

Antitrust Policy: In *Capitol Forum* Interview, Utah AG Sean Reyes Says He Will Overhaul FTC's "Sledgehammer" Approach to All but Worst Offenders

FTC Transition Update

Sean Reyes changed the way the Utah attorney general's office works, and now intends to upend business as usual at the FTC if nominated to head the agency. In his most extensive interview since emerging as the leading candidate for FTC chairman, Reyes told *The Capitol Forum* that the agency is in need of a "course correction" because of what he described as its occasionally heavy-handed approach to investigating companies.

As Utah's attorney general and before that as a lawyer in private practice, Reyes found a widely-held view among businesses that "the FTC could come down at times like a sledgehammer," he said. "You can still be effective, and you can still be aggressive, but you do it in a way that is not abusive and overbearing and overregulating," he said.

Targeted probes. Reyes said in his current job he has achieved a balance of enforcement and respect for those being investigated. He did this in part, Reyes said, by stopping the practice of state prosecutors issuing administrative subpoenas, which unlike regular subpoenas don't require a judge's approval. Although the Supreme Court has upheld their legality, administrative subpoenas can run roughshod over the privacy rights of individuals being investigated, he said.

If Trump gives him the nod, Reyes said he would be similarly mindful of how the FTC treats targets of its probes. He said he would create a new internal screening process at the FTC to discourage staff from making broad information demands of companies that lead to "fishing expeditions." As chairman, Reyes said he would task staff to study past probes to see which avenues of inquiry were fruitful and which were dead ends, developing guidance for future investigations.

Reyes said his concern about the needless disclosure of company information would extend to EU antitrust reviews of U.S. companies' mergers and conduct. As FTC chairman, he would urge his European counterparts to respect the confidentiality surrounding U.S. intellectual property, he said.

"We need to stand up for US companies. It has to be done diplomatically, but it has to be done with strength," Reyes said. One of his first priorities would be to embark on a "listening tour" of companies to find out what the agency does right and what it could do better, he said.

Self-regulation, incentives proposed. Reyes said in the chairman role he would support more self-regulation by industries, reserving the agency's enforcement firepower for the worst violators of consumer protection and antitrust laws. He also is toying with the idea of proposing a "gold star program" in which high ratings would be given to companies that excel at providing consumer benefits, such as privacy safeguards.

He also would develop criteria to give companies a better idea what the agency's expectations are for protecting data and devices, Reyes said. To emphasize the FTC's new way of dealing with companies, Reyes said he might rewrite the agency's mission statement so that the phrase "without unduly burdening legitimate business activity" is at the beginning rather than at the end, as it is currently.

But he said none of these steps should be seen by businesses as an invitation to be less vigilant in following the law. “Some companies, if they’re cheating and they’re lying and they’re stealing, the agency should come down like a sledgehammer,” Reyes said. “I’m no shill for the business community.”

Google questions. In [one case](#)—Google—Reyes and Washington, DC Attorney General Karl Racine have urged the FTC to be more aggressive and consider reopening its investigation into allegations that the search giant skews search results to favor its own services.

Reyes said if he became FTC chairman, he would examine previous agency probes of Google before deciding how to proceed. But he did not rule out reviving the investigation. “Whether it’s Google or any other company, I’d take a careful look,” he said. “I’m not afraid to look at companies very large [or] very small where there are allegations of anticompetitive behavior.”

His intention of improving the FTC’s relations with the business community at large while focusing on companies whose mergers or conduct are the most problematic appears to mesh with Trump’s approach to governing, Reyes said.

“Definitely they want to streamline [government regulation]. But when it comes to truly egregious conduct or other illegal conduct, they will be aggressive,” he said. As FTC chairman, while respecting the independence of the agency, “I would listen to the goals and ideas of the Trump administration.”

Trump’s Pick? Trump has taken his time in deciding if Reyes, or someone else, is his pick to head the agency. Reyes’ biggest rival for the job is acting FTC Chairman Maureen Ohlhausen, who has struck a similar business-friendly tone since taking over in February. Ohlhausen is a veteran of the agency, and some FTC staff support her being named to the post permanently.

But part of Trump’s mandate was to, in his words, “drain the swamp” and change how Washington, DC runs. Still, it took many by surprise when Reyes’s name surfaced as the man to beat. The attorney general rose to prominence mostly on issues unrelated to consumer protection and competition, and has little hands-on antitrust experience.

Reyes’s tenure in the Utah AG office. Reyes was appointed Utah’s attorney general in 2013 following the arrests of his two predecessors, and following his efforts to overhaul the attorney general’s office, voters elected him to a full term last year. He became known for his fight against child sex traffickers and participated in several stings. Reyes said he worked undercover in one such operation on Super Bowl Sunday that news reports said led to the rescue of 31 underage girls in Haiti.

Receiving less attention was his focus on consumer protection issues. Reyes pushed successfully for a white-collar “fraud registry” that lists people in the state convicted of illegal schemes. His desire to establish the registry stems from his earlier experience as a bishop for The Church of Jesus Christ of the Latter-Day Saints. Reyes said he heard “story after story” from people defrauded in business deals, sometimes by fellow Mormons.

Reyes attracted national attention when he spoke for Trump on the campaign trail and delivered criticism of Obama in a rap at the Republican National Convention last year. Despite his political differences with Obama, Reyes, like the former president, has an unusual, compelling biography. He was born in the Westchester section of Los Angeles, in the shadow of the city’s largest airport. Related to a former president of the Philippines, he also is part Spanish, Japanese and Hawaiian.

The attorney general said his concern about government overreach originates with his father becoming tangled in the US Immigration and Naturalization Service's red tape after legally emigrating from the Philippines. More deeply, Reyes said he bases his philosophy of governing on Ramon del Fierro Magsaysay, the former president of the Philippines, to whom he is related. Magsaysay established a process for people to air grievances and helped defeat a communist insurgency in part by offering its supporters land parcels, small-business loans and vocational aid.

"He didn't just crush [the communists] with physical force," Reyes said. "He wanted to bring people together."

The FTC chairmanship is an opportunity to apply at the federal level what he has been doing in the attorney general's office, he said. "I prayed about it, carefully talked about it with my family and said, 'If I'm needed there, I'm absolutely willing to answer the call,'" Reyes said.

Narrowed information demands. If he gets the job, Reyes said he would consider appointing several retired federal judges and magistrates to conduct internal evaluations of staff information demands of companies. Proposals for the information that passed muster with them would then go to the Commissioners for sign-off, he said. The two-tiered scrutiny would force staff to sharpen their justifications for the information and reduce time spent looking at every nook and cranny of a business that didn't merit a wide-ranging investigation, he said.

Reyes said he is most concerned with the FTC's reputation for too easily issuing broad subpoenas and civil investigative demands (CIDs) in consumer protection cases. But he said he would consider extending the screening process to second requests and CIDs issued in merger reviews and antitrust conduct probes. By targeting the necessary information, the FTC can better use its and companies' resources, he said. "Without Commission oversight, not only are [broad information requests] costly to business but also to the agency," Reyes said.

A Reyes-headed agency also would examine whether the FTC could do more to shorten the length of merger reviews, he said.

The FTC could further specify its information demands in antitrust investigations by doing more to mine its experience in past cases to figure out what areas of inquiry have been the most effective, he said. The agency could perform "very scientific studies" to determine how its predictions about a merger's impact on the market were tied to post-merger price changes, he said. He said the agency's recent study of past merger remedies was a step "in the right direction" but that the FTC needed to do more. "I don't think they should rest on that [study] and say all is well," Reyes said.

FTC guidance. Reyes said he would provide guidance to help businesses follow the law. The FTC under Reyes would clarify the expectations it had for companies to protect consumers' data, he said, with guidelines around the following concepts: the safeguards for limiting access to company and client data; protections computer servers would have if a hacker breached a firewall; the extent of staff training; whether an outside firm had been hired to test and evaluate security; and the frequency of updating software and using patches to fix vulnerabilities.

Companies also will be incentivized to do right by their customers, he said. With the gold-star program, Reyes said, the FTC would give ratings for company practices that benefit consumers—for example, superior privacy, labor and environmental policies. If well-rated businesses slip up, the FTC would take into account these positive factors before deciding what action to take, Reyes said. "There are enough truly bad actors," he said. "We don't need to shake down good businesses."