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Trump Administration Reverses the Biden Administration's Anti-Merger Policy and Returns to Merger Settlements; Proposed Budget and Personnel Cuts Likely Require a Period of Retrenchment and Triage in Merger Enforcement

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The current leadership of the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (Antitrust Division or DOJ) (collectively, "antitrust agencies") have signaled an intention to reject the anti-merger policies of the previous administration. Recent guidance from both antitrust agencies suggests that while mergers and other transactions between significant competitors and certain vertical transactions are likely to undergo a thorough review, most transactions that raise substantive concerns are likely to be allowed to close after the merging parties agree to divestitures or other conditions sufficient to address the potential for competitive harm.   With the Commission presently operating with only three Commissioners, all of the same political party, there is unlikely to be an intra-Commission challenge to the change in merger policy.

Merger Remedies Are No Longer Disfavored and Merger Process Will Not Be Used to Deter Mergers

In a statement accompanying the Commission's clearance of Synopsis Inc.'s acquisition of ANSYS Inc. (subject to a divestiture, discussed below), FTC Chairman Andrew Ferguson, joined by Commissioners Melissa Holyoak and Mark Meador, commented that "mergers and acquisitions are a critical way in which capital fuels innovation" and "the Commission must not reflexively oppose mergers and acquisitions." Rather, they noted, "when a merger would not violate the antitrust laws, the Commission must get out of the way quickly to avoid bogging down innovation and interfering with the forces of a free and competitive market." The Commissioners further commented that where a transaction raises competitive concerns, "a settlement may be the best way to protect competition" because it "can temper the potentially over-inclusive effects of an injunction blocking an entire merger" by "permit[ting] the procompetitive aspects [of the transaction] to proceed." "Settlement [also] maximizes the Commission's finite resources."

Chairman Ferguson's statement indicates a strong preference for divestiture, so-called structural relief. According to Ferguson, structural relief will generally require "the sale of a standalone or discrete business. . . with all tangible and intangible assets necessary (1) to make that line of business viable, (2) to give the divestiture buyer the incentive and ability to compete vigorously against the merged firm, and (3) to eliminate to the extent possible any ongoing entanglements between the divested business and the merged firm." Further, "the divestiture buyer [must have] the resources and experience necessary to make that standalone business competitive in the market." Where such conditions are not met, the Commission leadership suggests they will support litigation to block a transaction; this is consistent with the standard prior to the Biden Administration. With respect to non-structural relief, the Commissioners noted that "behavioral remedies [will be] treated with substantial caution" and "are disfavored." *Statement of Chairman Andrew N. Ferguson, Joined by Commissioner Melissa Holyoak and Commissioner Mark R. Meador, In the Matter of Synopsys, Inc. / Ansys, Inc.* (May 28, 2025).

While the disfavoring of behavioral remedies might suggest that vertical or non-horizontal transactions will be subject to a harder line when they raise competitive concerns—a continuation of the Biden Administration policy—the Trump

Administration may not view vertical transactions with the same skepticism as the Biden Administration. This position is reflected in the more positive treatment of efficiencies and other procompetitive benefits associated with non-horizontal transactions in the 2020 Vertical Merger Guidelines, promulgated by the antitrust agencies during the first Trump Administration, but subsequently rescinded by the Biden Administration.

Bill Rinner, Deputy Assistant Attorney General for Antitrust, made similar points on behalf of the Antitrust Division in a recent speech on merger policy. Rinner commented that "competition and economic growth. . . rely on a healthy dealmaking environment" and, in contrast to the previous administration, the Antitrust Division will "accelerate merger reviews and increase the rate and speed of early termination." Rinner promised no more "scarlet letters"— notice to companies who have otherwise obtained clearance through the Hart-Scott-Rodino merger review process that the Antitrust Division (or the FTC) might come back later and force an unwinding of their transaction. He indicated that the Antitrust Division would implement a "fair and predictable" merger review process, and not "over deter[ ] lawful transactions" by abusing the merger clearance and "Second Request" process.

Notwithstanding the Administration's retention of the Biden Administration's 2023 Merger Guidelines, Rinner made clear that the market share (30%) and concentration thresholds (1800) in the guidelines *do not require a challenge to all mergers in concentrated industries*. In fact, "the vast majority of mergers do not give rise to competitive concerns" and "for those that do, remedies may be available that adequately mitigate potential harm." Those remedies are likely to be structural, according to Rinner: divestitures to up-front buyers, with the ability and incentive to operate the divested assets in a competitively effective manner. Purchasers of to-be-divested assets will be subject to a "rigorous" assessment of their capabilities to operate the assets. Rinner indicated that the Antitrust Division would operate in a transparent manner and noted that the Antitrust Division would not continue the "shadow decree" process implemented by the Biden Administration DOJ to avoid the judicial oversight required by the Antitrust Procedures and Penalties Act (Tunney Act) (15 U.S.C. §16(e)) when the DOJ accepts a settlement in an antitrust matter. *Remarks of Deputy Assistant Attorney General Bill Rinner Regarding Merger Review and Enforcement (June 4, 2025)*.

Rinner also noted that under certain conditions, behavioral or conduct remedies may be sufficient to address the Antitrust Division's competitive concerns. The position reflected in the September 2020 Antitrust Division Merger Remedies Manual, although rescinded without replacement by the Biden Administration in 2022, is likely instructive:

Stand-alone conduct relief is appropriate only when the parties prove that: (1) a transaction generates significant efficiencies that cannot be achieved without the merger; (2) a structural remedy is not possible; (3) the conduct remedy will completely cure the anticompetitive harm, and (4) the remedy can be enforced effectively.

Additional Remedies Guidance

Although the Antitrust Division has not indicated a new remedies policy statement is forthcoming, FTC Chairman Ferguson's statement in the Synopsys/ANSYS matter indicated the Commission would issue a remedies policy statement "in due course." The FTC's most current comprehensive remedy guidance, by its Bureau of Competition, is from January 2012, and predates the learning from the 2017 study of its Merger Remedies 2006-2012. While the agencies have not previously issued a joint policy statement on remedies in merger matters, joint DOJ/FTC statements on antitrust and merger policy are common. However, they often require substantial compromise because of differences across the two agencies and within the multi-member Commission. If the agencies wish to proceed with a joint statement, it may be easier to achieve because of the current vacancies on the Commission.

Private Equity Firms Are Likely No Longer Disfavored Acquirers of To-Be-Divested Assets

Although unstated by FTC and DOJ officials, the Antitrust Division and the FTC are likely to return to the position of the agencies prior to the Biden Administration that private equity firms are often appropriate buyers of to-be-divested assets. However, as with all divestiture buyers, a private equity buyer will be evaluated on a case-by-case basis to determine whether the buyer has: (1) the financial capability to acquire and operate the assets; (2) the ability to maintain or restore competition in the market, with the assets to be acquired; (3) the acumen, experience and incentive to operate the assets competitively in the market(s) where harm from the merger was identified; and (4) without the acquisition itself raising competitive concerns.

Recent Merger Settlements Illustrate the Return to Predictive, Neutral Merger Policies

The FTC's acceptance of a divestiture remedy in the *Synopsys/ANSYS* transaction, and the DOJ's acceptance of a divestiture remedy in the *Keysight Technologies/Spirent Communications* transaction are further indications of the return to merger-neutral policies.

Synopsys/ANSYS

The FTC's Administrative Complaint alleges that Synopsys Inc.'s acquisition of ANSYS, Inc., would have eliminated "substantial head-to-head competition" in the markets for optical software tools, photonic software tools for designing and simulating photonic devices, and register transfer level power consumption analysis tools. Rather than seek a preliminary injunction to block the transaction pending an administrative trial, the Commission provisionally accepted a divestiture sufficient to address the concerns articulated in its administrative complaint. The FTC's proposed Decision and Order (subject to public comment and final approval by the Commission) requires divestiture of relevant products, assets and facilities of each of Synopsis and ANSYS to an up-front, pre-approved buyer (Keysight Technologies) within 10 days of the closing of the transaction. The divestiture obligation is subject to an Order to Maintain Assets and allows the FTC to appoint a divestiture monitor and trustee to sell the assets in the event the parties fail to comply with the divestiture requirement. In support of Keysight's ability to immediately compete in the relevant markets, the combined company is required to provide it a limited amount of technological support for a short period, post-acquisition. Additionally, with some exceptions, the combined entity may not enforce non-compete or non-solicit agreements with respect to its employees who may seek employment at Keysight and is subject to a three-year prohibition on soliciting employees who, pursuant to the divestiture, move to Keysight. The contemporaneous filing of an administrative complaint and proposed settlement marks a return to the approach prior to the Biden Administration (although the Biden Administration occasionally accepted a settlement in lieu of, or during, litigation).

The FTC's investigation of the Synopsys/ANSYS transaction took almost 18 months. The transaction was cleared earlier by the European Commission (January 9, 2025, same relief), Israeli Competition Authority (Oct. 9, 2024, unconditional clearance), the Japan Fair Trade Commission (March 13, 2025, unconditional clearance), the Korea Fair Trade Commission (March 21, 2025, same relief), and the United Kingdom's Competition and Markets Authority (CMA) (March 5, 2025, same relief). China's State Administration for Market Regulation (SAMR) is the only major competition authority that has not cleared the transaction; it is likely that the friction between the United States and China with respect to trade policy is a contributing factor to the delay.

Do not expect the FTC to be so significantly out of step with the clearance timeline in other jurisdictions during the remainder of the current administration. The long path to clearance in this transaction reflects, in part, the previous administration's use of the merger review process to delay clearance of transactions in the hope that they would be abandoned, or that some intervening event would cause the transaction to crater, rather than accept a settlement.

Keysight Technologies/Spirent Communications

The DOJ alleged that Keysight Technologies proposed acquisition of Spirent Communications would eliminate competition in the markets for high speed ethernet testing equipment, network security testing equipment, and radio frequency channel emulators. To address the DOJ's concerns, the parties agreed to divest Spirent's businesses operating in those markets to Viavi. (In early 2024, Viavi had bid to acquire all of Spirent, but Keysight outbid them.) Contemporaneously with its filing of a complaint setting forth its allegations, the DOJ filed a proposed Final Judgment to bind the combined entity to the terms of the agreed upon divestiture.

The settlement requires the combined entity to effectuate the divestiture to Viavi within 10 days of the later of its receipt of all regulatory approvals for the proposed transaction or the court's entering of the proposed Asset Preservation and Hold Separate Stipulation and Order. The settlement also requires the combined entity to provide transition services to Viavi (or any other buyer, if the assets are not divested to Viavi) for a short period, restricts its ability to enforce non-compete and nondisclosure agreements with respect to any employees who move to Viavi as part of the divestiture (or are hired within 180 days of the divestiture), imposes on it a one year non-solicit provision with respect to rehiring any employees hired by Viavi within 90 days of the divestiture (unless those employees are terminated by Viavi, or Viavi agrees), and requires appointment of a divestiture trustee to sell the to-be-divested assets if Keysight fails to divest them to Viavi. The proposed final judgment is subject to public comment and court approval, pursuant to the Tunney Act. This is a return to the general practice prior to the Biden Administration, although in non-complicated matters, the Antitrust Division had occasionally accepted "fix-it-firsts" not subject to the Tunney Act procedures.

The transaction was previously cleared by the United Kingdom's CMA in March 2025 without conditions (pursuant to an exception for *de minimis* effects) and is still subject to clearance by China's SAMR.

The Antitrust Agencies Face Significant Budgetary Limitations That May Impact Merger Review and Enforcement Efforts

Budgetary pressures may prevent the administration from adopting an aggressive anti-merger enforcement policy and litigation docket, if desired. President Trump's Fiscal Year 2026 Budget Request proposes **a 15% cut** to the FTC's budget and number of personnel (as compared to Fiscal Year 2024). Although the President's budget proposes a substantial increase to the Antitrust Division's budget, the increase is, as proposed, obligated to "other services from non-federal sources" (which are likely expert witness fees and related fees for its existing monopolization trial docket), it also proposes a **10% cut** in Antitrust Division personnel (as compared to Fiscal Year 2024). Antitrust merger (and non-merger) litigation is expensive—expert fees for testifying economists routinely run into the $5 to $10 million range and can be significantly more for complex cases – and requires a large number of litigating attorneys and support staff.

The FTC and the DOJ have a substantial docket of monopolization and unfair method of competition cases (*FTC v. Meta*, *FTC v. Amazon*, *In the Matter of CareMark et al.*, *FTC v. Syngenta*, *FTC v. Deere and Company*, *U.S. v. Google* (search), *U.S. v. Google* (ad-tech), *U.S. v. Apple*, *U.S. v. Live Nation/TicketMaster*, and *U.S. v. Visa*) and one Robinson Patman Act price discrimination case (*FTC v. Southern Glazer's*) in active litigation. Only two—the Google cases—have gone to trial; the other matters are in the pre-trial phase. It is unlikely either agency has the personnel to take on significant merger litigation until many of these trials are concluded or otherwise resolved.

The merger enforcement policy of the current administration will be significantly different from the policy of the Biden administration. It will not be an impediment to deal-making.