

WHAT TO EXPECT FROM THE BIDEN ADMINISTRATION

Over the weekend, former Vice President Joseph R. Biden, Jr. was declared the winner of the U.S. presidential election. Although President Trump has yet to concede and press reports suggest he will continue to make his case in court, thoughts have turned to what the Biden administration will mean for federal regulation of business and finance.

In many ways, the future will depend on whether the centrist, coalition-building Biden of yesteryear will show up, or if he will embrace the more progressive wing of the Democratic party that has since grown in influence. Below we lay out our initial reactions on how the Biden presidency is likely to reshape the corporate landscape.

ANTITRUST

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Antitrust Regulatory Change. Expect stepped-up merger and conduct enforcement from the DOJ, while the current aggressive levels of Federal Trade Commission enforcement will likely continue, with perhaps a slight uptick and a particular focus on pharmaceutical mergers. However, unless Democrats gain control of the Senate, a major swing toward progressive antitrust enforcement is unlikely.

Similarly, legislative changes will likely be incremental rather than radical, even if Democrats capture the Senate, since they will not have a filibuster-proof majority. Legislation that is more likely to pass includes increasing agency funding, addressing recent adverse court decisions involving the FTC's jurisdiction and remedial authority, and other marginal changes. Sweeping proposals such as those considered in the House Judiciary Majority Staff Report on the technology industry are not likely to advance.

DOJ (Antitrust Division). By historical standards, DOJ merger enforcement levels have been relatively low under Assistant Attorney General Delrahim, with the notable exception of a set of high-profile cases. That will likely change. Without control of the Senate, or even with marginal control, any Biden nominee for AAG will probably have to come from the mainstream antitrust tradition of the Democratic party, but that still leaves room for more aggressive merger enforcement. Expect current cases to continue, and mergers to receive more probing scrutiny, with enforcement levels possibly similar to those of the recent FTC. Criminal enforcement may also increase, though the decline in cartel cases we have observed is not limited to the U.S., and so may not result from administration policy. It is also reasonably likely that the Biden DOJ will reverse or step back from the strongly pro-IP "New Madison" approach to IP/antitrust issues advanced by AAG Delrahim, including perhaps altering the positions the DOJ took in the Qualcomm case and in recent business review

letters and other statements relating to standard-setting. DOJ may continue the aggressive “statement of interest/amicus” program AAG Delrahim developed, which resulted in historically high levels of DOJ court filings (though probably with somewhat different content).

FTC. The FTC has been very aggressive in recent years, including just this year breaking a record for merger enforcement actions that had stood since 2000. While there will be pressure to be even more aggressive, the FTC’s current activity levels do not leave huge amounts of room (or resources) for drastic increases. Also, as with the DOJ, unless Democrats succeed in taking control of the Senate, any Chairman President Biden might appoint, and the Bureau Directors that Chairman will select, will likely come from the mainstream of Democratic antitrust, which also suggests that FTC enforcement will not change radically. We do expect increasing scrutiny of pharmaceutical transactions, as the current Democratic Commissioners’ objections to FTC merger decisions have disproportionately focused on that industry. There’s an open question as to how long it will take the FTC to switch to Democratic control. However, even if Republicans remain in control of the FTC for a transition period, the FTC’s independence and existing policy priorities should mean that the FTC will sustain its high level of antitrust enforcement. And we do expect Democratic control of the FTC within 2021 (even though technically Republicans could retain control until 2023).