

President Biden’s Antitrust Gamble

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As President Biden’s term is nearing its end, did his aggressive antitrust agenda bear fruit? Axinn attorneys Daniel Bitton and Carol Liu recently published an article, [*Biden’s Antitrust Gamble*](#), taking stock of the Biden Administration’s antitrust scorecard to date.

Mixed record in merger enforcement. The statistics show that Biden has delivered on its promise to settle fewer and litigate more of its merger challenges. The results have been mixed. Where it challenged mergers on conventional horizontal theories of harm, it has largely secured court victories. But where it challenged mergers based on non-horizontal theories of harm, it mostly lost in court, except for a partial victory in its vertical merger challenge of *Illumina/Grail*. It has also struggled to secure victories where it litigated over the sufficiency of remedies offered by merging parties. Since the publication of *Biden’s Antitrust Gamble*, the FTC suffered another loss, this time seeing its serial acquisition claim in *FTC v. USAP* dismissed as to the private equity fund defendant, a blow to its anti-private equity agenda.

	Obama ('09-16)	Trump ('17-20)	Biden ('21-22)
% of Second Requests Leading to Challenge, of which:	83.2%	78.5%	73.2%
Negotiated Settlement	49.2%	41.0%	26.8%

Abandonment/Restructuring	25.5%	28.8%	29.5%
Litigation	8.5%	8.8%	17.0%

Setbacks in labor market enforcement efforts. Biden has suffered significant setbacks in pursuit of its aggressive labor market enforcement agenda. Although the DOJ has obtained a guilty plea and a pretrial diversion agreement, it has lost four different trials in which it brought criminal charges based on no-poach and wage-fixing allegations. Meanwhile, the FTC's controversial rulemaking prohibiting non-compete covenants in employment contracts faces a 1-1 score in court, with one federal court upholding the rule while another preliminarily enjoined it.

Scorecard in the crusade against tech: TBD. The Biden Administration has been on an antitrust crusade against tech, pursuing monopolization cases against Amazon, Apple, Google, Meta, and, most recently, Ticketmaster/LiveNation. In several of these cases, the Administration pushes the boundaries of US monopolization law in a more European direction or second-guesses merger clearance decisions of prior Administrations. With most of those cases still pending, it remains to be seen what Biden's legacy will be in its crusade against tech companies.

President Biden is taking a gamble with his Administration's aggressive approach; if pushed too far, it could lead to course corrections by courts or future Administrations that constrain rather than further his antitrust ambitions in the long term. For an in-depth discussion of the Biden Administration's antitrust track record, take a look at [*Biden's Antitrust Gamble*](#) by Daniel Bitton and Carol Liu.



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