

## Vital Briefing

# Trump win, Senate flip point to antitrust reset

By [Jeffrey May, J.D.](#)

Donald J. Trump was elected to serve as the 47th president of the United States on November 5. His long coattails led to a flip of the Senate from Democratic to Republican control. The election results provided Republicans with an opportunity to reset antitrust enforcement over the next four years. In particular, the Administration will likely move away from the current “New Brandeis” or “Neo Brandeisian” policies of FTC Chair Lina Khan, who has become a household name since being sworn in to lead the agency in June 2021.

**Policies.** On the campaign trail, both Trump and his opponent, Vice President Kamala Harris, were light on policy specifics. Antitrust policy was no exception. Most likely, changes to antitrust policy will focus on reversing course with respect to certain guidance. Just one week before the election, Commissioner Melissa Holyoak, one of the two Republican commissioners on the FTC, told the Mercatus Center that she would consider rescinding or revising the Biden Administration’s December 2023 Department of Justice Antitrust Division/FTC merger [guidelines](#) (See “[Republican FTC commissioner talks about rethinking merger guidelines, focusing on enforcement](#)”).

Such a reversal would not be unprecedented. The Joe Biden Administration rescinded antitrust guidance set out by the first Trump

Administration. For instance, a divided FTC quickly [withdrew](#) the 2020 vertical merger guidelines. The Biden Administration also [withdrew](#) a Trump-era joint policy statement of the Justice Department, U.S. Patent & Trademark Office, and National Institute of Standards and Technology, addressing the treatment of standard-essential patents or SEPs, where a patent holder has agreed to license its patents on fair, reasonable, and nondiscriminatory or FRAND terms. That 2019 policy statement had backed away from earlier guidance issued during the Obama administration, which arguably had disfavored the use of injunctions and other exclusionary remedies in actions for infringement of SEPs.

At the FTC, both Holyoak and her fellow Republican commissioner, Andrew Ferguson, have also taken issue with the agency’s rulemaking agenda. They objected to the agency’s [rule](#) banning noncompetes. The rule had been set to take effect on September 4, 2024. However, it was set aside by a federal district court in [Texas](#) and a federal district court in [Florida](#). While an appeal has been filed by the agency, the future viability of the rule seems even less likely than it did before. Both Holyoak and Ferguson dissented from the rule’s issuance and contended that the FTC should focus on enforcement over rulemaking. The views square with Trump’s call for cutting regulatory burdens on business.

At the Antitrust Division, there likely will be a return of negotiated settlements. Jonathan Kanter, Assistant Attorney General in charge of the Department of Justice Antitrust Division, moved away from the practice of issuing proposed final judgments or consent decrees along with complaints in civil antitrust matters involving alleged anticompetitive conduct or potentially anticompetitive acquisitions. Kanter showed a greater willingness to challenge questionable deals and conduct in court. Particularly if the Antitrust Division faces budget cuts or the agency reprioritizes to focus more on criminal conduct, then merging parties and civil investigation targets will see more willingness on the part of the Antitrust Division to accept a compromise.

There was speculation during the campaign that a Trump win would lead to less aggressive antitrust enforcement against the big tech companies. Trump has reportedly questioned the break-up of Google as a remedy for its monopolization of the markets for general search services and general search text advertising. In August, the federal district court in Washington, D.C. [found](#) that Google used its exclusive distribution agreements with major browser developers, Android device makers, and wireless carriers to maintain its monopoly power in violation of Sec. 2 of the Sherman Act. The remedies phase is now underway. The Justice Department in October filed a [framework](#) of potential

remedies to address Google liability in the case, which was started during the first Trump Administration. A decision on the remedy is expected in 2025, and Trump's picks to head the Justice Department and its Antitrust Division will have a significant say in the company's future. It remains unclear whether Trump will take a lighter touch in the sector.

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There are Republican lawmakers who have cheered the crackdown on the tech sector. Some, including Trump's running mate, Senator J.D. Vance (R., Ohio)—as well as Representative Matt Gaetz (R., Fla.) who was re-elected to a fifth term—have been dubbed “Khanservatives” in light of their support for the FTC chair's scrutiny of tech giants. However, a possible shift in focus by Republican-led agencies to probe big tech's role in political censorship could go a long way in mollifying the concerns of these Republican lawmakers.

**Legislation.** Federal antitrust legislation is less likely to shape policy than changes in guidance or agency process. Despite the Republican majority in the Senate, the filibuster creates difficulty for passing legislation without bi-partisan support. Mitch McConnell, the current leader of the Senate Republicans, has said the filibuster will stand. As a result, some Republican-backed legislation that lacks

Democratic support would have a difficult time reaching Trump's desk. For example, Republican lawmakers' calls to consolidate antitrust enforcement authority at the Department of Justice and leaving the FTC with authority over only consumer protection issues would likely not become law. Moreover, in the last Congress when the Democrats held a majority, bi-partisan legislation to take on big tech could not overcome procedural hurdles in the Senate and failed to become law.

**Personnel.** While there was much speculation in the media about the fate of Khan in the event of a Harris win, there was not much discussion about who Trump would select to replace her at the FTC, as well as Kanter at the Antitrust Division. Republican FTC Commissioners Holyoak and Andrew Ferguson, both former state solicitor generals, could be tapped to serve as chair. One of them will likely serve as interim head of the FTC. The Trump transition team will need to start in earnest searching for Justice Department leadership. As with FTC commissioners, few names have been floated. With a Republican majority in the Senate, Trump will have an easier time installing his picks to head the agencies.

**Senate shift.** A total of 34 Senate seats were up for grabs on Election Day 2024 with 22 of those held by Democrats or Independents that caucus with the Democrats. Republicans picked up Senate seats in West Virginia, Montana, and Ohio. That majority will stick, even though Vance will become the Vice President and step down as senator. Ohio Republican Governor Mike DeWine will pick the replacement who

will fill that seat until there is a special election in 2026.

While membership in the Senate subcommittees that have oversight of the federal antitrust agencies might change in 2025, the senators who are currently members of those committees held their seats. As a result, familiar faces could remain on the committees, just in new roles. However, priorities will certainly change as the Republicans take the chair positions.

Senator Amy Klobuchar (D., Minn.), the chair of the Senate Judiciary Committee's antitrust subcommittee, was up for re-election but held her seat. The term of the antitrust subcommittee's ranking member, Mike Lee (R., Utah), runs until January 2029. The antitrust subcommittee has oversight of antitrust enforcement and competition policy at the FTC and the Department of Justice Antitrust Division.

In the Commerce Committee's Consumer Protection, Product Safety, and Data Security, Subcommittee Chair John Hickenlooper (D., Colo.) was not up for re-election. Subcommittee Ranking Member Marsha Blackburn (R., Tenn.) was up for re-election; however, she defeated her opponent. Before Election Day, there was speculation about possible losses for only two senators on the subcommittees. Both held on to their seats. Senator Tammy Baldwin (D., Wis.) won in a nail-biter against her Republican challenger. Senator Ted Cruz (R., Tex.) easily defeated his Democratic rival. Cruz is also the Ranking Member of the full Commerce Committee.