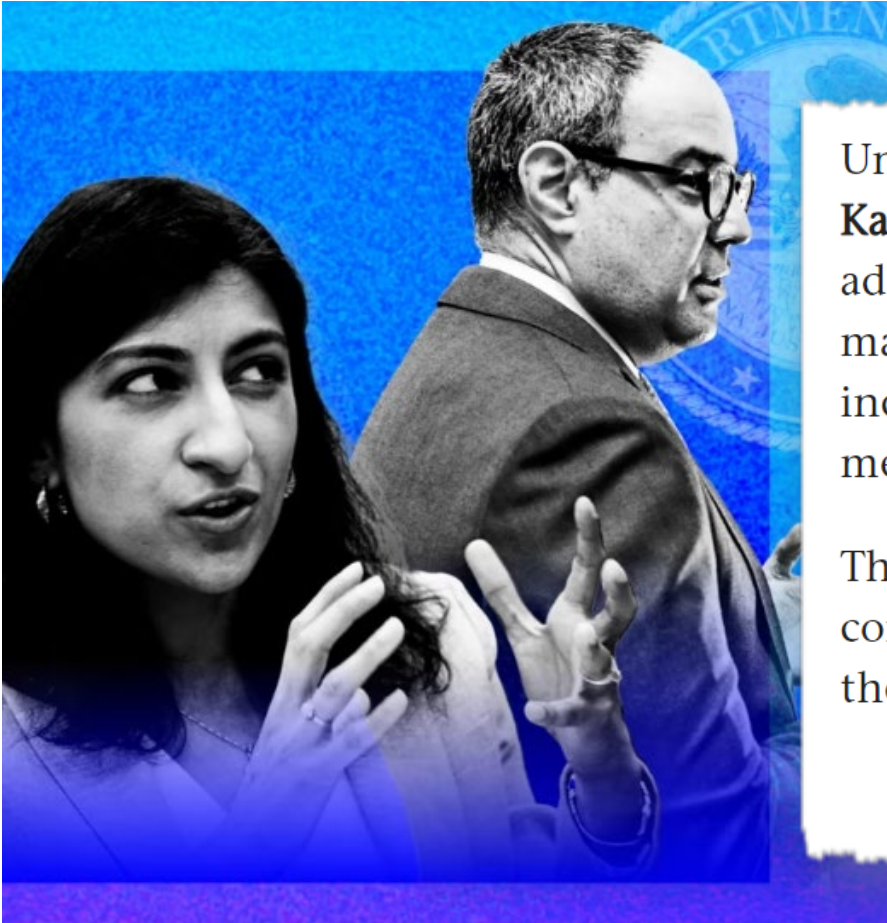




# Private Equity



# The Biden Administration Hates Private Equity



Under **Lina Khan**, chair of the **Federal Trade Commission**, and **Jonathan Kanter**, who heads the **Department of Justice** antitrust division, Biden administration enforcers have already adopted or proposed new guidelines making it easier for Washington to attack interlocking board memberships, industry roll-ups and non-compete agreements, and block pending mergers.

They've also filed suit against private equity managers or imposed strict conditions on the mergers they have approved. They've made it clear that they're only getting started.

# Serial Acquisitions “Beware”

“When private equity firms buy out healthcare facilities only to slash staffing and cut quality, patients lose out,” said Chair Lina M. Khan of the FTC. “Through this inquiry, the FTC will continue scrutinizing private equity roll-ups, strip-and-flip tactics and other financial plays that can enrich executives but leave the American public worse off.”



“Firms relying on a strategy of serial acquisitions should beware. There is growing concerns about the proliferation of serial acquisition strategies among private equity firms, and as such, the FTC and the DOJ is seeking public comments in identifying sectors where serial acquisitions are common.”

# Roll Ups and Leasebacks Under Scrutiny



**PE Hospital Leasebacks Raise Antitrust Issues, FTC's Khan Says**

**FTC's Khan Targets Private Equity 'Roll-Up' Tactic in Court**

The FTC sued US Anesthesia Partners Inc. and its private equity partner Welsh Carson Anderson & Stowe LP on Thursday, alleging they engaged in a scheme to monopolize the market for anesthesiologists in Texas using the “roll-up” strategy. It’s the first time the agency has targeted such deals, which usually are small enough to avoid antitrust review.

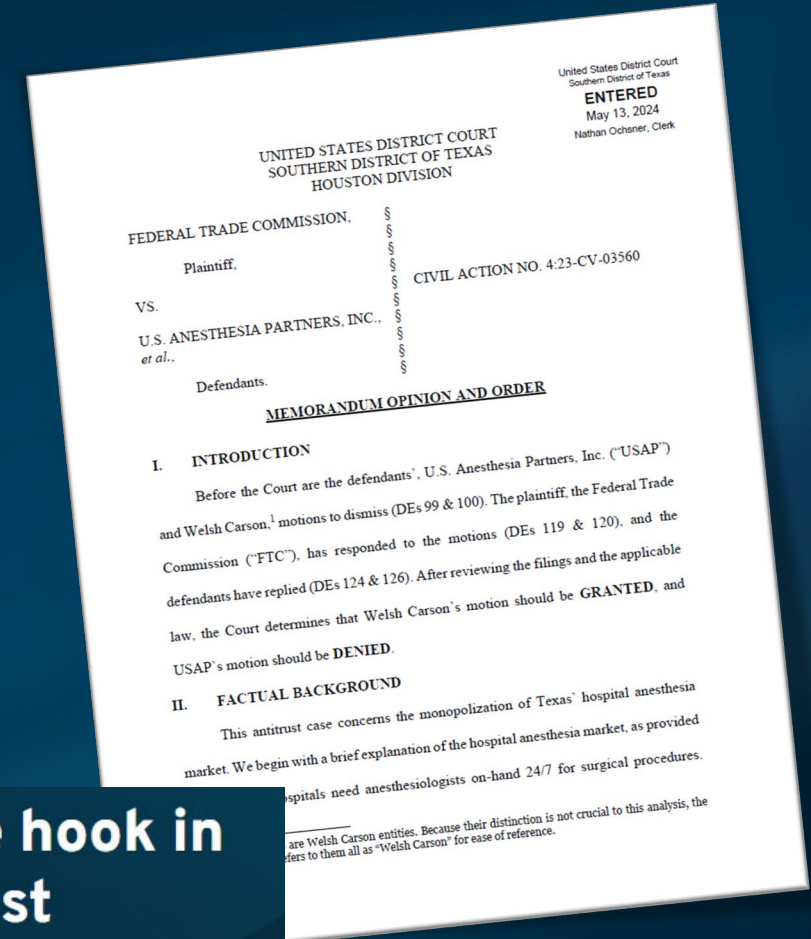


# FTC Tried to Sue Private Equity But Failed

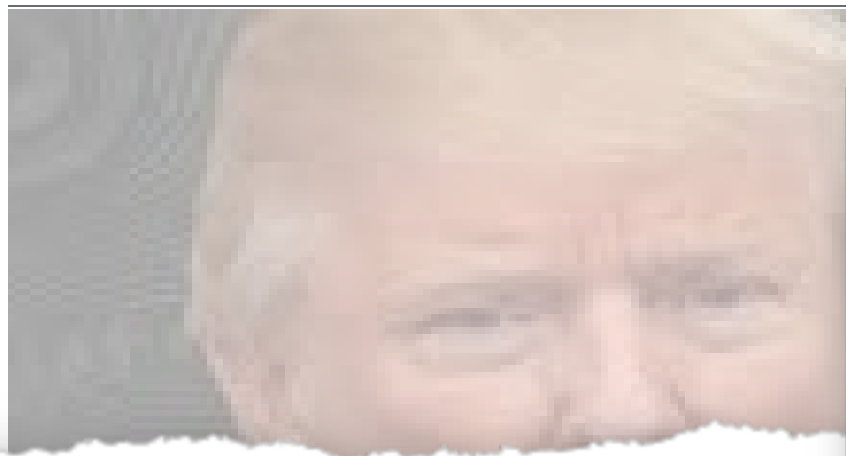
## *A) 1) The FTC Has Not Adequately Alleged that Welsh Carson "is violating" Antitrust Law*

The FTC argues that Welsh Carson is currently violating antitrust laws. The FTC insists that "USAP continues to hold the illegally acquired practices, uses the resulting leverage to raise prices, and shares its profits with Welsh Carson." But the FTC does not cite any authority for the proposition that receiving profits from an entity that may be violating antitrust laws is itself a violation of antitrust laws. Indeed, "profits, sales, and other benefits accrued as the result of an initial wrongful act are not treated as 'independent acts.'" *Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 600 (6th Cir. 2014). Thus, the act of receiving profits from USAP is not an ongoing antitrust violation.

**Private equity firm off the hook in FTC's antitrust case against portfolio anesthesia provider**



# Trump: *Deregulation Champion, But Open Question*



## Private equity's (anti) trust issues

“[The Republican Party is] not as safe a bet as it used to be, Kovacic says. ... It’s not hard to see that the populist right’s anger aimed at ‘Wall Street’ could land hard on private equity and venture capital managers.”

Private equity in health care becomes a bigger Washington target

“Separately, big private equity firms’ embrace of ESG has alienated many hard-right Republicans.”

**Yes, but:** There is some Republican interest in the issue, mainly around the investigations of how PE ownership, with its focus on short-term profits, is influencing patient care.



# Other Changes



# The Consumer Welfare Standard (Returns?)



**QUESTIONS FOR THE RECORD**  
**JONATHAN KANTER**  
**NOMINEE TO BE ASSISTANT ATTORNEY GENERAL**  
**OF THE ANTITRUST DIVISION**

Please describe in detail why you believe the consumer welfare standard is inadequate and the analytical approach you would prefer courts to adopt.

**RESPONSE:** In the past, I have voiced concerns that the application of the consumer welfare standard has been inconsistent, vague, and insufficient to keep pace with market realities. Effective antitrust enforcement requires a deep understanding of market realities and facts to determine whether the conduct at issue harms competition and the competitive process. Enforcement authorities should use state-of-the-art analytical tools to analyze key facts and empirical evidence with the aim of protecting competition and the competitive process.

Can courts be tasked with determining the optimal amount of competition in an industry without engaging in judicial activism? Why or why not?

Should courts engage in activism here?

# The Consumer Welfare Standard (Returns?)

## THE YALE LAW JOURNAL

LINA M. KHAN

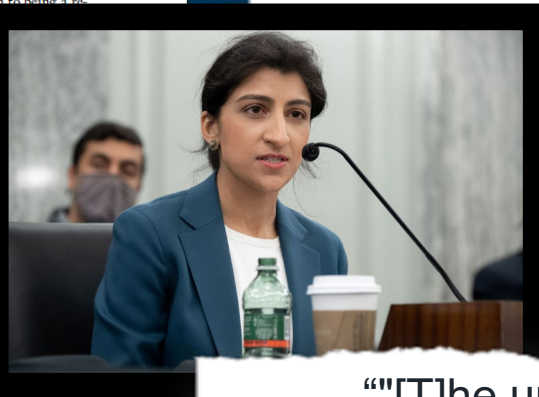
### Amazon's Antitrust Paradox

**ABSTRACT.** Amazon is the titan of twenty-first century commerce. In addition to being a retailer, it is now a marketing platform, a delivery and logistics network, a payment lender, an auction house, a major book publisher, a producer of television and film, a designer, a hardware manufacturer, and a leading host of cloud server space. Amazon has clocked staggering growth, it generates meager profits, choosing to price below short-term marginal cost and expand widely instead. Through this strategy, the company has positioned itself as essential infrastructure for a host of other businesses and now serves as essential infrastructure for a host of other businesses upon it. Elements of the firm's structure and conduct pose anticompetitive concerns that have escaped antitrust scrutiny.

This Note argues that the current framework in antitrust—specifically its focus on “consumer welfare,” defined as short-term price effects—is unequipped to address the architecture of market power in the modern economy. We cannot recognize the potential harm to competition posed by Amazon's dominance if we measure competition primarily in terms of price and output. Specifically, current doctrine underappreciates the risk of predator integration across distinct business lines may prove anticompetitive. These concerns are magnified in the context of online platforms for two reasons. First, the economics of scale create incentives for a company to pursue growth over profits, a strategy that is often rewarded. Under these conditions, predatory pricing becomes highly rational and therefore plausible. Second, because online platforms are critical intermediaries, integrating across business lines positions these platforms as essential infrastructure on which their rivals depend. This dual role also enables them to exploit information collected on companies using its services to undermine their competition.

This Note maps out facets of Amazon's dominance. Doing so enables us to better understand its business strategy, illuminates anticompetitive aspects of Amazon's structure and conduct, and underscores deficiencies in current doctrine. The Note closes by considering two potential regimes for addressing Amazon's power: restoring traditional antitrust and competition policy principles or applying common carrier obligations and duties.

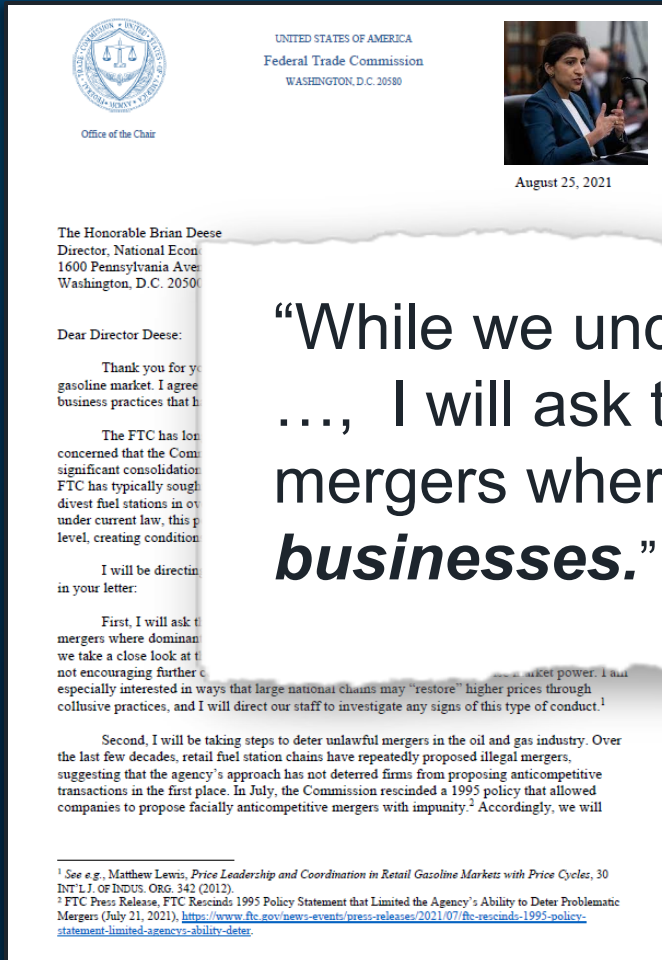
**AUTHOR.** I am deeply grateful to David Singh Grewal for encouraging me to pursue this project and to Barry C. Lynn for introducing me to these issues in the first place. For thoughtful feedback at various stages of this project, I am also grateful to Christopher R. Leslie, Daniel Markovits, Stacy Mitchell, Frank Pasquale, George Priest, Maurice Stucke, and Sandeep Vahegnan. Lastly, many thanks to Juliana Brint, Urja Mittal, and the *Yale Law Journal* staff for insightful comments and careful editing. All errors are my own.



“ [P]otential harms to competition posed by Amazon's dominance are not cognizable if we assess competition primarily through price and output. Focusing on these metrics instead blinds us to the potential hazards.”

“ “[T]he undue focus on consumer welfare is misguided. Antitrust law and competition policy should promote not welfare but competitive markets. By refocusing attention back on process and structure, this approach would be faithful to the legislative history of major antitrust laws. It would also promote actual competition—unlike the present framework, which is overseeing concentrations of power that risk precluding real competition.”

# The FTC Conceded that It Can't Really Do Anything to Replace the Consumer Welfare Standard.



“While we undoubtedly face significant limitations under current law ..., I will ask that we identify additional legal theories to challenge ... mergers where dominant players are buying up *family-run businesses*.”



# Criminal Monopolization (Fades Away?)

**US DOJ files first criminal charge under Sherman Act Section 2 in nearly 50 years**

United States | Publication | November 2022

ANTITRUST / COMPETITION

**United States: DOJ scores its second successful Sherman Act Section 2 criminal prosecution**

BY JEFFREY (JEFF) D. MARTINO, BYRON TUYAY, KRISTEN E. LLOYD AND ALLISON SIMKINS - MAY 9, 2024 - 7 MINS READ

Robust antitrust enforcement is particularly critical right now. As we've seen time and time again, collusion thrives in consolidated industries. And when Congress passed the Sherman Act in 1890, it made Section 2 a crime as it did with Section 1. Since the 1970s, Section 2 has been a felony, just like Section 1. In 2004, Congress increased Section 2's criminal penalties in lockstep with the increased penalties for Section 1 crimes. So if the facts and the law, and a careful analysis of Department policies guiding our use of prosecutorial discretion, warrant a criminal Section 2 charge, the Division will not hesitate to enforce the law.

# Robinson Patman (Resurgent?)

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June 2022 FTC policy statement



Commissioner Bedoya's remarks in favor of revitalization



Two investigations into possible discriminatory pricing:

- Wine and liquor distributor Southern Glazer's
- Coke and Pepsi in the soft-drink market

# Big Tech & AI

TECHNOLOGY

## Biden's big new push against AI companies faces a Trump-shaped obstacle

"Administrations are short and investigations are long," said Daniel Francis, former senior Federal Trade Commission official in the Trump administration, now a professor at NYU.

**FTC Chair Lina Khan plans to go after Big Tech's 'mob boss' instead of 'the henchmen at the bottom'—targeting AI giants OpenAI, Microsoft, and Nvidia**

Technology

**Biden administration continues Trump antitrust focus on tech giants**

WSJ | OPINION

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## Donald J. Trump: Why I'm Suing Big Tech

If Facebook, Twitter and YouTube can censor me, they can censor you—and believe me, they are.





# Algorithmic Pricing & Information Sharing: Bipartisan Skepticism



“the A.I. tools that firms use to set prices for everything from laundry detergent to bowling lane reservations can facilitate collusive behavior that unfairly inflates prices — as well as forms of precisely targeted price discrimination.”

It's both exciting and unsettling to see artificial intelligence, many of us have and communicate around the world. The full extent of generative A.I.'s potential is still up for debate, but there's little doubt it will be highly disruptive.

The last time we found ourselves facing such widespread social change wrought by technology was the onset of the Web 2.0 era in the mid-2000s. New, innovative companies like Facebook and Google revolutionized communications and delivered popular services to a fast-growing user base.

Those innovative services, however, came at a steep cost. What we initially conceived of as free services were monetized through extensive surveillance of the people and businesses that used them. The result has been an online economy where access to increasingly essential services is conditioned on the widespread hoarding and sale of our personal data.

These business models drove companies to develop endlessly invasive ways to track us, and the Federal Trade Commission would later find reason to believe that several of these companies had broken the law. Coupled with aggressive strategies to acquire or lock out companies that threatened their position, these tactics solidified the dominance of a handful of companies. What began as a revolutionary set of technologies ended up concentrating enormous private power over key services and locking in business models that come at extraordinary cost to our privacy and security.

The trajectory of the Web 2.0 era was not inevitable — it was instead shaped by a broad range of policy choices. And we now face another moment of choice. As the use of A.I. becomes more widespread, public officials have a responsibility to ensure this hard-learned history doesn't repeat itself.

As companies race to deploy and monetize A.I., the Federal Trade Commission is taking a close look at how we can best achieve our dual mandate to promote fair competition and to protect Americans from unfair or deceptive practices. As these technologies evolve, we are committed to doing our part to uphold America's longstanding tradition of maintaining the open, fair and competitive markets that have underpinned both breakthrough innovations and our nation's economic success — without tolerating business models or practices involving the mass exploitation of their users. Although these tools are novel, they are not exempt from existing rules, and the FTC will vigorously enforce the laws we are charged with administering, even in this new market.

While the technology is moving swiftly, we already can see several risks. The expanding adoption of A.I. risks further locking in the market dominance of large incumbent technology firms. A handful of powerful businesses control the necessary raw materials that start-ups and other companies rely on to develop and deploy A.I. tools. This includes cloud services and computing power, as well as vast stores of data.

Enforcers and regulators must be vigilant. Dominant firms could use their control over these key inputs to exclude or discriminate against downstream rivals, picking winners and losers in ways that further entrench their dominance. Meanwhile, the A.I. tools that firms use to set prices for everything from laundry detergent to bowling lane reservations can facilitate collusive behavior that unfairly inflates prices — as well as forms of precisely targeted price discrimination. Enforcers have the dual responsibility of watching out for the dangers posed by new A.I. technologies while promoting the fair competition needed to ensure the market for these technologies develops lawfully. The FTC is well equipped with legal jurisdiction to handle the issues brought to the fore by the rapidly developing A.I. sector, including collusion, monopolization, mergers, price discrimination and unfair methods of competition.



“Everywhere the word ‘**algorithm**’ appears, please just insert the words ‘a guy named Bob.’ Is it OK for a guy named Bob to collect confidential price strategy information from all the participants in a market, and then tell everybody how they should price? If it isn't ok for a guy named Bob to do it, then it probably isn't ok for an algorithm to do it, either.”

-Maureen Ohlhausen, Acting FTC Chair, January 2017-April 2018

# Algorithmic Pricing & Information Sharing: Activity

Three statements of interest filed:

- Two cases re rental rates for multifamily apartments
- One case re hotel prices

## FTC and DOJ File Statement of Interest in Hotel Room Algorithmic Price-Fixing Case

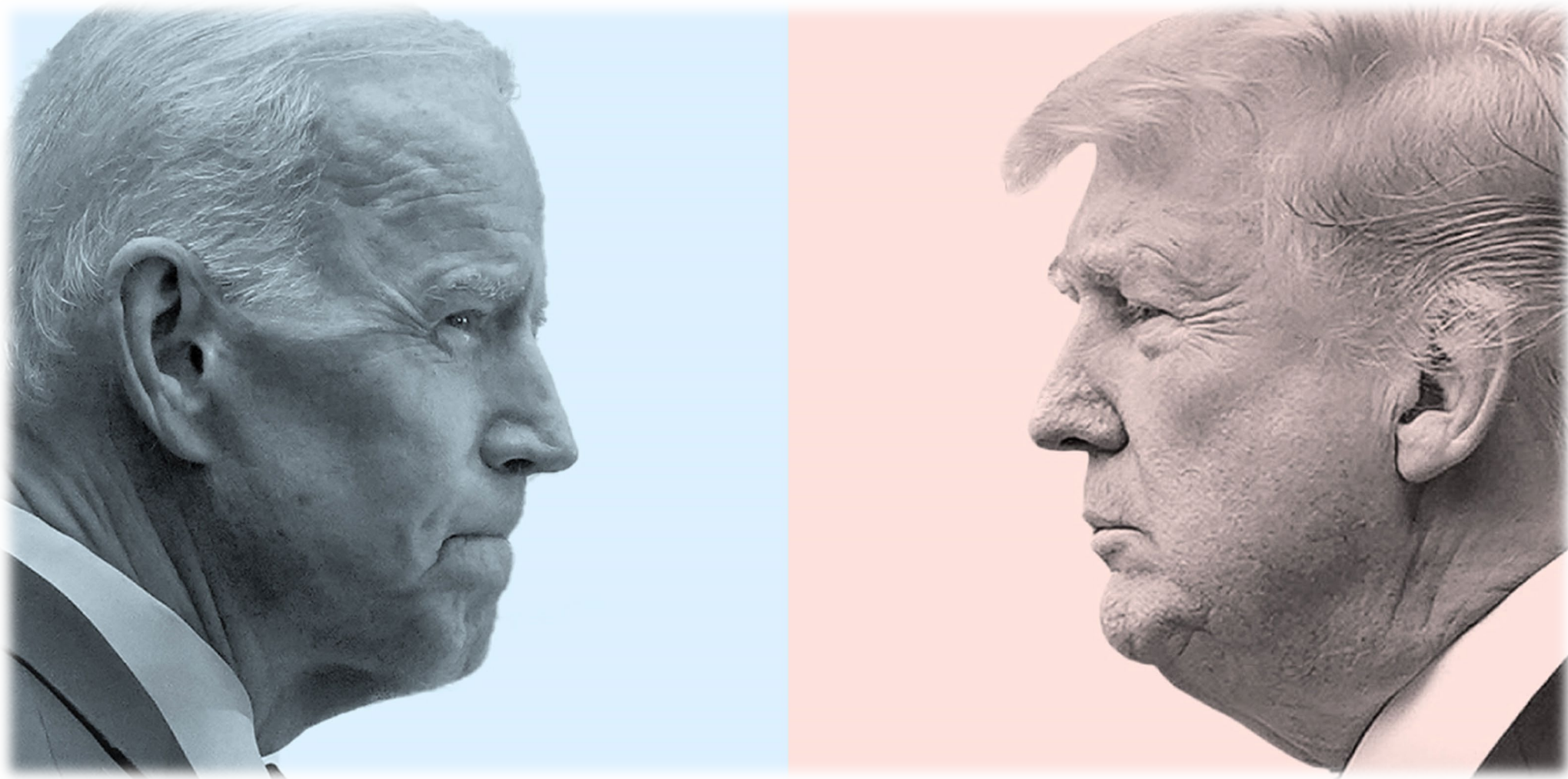
Statement of interest explains that hotel companies cannot use algorithms to evade antitrust laws

## Price fixing by algorithm is still price fixing

Today, the FTC and Department of Justice took action to fight algorithmic collusion in the residential housing market. The agencies filed a [joint legal brief](#) explaining that price fixing through an algorithm is still price fixing. The brief highlights key aspects of competition law important for businesses in every industry: (1) you can't use an algorithm to evade the law banning price-fixing agreements, and (2) an agreement to use shared pricing recommendations, lists, calculations, or algorithms can still be unlawful even where co-conspirators retain some pricing discretion or cheat on the agreement.

# Conclusion

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