# Interview with Noah Phillips

Noah Phillips served as Commissioner of the Federal Trade Commission from 2018 to 2022 and is Co-Chair of the Antitrust Practice at Cravath. Below, he discusses the workings of US antitrust policy and what may lie ahead for antitrust under the new administration, arguing that investors looking for less regulatory scrutiny of big tech firms may be disappointed.

*The views stated herein are those of the interviewee and do not necessarily reflect those of Goldman Sachs.*

**Allison Nathan: Which institutions are responsible for antitrust initiatives in the US today, and how do their roles differ?**

**Noah Phillips:** The US oddly has two government agencies responsible for antitrust enforcement and policymaking, and much of their jurisdictions overlap: the Department of Justice (DOJ) and the Federal Trade Commission (FTC). Both bring conduct—involving alleged anticompetitive behaviors—and merger cases. But several important differences exist between the two. One, their processes. Take mergers as an example. The DOJ brings cases to block mergers in federal court, whereas the FTC typically brings two merger cases—one in federal court and the other in its in-house administrative court, with the federal case to enjoin the merger so the FTC can resolve the case in its administrative court. Two, their structures. At the DOJ, the assistant attorney general for the Antitrust Division leads antitrust efforts on the agency's behalf. At the FTC, five commissioners, one of whom is the chair and directs the staff, run the agency.

Three, the legal statutes they enforce. The DOJ enforces the Sherman Antitrust Act and the Clayton Antitrust Act, Section 7 of which is the federal merger statute. The FTC enforces the Clayton Act as well but also Section 5 of the FTC Act, which "prohibits unfair methods of competition". Section 5 is broader than the Sherman Act, though how much broader has been a matter of debate for over a century. And four, the industries they focus on, which is generally more a matter of historical precedent than law—except in a few areas such as common carriers, where the FTC is barred by statute from involvement. Over time, for example, the DOJ has come to focus on media and energy transmission and production, while the FTC has come to focus on pharmaceuticals and oil and gas. But in a lot of sectors, including tech, the lines are not clearly drawn. In the rare case when the agencies can't decide who should deal with a merger, they literally flip a coin, which happened once during my time as FTC Commissioner.

**Allison Nathan: To what extent does the US president have authority in the antitrust arena?**

**Noah Phillips:** The president's main authority in this arena is over appointments. The president can appoint the assistant attorney general and his/her superiors in the DOJ as well as FTC commissioners, so long as the positions of the latter are open. That's important to note because FTC commissioners' terms don't necessarily align with elections or the transfer of power between administrations. And because the FTC is an independent agency in the scheme of the federal government, under prevailing law, the president can't fire FTC commissioners for policy differences—only for cause—and the commissioners can't be forced to step down when a new president is elected. That said, the FTC chair has historically stepped down when a new president assumes office to allow that president to effectuate his policy views via a new chair. The president can designate a new chair from among the commissioners. But a degree of leadership continuity still exists, as many or all of the non-chair commissioners stay on.

The DOJ leadership isn't statutorily protected from firing by the president, so the DOJ is less independent, although the agency has generally been protected from White House involvement since the Nixon years. That said, on day one of a new administration, political appointees at the head of government agencies and divisions such as the DOJ typically step down and different political appointees and some career officials temporarily step in until new senior leadership are confirmed.

The president can also guide antitrust policy through his/her actions. Over the years, presidents have exercised this authority to varying degrees. President Biden was very focused on competition early in his term and adopted a "whole-of-government" approach to competition policy, issuing an Executive Order in 2021 that directed many federal agencies, including the FTC and DOJ, to take action against dozens of practices identified by the Administration and established the White House Competition Council, with Biden also appointing a special assistant for competition policy, Tim Wu, to coordinate the whole effort. So, the president can play a strong role in the antitrust arena.

**Allison Nathan: So, what will likely happen at the FTC and DOJ now that Trump has been reelected?**

**Noah Phillips:** The fact that FTC Chair Lina Khan's term recently expired wouldn't force her to step down until the lengthy process of appointing and confirming a new commissioner takes place, but she is most likely to observe the historical norm and do so. That would leave the FTC with an even split of two Republican commissioners, Melissa Holyoak and Andrew Ferguson, and two Democratic commissioners, Rebecca Kelly Slaughter and Alvaro Bedoya. So, in the immediate term, while Trump will likely designate a new chair or acting chair from among the remaining commissioners, given that they agree on the overwhelming bulk of matters and decisions are made by majority vote, it will probably be largely business as usual at the FTC. Trump filling the open fifth commissioner slot would break any possible tie regardless of whether that person comes in as the new chair or a non-chair commissioner. But that probably wouldn't happen for months given that the Senate must confirm FTC commissioners. At the DOJ, Assistant Attorney General for the Antitrust Division Jonathan Kanter will also likely step down, setting the stage for

Trump's appointee to take the helm as soon as the Senate confirms them.

**Allison Nathan: You served as FTC Commissioner for four years that spanned the Trump and Biden Administrations. How did antitrust policy and enforcement evolve over the two administrations?**

**Noah Phillips:** Biden's Executive Order purported to shift US antitrust policy to a more interventionist and aggressive stance relative to the prior several decades in response to rising economic populism that featured concerns about the conduct and power of large corporations. This shift in approach was visible along several dimensions, from the rhetoric the White House and enforcers used, to the types of cases the agencies brought, to the policy statements they adopted, to the Administration's "whole-of-government" strategy.

But, as a practical matter, the biggest change the Biden Administration brought to merger control was its aversion to remedies—deals that the parties in a case agree to in order to address concerns about competition. The DOJ's current public position is that it doesn't do remedies, although it has been forced to in a few cases. The FTC, by contrast, issued a policy in 2021 stating that it would do remedies, but only if the surviving party agreed to seek prior approval before closing any future deals; the government would no longer have to challenge a deal to block it. While the FTC hasn't fully abided by that policy, for example, allowing Exxon to acquire Pioneer and Chevron to acquire Hess without including prior approval requirements, most of the agreements the FTC has struck in merger cases have involved such requirements.

All that said, as much as the Biden Administration has strived to strike a different tone on antitrust, the reality is that the road toward more aggressive policy and enforcement began before it. While it's not often characterized as such, antitrust enforcement was fairly aggressive during the first Trump Administration, which blocked many mergers and oversaw the initiation of monopolization cases, including the DOJ's case against Google as well as the FTC's case against Facebook. So, not nearly as much daylight exists between Biden's and Trump term one's approaches to antitrust as the former envisioned and as many people seem to think. There is also reason to believe that Trump term two will be closer to Biden than Trump term one.

**Allison Nathan: So, are investors that expect less regulatory scrutiny of big tech firms under the new administration likely to be disappointed?**

**Noah Phillips:** Yes. Some variations in antitrust policy and the basis for enforcement may occur, but the appetite to scrutinize large firms, especially tech firms, will probably remain given that the political salience of economic populism has only grown since Trump's first term. An underappreciated but consequential issue to watch will be how regulators' approach to remedies evolves—will they do remedies, and what kind? For every case that the FTC or DOJ files, whether it ends up in liability—meaning, the company has been found legally responsible for violating antitrust laws—or the parties reach an agreement to settle the case, the agencies need to have a view on the appropriate remedies. And regulators could find themselves in a fraught situation because the expectations of them could differ from the public posture of the agency. For example, in an interview before the election, Trump suggested that he would not support breaking up Google, despite the DOJ's current public position that it is seeking Google's breakup now that it has been found liable in a court of law. Whether that changes will be important to watch and will largely depend on who ends up running these efforts at the DOJ under Trump. If Trump wants the DOJ to switch course on the Google case, he would likely attempt to appoint someone who shares that view.

**Allison Nathan: Several other cases against big tech firms, including the FTC's case against Amazon and the DOJ's case against Apple, are pending. What could happen to those cases?**

**Noah Phillips:** Each agency will need to decide whether they want to drop, settle, or continue to prosecute their respective cases, and what outcome they hope to achieve by doing so. At the DOJ, the fate of each case will largely depend on what the new assistant attorney general for Antitrust wants to do. At the FTC, if a majority of the Commission can't come to an agreement on a pending case, the case will continue. That said, the FTC chair has the ability to steer much of what the staff does, which includes the government's litigating position. So, the new chair could decide to include some remedies in the case filing, that he/she doesn't want to make a certain argument, or, at the extreme, to tell the court that he/she doesn't believe the FTC has the power to take a certain action, just as the Republican commissioners did when the FTC tried to ban non-competes.

**Allison Nathan: What sectors beyond tech are worth keeping an eye on in terms of how antitrust policy may evolve during Trump's second term?**

**Noah Phillips:** Many sectors—not just big tech—have been the objects of antitrust scrutiny under the Biden Administration; in general, that may well continue. However, some sectors were also singled out in odds ways that may not continue, such as the way in which the FTC allowed the Exxon-Pioneer and Chevron-Hess mergers to proceed. Private equity is another area to watch. Even though it wasn't mentioned in Biden's Executive Order, both Lina Khan and Jonathan Kanter have been very focused on private equity and skeptical of the business model. Whether that continues under Trump is an open question.

**Allison Nathan: What will you be watching to gauge the direction of antitrust policy and enforcement ahead?**

**Noah Phillips:** I will be closely watching whom Trump nominates for the open FTC and DOJ positions, which will give some indication of where antitrust policy and enforcement may be headed. At the end of the day, though, the headlines about how permissive the Trump Administration could be in its second term will probably prove too bullish. As we've discussed, there is substantial reason to believe that the Trump Administration will remain fairly aggressive in the pursuit of antitrust prosecutions and blocking mergers in the tech sector and beyond.