



## A Q&A with James Weingarten

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The Federal Trade Commission's chief trial counsel departed the agency last week for Milbank. Weingarten spoke to GCR USA about leading the fight in the trenches in efforts against *Microsoft/Activision*, *Kroger/Albertsons* and *Sanofi/Maze* and how the antitrust landscape has changed since the Obama Administration.

### **What motivated you to join Milbank?**

The people at Milbank impressed me a lot. Fiona Schaeffer – the head of our group here and the head of the American Bar Association's antitrust

law section – is a very impressive person. She has built a group here at Milbank with people whom I knew by reputation were extremely well-respected, very smart and just good people.

I loved that the firm was clearly investing in the antitrust practice, with a view of both serving existing clients and being a destination practice. It's exciting to join a place that wants to be where clients come for advice on the most complex matters and not just routine antitrust advice. What they wanted to do matched where I wanted to be.

Finally, as a trial lawyer, Milbank was a good fit because they are ready, willing, and able to try cases.

### **Why did you leave the FTC?**

The final job that I had before I left was chief trial counsel. I don't think it's a forever job by its nature. I'd been at the agency for seven years and had done every role, from staff attorney to senior trial counsel to deputy chief trial counsel to chief trial counsel.

There is always one more case to resolve. And even though it's a tremendous privilege to represent the public, it was time for something new.

I had come to the government from private practice, and I was excited to go back to working that muscle, advising clients and taking what I had learned and the experiences I had at the FTC and taking it to the private side. It was the right time, and when a place like Milbank asks, 'you want to come work with us?', that makes it the right time.

### **Your career at the FTC spanned both the Trump and Biden administrations. The agency seems different from the outside. Have you noticed changes from within?**

There was a high level of enforcement activity ongoing when I started in January of 2017. When I started 11 days before Trump's inauguration, we were bringing important cases in the healthcare division that were in process. The FTC brought a significant number of merger challenges during those years. That was a high level of enforcement activity

compared to the 10 or 15 years previous. That has ramped up under the current administration but wasn't from zero to 100.

For example, when I started at the agency, there were three or four active litigations where a complaint had been filed. And now, I think the agency has up to eight active cases pending in court at a time. There has been a steady increase in enforcement action. I don't think the trend of increasing antitrust law enforcement activity is attributable just to the Biden Administration. It's a secular trend.

**As chief trial counsel, you were on the front lines for many of the FTC's most high-profile antitrust cases over the past few years including [Microsoft/Activision Blizzard](#). Do you have any reflections on that case, as the US Court of Appeals for the Ninth Circuit's decision is still pending?**

The case is still on appeal, and I look forward to the decision. We really went toe-to-toe with Microsoft with our evidence and I still think that was a great case. We'll see what the court of appeals comes out with.

**Did you see ambitious cases like the challenge to *Microsoft/Activision* impacting businesses' decision-making?**

No one from the business community came to me directly while I was at the FTC and said, "Oh, this is moving the dial." But I have to believe that it does have an effect. The business community definitely takes note of the increased enforcement activity. I think it was notable under the prior administration – and it's certainly notable under the Biden Administration – that sophisticated companies are absolutely incorporating litigation and advocacy strategy with antitrust in mind earlier and earlier on in their process. There is no question about it. I have heard that from clients already in this job.

The agencies are bringing so many more enforcement actions, and there's just a ferment, right? We talked about the Trump Administration and the Biden Administration, but regardless of political party, antitrust is having a moment that it hasn't had for quite some time in terms of public salience. Antitrust is top of mind in a way it was not 10 or 15 years ago.

**As antitrust makes it onto the front page more often, are there any issues you think deserve more attention from the public?**

I think the FTC and DOJ are looking at all of the authorities and the theories available to them under the law and being much more creative and aggressive than ever. For example, look at what the Commission did with the [Section Five authority statement](#). There is the healthcare [roll-up case](#) that the FTC brought in Texas federal court. I don't think that's the last one. That's not the only instance of a so-called roll-up in the country.

**FTC chair Lina Khan has drawn significant ire from Republican lawmakers since joining the commission. Do these [reports](#) and probes from the House of Representatives impact morale at the Bureau of Competition?**

I can't speak for everyone at the FTC, but in my world, we really just put our heads down and did the work. So, as litigators, we tried the cases the best we could.

**What hopes do you have for the FTC moving forward?**

A well-functioning competition agency is an important part of our economy and our law enforcement structure. I hope that they keep an open mind now that I'm on the other side of the arguments that are being presented.

I hope that they're resourced and able to do their jobs. I think the people there are fair and even-tempered and try to follow the law. I hope that they keep doing that.