

10. U.S. Antitrust Enforcement in the Trump Administration

D.S. BITTON EN M. KISER¹

This article provides an overview of major developments in U.S. antitrust enforcement during the presidency of Donald Trump and a preview of what to expect and look for under President Joe Biden. It offers practical insights on what companies and counsel can learn from recent enforcement actions and expect going forward in the new administration. As was the case across government, the Trump years were very eventful for antitrust enforcement and competition policy, characterized by a mix of policy changes, political controversies, inter-agency conflict, and a broader political movement towards a more aggressive and interventionist approach to competition law and policy.

I. Introduction

U.S. antitrust enforcement during Donald Trump's presidency (from January 20, 2017 to January 20, 2021) was active and shaped by a mix of policy changes, political controversy, inter-agency conflict, and a broader movement towards more aggressive antitrust enforcement.

Under Trump, the Department of Justice Antitrust Division ('DOJ') reversed long-standing policy on antitrust and intellectual property, took a hard line against behavioral remedies for vertical mergers, and opposed fellow federal and state antitrust enforcers in court. There was also a series of controversies about alleged improper political influence from the White House and alleged use of DOJ authority for political ends.² Notably, in 2020,³ DOJ pursued more monopolization cases than any year since

the 1990s.⁴ In contrast, unlike previous Republican administrations, which have tended to prioritize criminal cartel cases while pursuing fewer merger and monopoly matters, the Trump DOJ pursued fewer criminal cases annually than any administration since President Richard Nixon, who resigned in August 1974.⁵ DOJ continued its criminal enforcement focus on 'no poach' agreements established under the previous Administration, opening many such investigations, and bringing the first indictments on such counts in December 2020 and January 2021.⁶ The Federal Trade Commission ('FTC') was likewise very active under the Trump Administration, focusing especially

1 The authors thank Katie Hibert, Parris Greenwood, Nicholas D.M. Duffee, and Lukas Gemar for their assistance in preparing this article. The views expressed here are the authors' alone and do not necessarily represent the views of Axinn or any of its clients.

2 See discussion *infra* Sections II.A, VI.B.2.

3 See Complaint, *United States v. Visa Inc.*, Case No. 3:20-cv-07810 (N.D. Cal. Nov. 5, 2020), <https://www.justice.gov/opa/pressrelease/file/1334726/download>; Complaint, *United States v. Google*, Case No. 1:20-cv-03010 (D.D.C. Oct. 20, 2020), <https://www.justice.gov/opa/press-release/file/1328941/download>; Complaint, *Federal Trade Comm'n v. Facebook*, Case No. 1:20-cv-03590-JEB (D.D.C. Jan. 13, 2021), https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_complaint.pdf.

4 See Division Operations, U.S. Dep't Of Justice, <https://www.justice.gov/atr/division-operations> [hereinafter 'DOJ Division Operations']; Antitrust Division Workload Statistics FY 2010-2019, U.S. Dep't Of Justice, <https://www.justice.gov/atr/file/788426/download> [hereinafter 'DOJ Workload Statistics, FY 2010-2019']; Antitrust Division Workload Statistics FY 2000-2009, U.S. Dep't Of Justice, <https://www.justice.gov/sites/default/files/atr/legacy/2012/04/04/281484.pdf> [hereinafter 'DOJ Workload Statistics, FY 2000-2009']; Antitrust Division Workload Statistics FY 1990-1999, U.S. Dep't Of Justice, <https://www.justice.gov/sites/default/files/atr/legacy/2009/06/09/246419.pdf> [hereinafter 'DOJ Workload Statistics, FY 1990-1999'].

5 See DOJ Division Operations, *supra* note 4; DOJ Workload Statistics FY 2010-2019, *supra* note 4; DOJ Workload Statistics FY 2000-2009, *supra* note 4; DOJ Workload Statistics FY 1990-1999, *supra* note 4; Antitrust Division Workload Statistics FY 1980-1989, U.S. Dep't Of Justice, <https://www.justice.gov/sites/default/files/atr/legacy/2011/09/13/215423.pdf> (last visited June 14, 2021); Antitrust Division Workload Statistics FY 1970-1979, U.S. Dep't Of Justice, <https://www.justice.gov/sites/default/files/atr/legacy/2009/06/09/215792.pdf> (last visited June 14, 2021).

6 See *Former Owner of Health Care Staffing Company Indicted for Wage Fixing*, U.S. Dep't Of Justice (Dec. 10, 2020), <https://www.justice.gov/opa/pr/former-owner-health-care-staffing-company-indicted-wage-fixing&sa=D&source=editors&ust=1624029404327000&usg=AOvVaw39CjA-Ac5nxkgRHY-zJufo>; *Health Care Company Indicted for Labor Market Collusion*, Dep't. of Just. (Jan. 7, 2021), <https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion>.

on the technology and healthcare industries and breaking ground with challenges to several nascent competitor acquisitions. As an agency one-step removed from the Administration and with a bipartisan makeup, the FTC was less plagued by allegations of political controversy. Though it did not go entirely unscathed. For example, President Trump issued an executive order in May 2020 directing the FTC to investigate social media platforms' content moderation policies.⁷

At the same time, as in other jurisdictions, antitrust law entered the mainstream political debate, with calls for more aggressive enforcement, especially in digital markets. Many newcomers to the conversation saw antitrust not just as a tool for protecting competition and consumers but also for pursuing an array of other public interest or political goals, such as employment, privacy protection, and prevention of alleged 'censorship' of conservative voices.⁸

U.S. antitrust enforcement during Donald Trump's presidency (from January 20, 2017 to January 20, 2021) was active and shaped by a mix of policy changes, political controversy, inter-agency conflict, and a broader movement towards more aggressive antitrust enforcement.

This also affected policy thinking and enforcement priorities at the Agencies. For example, both agencies took the cue to investigate 'Big Tech' and sparred amongst themselves over which agency would pursue which tech companies. State attorneys general also got into the game with their own investigations and lawsuits. By the time of President Joe Biden's inauguration, the FTC and several states had sued Facebook over past acquisitions, DOJ and several states had sued Google over search engine distribution, and certain Republican states had sued Google over advertising technology.

In this article, we look back on government antitrust enforcement during the Trump Administration in more detail and conclude with a brief forward look at what to expect under the Biden administration, sharing practical takeaways along the way.

7 Tony Romm and Elizabeth Dwoskin, *Trump Executive Order Challenges Section 230 Protections for Facebook, Twitter, and Google*, Washington Post (May 28, 2020), <https://www.washingtonpost.com/technology/2020/05/28/trump-social-media-executive-order/>; Leah Neylon et al., *Trump Pressures Head Of Consumer Agency To Bend On Social Media Crackdown*, Politico (Aug. 21, 2020), <https://www.politico.com/news/2020/08/21/trump-ftc-chair-social-media-400104>.

8 Mark Scot, *Despite Cries Of Censorship, Conservatives Dominate Social Media*, Politico (Oct. 26, 2020), <https://www.politico.com/news/2020/10/26/censorship-conservatives-social-media-432643>

II. Controversies

A. Allegations of Politically Motivated Antitrust Enforcement

The Trump DOJ was plagued by political controversies, and the Antitrust Division got its share of it. The first allegations of improper White House influence came as early as 2017, around the DOJ's decision to challenge AT&T's acquisition of CNN parent company Time Warner Inc. Trump had vowed to block the transaction when it was announced during the 2016 presidential campaign.⁹ At the time, Trump's future appointee to lead the DOJ Antitrust Division took a different view, saying he didn't see the transaction 'as a major antitrust problem.'¹⁰ But after taking the helm a year later, that appointee took issue with the merger and led a suit to block it.¹¹ AT&T's CEO called Trump's frequent criticism of CNN's news reporting the 'elephant in the room.'¹² News reports suggested that the president's 'running war with CNN [would] hang heavily over [DOJ's suit].'¹³ During litigation, AT&T sought discovery to determine whether there had been White House interference, but the Judge denied that discovery.¹⁴ As discussed below, DOJ lost the challenge in court, and AT&T acquired Time Warner, including CNN.

Under Trump, the Department of Justice Antitrust Division ('DOJ') reversed long-standing policy on antitrust and intellectual property, took a hard line against behavioral remedies for vertical mergers, and opposed fellow federal and state antitrust enforcers in court.

In 2020, a whistleblower testified that the Attorney General had used the Antitrust Division for political objecti-

9 Brian Stelter, *Donald Trump Rips into Possible AT&T-Time Warner Deal*, CNN (Oct. 22, 2016, 4:05PM), <https://money.cnn.com/2016/10/22/media/donald-trump-att-time-warner/>.

10 Brian Fung, Hamza Shaban, *Trump's Antitrust Chief's Views on AT&T Merger Have Shifted Since Last Year*, The Washington Post (Nov. 9, 2017), https://www.washingtonpost.com/business/economy/trumps-antitrust-chiefs-views-on-atandt-merger-have-shifted-since-last-year/2017/11/09/3d9c968c-c586-11e7-84bc-5e285c7f4512_story.html.

11 Complaint, *United States v. AT&T, Inc.*, No. 1:17-cv-02511 (Nov. 20, 2017), <https://www.justice.gov/atr/case-document/file/1012916/download>.

12 Leon Lazaroff, *DOJ's Lawsuit Against AT&T Will Always Be Seen as Trump's Retaliation for CNN*, The Street (Nov. 21, 2017), <https://www.thestreet.com/markets/mergers-and-acquisitions/trump-cnn-att-elephant-in-the-room-14398491>.

13 Leon Lazaroff, *DOJ's Lawsuit Against AT&T Will Always Be Seen as Trump's Retaliation for CNN*, The Street (Nov. 21, 2017), <https://www.thestreet.com/markets/mergers-and-acquisitions/trump-cnn-att-elephant-in-the-room-14398491>.

14 Collin Lecher, *Judge Rules AT&T Can't See Trump White House Communications About the Time Warner Merger*, The Verge (Feb. 20, 2018), <https://www.theverge.com/2018/2/20/17032956/att-white-house-justice-department-lawsuit>.

ves. In particular, he claimed that the Attorney General had instructed the Antitrust Division to pursue burdensome investigations of cannabis mergers over the objections of career staff because he disliked the industry. The whistleblower noted that nearly one-third of the Second Requests¹⁵ issued by DOJ in 2019 had related to cannabis transactions posing no threat to competition, including one with a combined post-merger market share below one percent.¹⁶ The whistleblower also questioned the legitimacy of an investigation by the Antitrust Division of an agreement between auto makers and the state of California to comply with certain emissions regulations, because it was initiated a day after President Trump publicly denounced that arrangement for imposing stricter emissions standards than he wanted.¹⁷

B. Divergence on Antitrust/IP Policy and Inter-Agency Conflict

The Trump DOJ took a notably different view on the role of antitrust in patent disputes than the Obama DOJ. For at least six years, the DOJ had taken the position that certain practices with standard-essential patents could violate the antitrust laws.¹⁸ Under Trump, however, DOJ saw few situations in which antitrust should be involved with patent practices.¹⁹ DOJ put this into practice through positions in cases, business review letters, and amicus briefs or statements of interests.²⁰

The FTC, however, stayed with what was once the prevailing government position and challenged certain patent

practices of Qualcomm Inc. in federal court.²¹ DOJ made news by filing briefs against the FTC in that matter at the district court and appellate levels,²² souring relations between the once-friendly sister agencies.

The agencies also sparred over which agency would investigate which Big Tech companies,²³ and there appeared to be an increase in the extent to which pre-merger reviews were held up by these kinds of ‘clearance’ battles, which arise whenever both agencies are interested in investigating a matter.²⁴

C. FTC’s Use of Administrative Trials as ‘Trump Card’ in Merger Cases

Recent years have also seen rising controversy over the FTC’s reliance on its in-house administrative hearing process to challenge mergers. That process is perceived as giving the FTC a major ‘home court advantage’ (it reportedly has won 100% of its administrative law cases in the last 25 years), with no oversight from an independent federal district judge, and a longer time frame to hold up a merger than available in a preliminary injunction proceeding in federal district court.

Practically, this administrative law challenge to a merger often is not available to the FTC, because the FTC typically can only stop a merger from closing by seeking a preliminary injunction in federal district court. However, when there are other reasons the merging parties cannot yet close their deal, for example due to pending foreign regulatory reviews, the FTC has increasingly opted to initiate the administrative law process to challenge a merger, ostensibly to try to kill it without having to prove its case to a federal district court judge.²⁵ For example, in the 2018 merger of Tronox and Cristal, the FTC did not pursue a preliminary injunction because the European Commission’s review was expected to hold up the transaction long enough for an administrative trial to take place. In May 2021, the FTC dismissed its bid for a federal injunction against DNA sequencing firm Illumina’s proposed acquisition of GRAIL because the EC had opened an investigation that would prevent the merger from closing before the FTC could finish

15 A Second Request, formally titled a Request for Additional Information and Documentary Materials, is issued if an agency has competitive concerns at the end of the initial HSR waiting period, which begins when a premerger notification is filed. Second Requests require the merging parties to produce extensive volumes of documents and data and signal the start of a lengthier and more in-depth investigation—it is the American equivalent to the European Commission’s Phase II review, but historically has entailed much larger document productions.

16 See *Testimony of John W. Elias Before the H. Comm. on the Judiciary*, 116th Cong. 3-6 (June 24, 2020), https://judiciary.house.gov/uploadedfiles/elias_written_testimony_hjc.pdf?utm_campaign=4024-519.

17 See *id.* at 6-8; see also Greg Petrosyan, *DOJ’s Probe into Four Automakers: Impartial Investigation or Politicization of Antitrust?*, Competition Policy Int’l (Oct. 29, 2019), <https://www.competitionpolicyinternational.com/dojs-probe-into-four-automakers-impartial-investigation-or-politicization-of-antitrust/>.

18 See U.S. Dep’t Of Justice & U.S. Patent & Trademark Office, *Policy Statement On Remedies For Standards-Essential Patents Subject To Voluntary F/Rand Commitments* (2013), available at <https://www.justice.gov/atr/page/file/1118381/download>; U.S. Dep’t Of Justice, Nat’l Inst. Of Standards, & U.S. Patent & Trademark Office, *Policy Statement On Remedies For Standards-Essential Patents Subject To Voluntary F/Rand Commitments* (2019), available at <https://www.justice.gov/atr/page/file/1228016/download>.

19 Makan Delrahim, Assistant Attorney General, U.S. Dep’t of Justice, *Remarks at the Leadership Virtual Series: Innovation Policy and the Role of Standards, IP, and Antitrust* (Sept. 10, 2020), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-leadership-virtual-series>.

20 Makan Delrahim, Assistant Attorney General, U.S. Dep’t of Justice, *Updated Response to Electrical Engineers, Inc.’s 2015 Request for a Business Review Letter* (Sept. 10, 2020), <https://www.justice.gov/atr/page/file/1315291/download>.

21 Federal Trade Commission’s Complaint for Equitable Relief, *Fed. Trade Comm’n v. Qualcomm, Inc.*, 411 F.Supp.3d 658 (N.D. Cal. 2019).

22 John McGinnis and Linda Sun, *Justice-FTC Antitrust Feud is Wrong Kind of Competition*, Wall Street Journal Opinion (Aug. 13, 2020), <https://www.wsj.com/articles/justice-ftc-antitrust-feud-is-the-wrong-kind-of-competition-11597336577>; United States’ Statement of Interest Concerning Qualcomm’s Motion for Partial Stay of Injunction Pending Appeal, *Fed. Trade Comm’n v. Qualcomm, Inc.*, 969 F.3d 974 (9th Cir. 2020).

23 John McKinnon and James Grimaldi, *Justice Department, FTC Skirmish Over Antitrust Turf*, Wall Street Journal (Aug. 5, 2019), <https://www.wsj.com/articles/justice-department-ftc-skirmish-over-antitrust-turf-11564997402>.

24 *For DOJ And FTC, Clearing Deals Remains A Gray Area*, Law360 (Mar. 20, 2020), <https://www.law360.com/articles/1255073/for-doj-and-ftc-clearing-deals-remains-a-gray-area>.

25 *What’s Behind The FTC’s Odd Bid To Stop Tronox’s \$2.4B Deal*, Law360 (Sept. 27, 2018), <https://www.law360.com/articles/1087192>.

its administrative trial.²⁶ The FTC has similarly used this administrative law path to challenge deals in other types of situations where it knew the parties could not yet close, such as where a poison pill construct²⁷ delayed a hostile takeover buyer's ability to acquire the shares in a target.²⁸

In contrast, unlike previous Republican administrations, which have tended to prioritize criminal cartel cases while pursuing fewer merger and monopoly matters, the Trump DOJ pursued fewer criminal cases annually than any administration since President Richard Nixon, who resigned in August 1974.

Companies pursuing cross-border transactions or hostile tender offers should be mindful of this tactic when planning their strategy. Often, parties file and engage early with the U.S. in hopes that approval or a win in court will increase pressure on other jurisdictions to clear the deal. If the FTC, rather than DOJ, is likely to review and challenge a deal, there may be a benefit in first securing overseas approvals, so that the FTC would have to go to federal district court to stop a deal. One defendant, body camera maker Axon, recently challenged the constitutionality of the FTC's internal administrative law process, which is now before the Supreme Court.²⁹

D. FTC Stripped of Increasingly-Used Monetary Relief Remedy

The FTC, increasingly, had been seeking substantial equitable monetary relief on top of injunctive relief in rule-of-reason antitrust cases as a means of punishing and deterring violations. In one pharmaceutical pay-for-delay case (Cephalon), the FTC sought as much as \$1.2 billion. But the Supreme Court recently put a stop to that, holding that the FTC lacks the authority to collect monetary rem-

edies in federal court under the statutory provision it has historically used.³⁰ As a result, the FTC's ability to penalize anticompetitive conduct is limited unless or until Congress amends the statute to grant the necessary authority to the FTC. Until then, in federal court, the FTC will be limited to seeking injunctive relief, like the DOJ is in civil antitrust matters.

III. Antitrust During the Pandemic

The COVID-19 pandemic was declared a national emergency in the U.S. on March 13, 2020, and soon brought a number of changes to the enforcement agencies' processes and timelines. The FTC's Premerger Notification Office, which handles intake of Hart-Scott-Rodino Act ('HSR') filings for both the FTC and DOJ, quickly shifted to an e-filing system.³¹ Pre-pandemic, parties submitted their filings in physical form through compact disks, paper, or a mix of the two. COVID-19 forced a quick transition to truly electronic filings, which had long been discussed but not yet adopted.

On March 24, 2020, the agencies announced an accelerated review process for COVID-19-related competitor collaborations, acknowledging that such activities could be key to an efficient crisis response.³² Within weeks, on April 4, 2020, DOJ issued its first expedited review letter, clearing the way for coordination by major medical suppliers McKesson, Cardinal Health, Henry Schein, Medline Industries, and Owens & Minor, to expedite and increase the manufacture, sourcing, and distribution of personal protective equipment ('PPE') and other medical supplies.³³ Other expedited business reviews followed throughout the year relating to the distribution of medical supplies, the production of antibody treatments, the standard for COVID-19 convalescent plasma, and the ripple effects of the pandemic on various industries.

IV. Two-Sided Markets

Few cases during the Trump years changed the antitrust landscape more than the Supreme Court's 2018 opinion in *Ohio v. American Express* ('Amex').

The case originated well before Trump was elected. In 2010, DOJ and State enforcers challenged Amex's 'anti-steering' rules under Section 1 of the Sherman Act (the U.S. equivalent of Article 101 TFEU). Amex's anti-steering rules prohibited merchants from steering customers to other payment methods with lower transaction costs than Amex's

26 *Statement of FTC Acting Bureau of Competition Director Maribeth Petrizzi on Bureau's Motion to Dismiss Request for Preliminary Relief in Illumina/GRAIL Case*, Fed. Trade Comm'n (May 20, 2021), <https://www.ftc.gov/news-events/press-releases/2021/05/statement-ftc-acting-bureau-competition-director-maribeth>.

27 A 'poison pill,' also known as a shareholder rights plan, is a technique used to defend against a hostile takeover attempt by making the target company less desirable to its would-be acquirer. Poison pills come in many forms. One common approach grants existing shareholders discounted shares when the acquiring firm reaches a certain percentage of ownership, thereby diluting the acquirer's equity and concentrating additional power with existing shareholders.

28 See John D. Harkrider, *Cash Tender Offers Under the HSR Act: Protecting An Efficient Market for Corporate Control*, 31 *Antitrust* 28, 29 (2016) (discussing this tactic in Omnicare's cash tender offer to acquire PharMerica); see also *Omnicare Abandons Plan to Buy Rival Pharmacy in Light of FTC Lawsuit*, Fed. Trade Comm'n, (Feb. 23, 2012), <https://www.ftc.gov/news-events/press-releases/2012/02/omnicare-abandons-plan-buy-rival-pharmacy-light-ftc-lawsuit-ftc>.

29 *FTC's Body Cam Case Stays Paused For High Court Petition*, Law360 (Apr. 22, 2021), <https://www.law360.com/articles/1377870>.

30 *AMG Capital Management, Llc, Et Al. V. Fed. Trade Comm'n*, 593 U. S. (2021).

31 *COVID-19 - Guidance for Filing Parties*, Fed. Trade Comm'n (updated Feb. 25, 2021), <https://www.ftc.gov/enforcement/premerger-notification-program/guidance-filing-parties>.

32 *Statement, U.S. Dep't Of Justice & Fed. Trade Comm'n, Joint Antitrust Statement Regarding COVID-19* (updated May 1, 2020), <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19>.

33 *Letter from Makan Delrahim, Assistant Attorney General, U.S. Dep't of Just., to Lori A. Schechter, Executive Vice President, Chief Legal Office, and General Counsel, McKesson Corporation et al* (April 4, 2020), <https://www.justice.gov/atr/page/file/1266511/download>.

cards. DOJ and the States won in federal district court, but lost on appeal and, ultimately, before the Supreme Court. The Court concluded that the plaintiffs had not met their burden of proof because they exclusively focused on the merchant side of Amex's platform, and failed to account for the card holder side of the platform, both in defining a relevant market and in demonstrating anticompetitive effects from the challenged anti-steering rules.³⁴ The Court explained that 'courts must include both sides of the platform' in the analysis of two-sided markets characterized by strong indirect network effects³⁵ because in such markets a platform 'cannot raise prices on one side without risking a feedback loop of declining demand.'³⁶ The Court drew a contrast between the strong indirect network effects in credit card networks and weaker ones seen in two-sided products such as newspapers, connecting advertisers to readers. In those markets, the Court explained, 'readers are largely indifferent to the amount of advertising that a newspaper contains.' As a result, the indirect network effects 'operate only in one direction,' with additional readers increasing value for advertisers but not vice versa, according to the Court.³⁷

Within two years, the Supreme Court's *Amex* decision contributed to another DOJ loss, this time in its challenge of Sabre's acquisition of Farelogix, which was allegedly disruptive to Sabre's two-sided travel booking platform despite not being a two-sided platform itself.³⁸ Relying on a footnote in the Supreme Court's *Amex* decision, the district court concluded that Farelogix could not be in the same relevant market as Sabre because Farelogix was not a two-sided platform like Sabre, though the district court recognized it was an awkward conclusion given the facts. The district court also held that, even if Sabre and Farelogix were considered to be competitors in the same relevant market, that DOJ had not adequately accounted for the two-sided nature of Sabre's business in its anticompetitive effects analysis.³⁹ Two days after the U.S. court's decision, however, the transaction was blocked by the U.K. Competition and Markets Authority.⁴⁰

DOJ's losses in *Amex* and *Sabre* did not deter it from challenging Visa's acquisition of Plaid, another merger between a two-sided transaction platform and an emergent disruptive rival with a different business model.⁴¹ In this case, however, DOJ acknowledged in its complaint that Visa was a two-sided transaction platform falling within the

Amex framework, presumably because Visa is a credit card network, very similar to Amex. Visa and Plaid abandoned the transaction in January 2021.⁴²

Meanwhile, the FTC survived *Amex* arguments to avoid dismissal of its monopolization suit against electronic prescribing company Surescripts.⁴³ In rejecting Surescripts' *Amex*-based arguments to dismiss the FTC's complaint, the district court in that case said that 'Surescripts read [] too much into *Amex*,' emphasizing that Amex 'was not a monopolist' and had only a 26.4 percent share of the relevant product market,⁴⁴ and that in any event the FTC had 'pleaded sufficient facts addressing the totality of both two-sided markets' alleged.⁴⁵

The agencies thus seem to be adapting to the post-*Amex* world. Companies in two-sided markets may face broader demands for documents and information as the agencies prepare to satisfy the heightened standard set forth in *Amex*. The *Amex* decision likely will play a major role in some of the recently-filed lawsuits against digital platforms.

V. Digital Platforms

Perhaps the most formative trend in antitrust during the Trump years was the emergence of antitrust as a political football with respect to leading technology companies Amazon, Apple, Facebook, and Google. Politicians from both parties made 'Big Tech' part of their agendas, with rhetoric, calls for investigations, and legislative proposals, albeit for different reasons and objectives. Certain Republicans raised concerns about concentrations of power 'censoring' conservative viewpoints as social media platforms took steps to stop the spread of misinformation, hate speech, and calls to violence. Democrats, meanwhile, raised concerns that the antitrust laws were not up to the task of dealing with digital markets and so-called platform self-preferencing, arguing for legislative changes to push U.S. antitrust law to be more similar to European 'abuse of dominance' concepts and to introduce *ex ante* regulation. Both enforcement agencies initiated investigations into digital platforms.

In February 2019, the FTC launched a Technology Task Force dedicated to the scrutiny of technology markets, indicating that it was especially interested in 'killer acquisitions,' platform self-preferencing, and exclusionary data practices.⁴⁶ It soon became a permanent Technology

34 *Am. Express Co.*, 138 S.Ct. at 2284-85.

35 *Id.* at 2285.

36 *Id.* (internal citations omitted).

37 *Id.* at 2286.

38 *United States v. Sabre Corp.*, 452 F. Supp. 3d 97 (D. Del. 2020), *vacated*, 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020).

39 *Id.*

40 UK Antitrust Dept. Claims Authority To Ban \$360M Sabre Deal, Law360 (Nov. 25, 2020), <https://www.law360.com/articles/1332312/uk-antitrust-dept-claims-authority-to-ban-360m-sabre-deal>.

41 Press Release, U.S. Dep't Of Justice, *Justice Department Sues to Block Visa's Proposed Acquisition of Plaid*, Dep't of Just. (Nov. 5, 2020), <https://www.justice.gov/opa/pr/justice-department-sues-block-visas-proposed-acquisition-plaid>.

42 Complaint, *United States v. Visa Inc.*, Case No. 3:20-cv-07810 (N.D. Cal. Nov. 5, 2020), <https://www.justice.gov/opa/pressrelease/file/1334726/download>.

43 Mr. Bitton represents McKesson Corporation's RelayHealth subsidiary in connection with this matter, and in a follow-on class action.

44 *Fed. Trade Comm'n v. Surescripts, LLC*, 424 F.Supp.3d 92, 103 (D.D.C. 2020).

45 *Id.*

46 Press Release, Fed. Trade Comm'n, FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets (Feb. 26, 2019), <https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology>; Alexis Gilman and Akhil Sheth, INSIGHT: The FTC Tech Task Force—Answers to Important Questions, *Bloomberg Law* (Sept. 10, 2019), <https://news.bloomberglaw.com/us-law-week/insight-the-ftc-tech-task-force-answers-to-important-questions>.

Enforcement Division⁴⁷ and, in February 2020, started a sector study of unreported acquisitions by Amazon, Apple, Facebook, Google, and Microsoft.⁴⁸ Later that year, DOJ announced that it was looking into practices by ‘market-leading online platforms.’⁴⁹

On Capitol Hill, the House Committee on the Judiciary launched an inquiry into acquisitions and practices in June 2019, which culminated in the October 2020 release of a Majority Staff Report and Recommendations⁵⁰ proposing an array of legislative changes, from structural separations of business lines to limiting the markets in which dominant firms may compete. Several new bills were recently introduced based on those recommendations. Companies outside the technology sector should be aware that many proposals in this Report, if adopted into law, would apply more broadly across many industries, including an ‘abuse of dominance’ cause of action, increased use of presumptions of market power and anticompetitive effects, and *per se* illegality for firms with market power.

Around the same time in late 2020, DOJ and the FTC filed lawsuits against Google and Facebook. DOJ’s complaint against Google alleged exclusionary practices in search engine distribution.⁵¹ The FTC’s suit against Facebook alleged that its previously-approved acquisitions of Instagram in 2012 and WhatsApp in 2014 comprised a monopolistic course of conduct in violation of Section 2.⁵² Various states joined in these lawsuits and in some cases added claims. A federal judge dismissed the case against Facebook on June 28, 2021 for failure to plead facts sufficient to support several elements of the claims, including the allegation of monopoly power. The FTC is expected to file an amended complaint addressing this issue. As of mid-2020, the FTC, New York, and California were also reportedly still investigating Amazon for practices related to its Amazon Marketplace, including apparently Amazon’s use of data about third-party sellers on its

Marketplace to launch competing Amazon products.⁵³ In late 2020, a number of Republican states led by the Texas Attorney General sued Google in relation to its advertising technology business.⁵⁴ Most recently, in 2021, well after President Biden had taken office, the District of Columbia filed a lawsuit against Amazon, challenging certain alleged most favored nation clauses.

Notable elephants in the room in the frantic political and regulatory debate and cases about digital platforms include: (i) the intense competition among digital platforms along various parameters; (ii) entry, growth and IPOs by new tech companies (such as Tiktok, Snapchat, Spotify, Pinterest); and (iii) the competitive and regulatory battles between new tech (digital / e-commerce platforms) and old tech/media incumbents (telecoms, cable companies, brick & mortar stores, newspapers, taxi cabs, hotels, etc.) that are often at the core of the cases brought by the agencies.

VI. Merger Enforcement

The FTC and DOJ were both quite active in merger enforcement under Trump.⁵⁵ The FTC tallied 28 merger enforcement actions in fiscal year 2020 alone, the most in a single year since 2001, including seven contested complaints, 10 settlements, and 11 transactions abandoned or restructured.⁵⁶ DOJ filed nine merger enforcement actions during the same time period.⁵⁷ DOJ had only two merger trials in the Trump years, both of which were lost,⁵⁸ but it did initiate and win the first-ever arbitration of a merger case in its challenge to Novelis’s acquisition of Aleris, a merger of aluminum auto body sheet

47 Patricia Galvan, Krisha Cerilli, *What’s in a Name? Ask the Technology Enforcement Division*, Fed. Trade Comm’n Blog, (Oct. 16, 2019, 1:59PM), <https://www.ftc.gov/news-events/blogs/competition-matters/2019/10/whats-name-ask-technology-enforcement-division>

48 Lesley Fair, *FTC Issues 6(b) Orders to Social Media and Video Streaming Services*, Fed. Trade Comm’n Blog (Dec. 14, 2020), <https://www.ftc.gov/news-events/blogs/business-blog/2020/12/ftc-issues-6b-orders-social-media-video-streaming-services>

49 Press Release, U.S. Dep’t Of Justice, Justice Department Reviewing the Practices of Market-Leading Online Platforms (July 23, 2019), <https://www.justice.gov/opa/pr/justice-department-reviewing-practices-market-leading-online-platforms>

50 Jerrold Nadler, David N. Cicilline, *Investigation of Competition in Digital Markets*, House Committee On The Judiciary (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf. (2020) [hereinafter ‘Majority Staff Report’].

51 Complaint, *United States v. Google*, Case No. 1:20-cv-03010 (D.D.C. Oct. 20, 2020), <https://www.justice.gov/opa/press-release/file/1328941/download>.

52 Complaint, *Federal Trade Comm’n v. Facebook*, Case No. 1:20-cv-03590-JEB (D.D.C. Jan. 13, 2021), https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_complaint.pdf.

53 See, e.g., Spencer Soper, *Amazon’s Market Power to Be Investigated by New York AG*, Bloomberg (Aug. 3, 2020), <https://www.bloomberg.com/news/articles/2020-08-03/amazon-s-market-power-is-said-to-be-investigated-by-new-york-ag>; Tyler Sonnemaker, *Amazon is reportedly facing a new investigation into its online marketplace by the FTC and attorneys general in New York and California*, Business Insider (Aug. 3, 2020), <https://www.businessinsider.com/amazon-antitrust-probe-ftc-new-york-california-online-marketplace-2020-8>.

54 *Texas v. Google*, Case No. 4:20-cv-00957-SDJ (E.D. Tex. Dec. 16, 2020), [https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/20201216_1%20Complaint%20\(Redacted\).pdf](https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/20201216_1%20Complaint%20(Redacted).pdf). Mr. Bitton represents Google in this litigation.

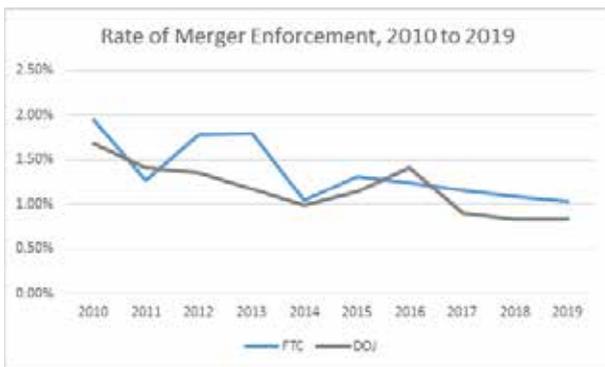
55 The government’s fiscal year runs from October 1 of the previous calendar year through September 30 of the named calendar year.

56 Ian R. Conner, *A Fiscal Year Like No Other*, Federal Trade Comm’n (Oct. 6, 2020), <https://www.ftc.gov/news-events/blogs/competition-matters/2020/10/fiscal-year-no-other>.

57 *Antitrust Case Filings*, U.S. Dep’t Of Justice, https://www.justice.gov/atr/antitrust-case-filings?f%5B0%5D=field_case_type%3Acivil_merger.

58 DOJ did win three cases initiated under the Obama administration and tried before Delrahim took the helm. See Press Release, U.S. Dep’t Of Justice, U.S. District Court Blocks Anthem’s Acquisition of Cigna (Feb. 8, 2017), available at <https://www.justice.gov/opa/pr/us-district-court-blocks-anthem-s-acquisition-cigna>; Press Release, U.S. Dep’t Of Justice, U.S. District Court Blocks Aetna’s Acquisition of Humana (Jan. 23, 2017), available at <https://www.justice.gov/opa/pr/us-district-court-blocks-aetna-s-acquisition-humana>; Press Release, U.S. Dep’t Of Justice, U.S. District Court Blocks EnergySolutions’ Acquisition of Waste Control Specialists (June 21, 2017), available at <https://www.justice.gov/opa/pr/us-district-court-blocks-energysolutions-acquisition-waste-control-specialists>.

manufacturers.⁵⁹ Some of DOJ's other greatest triumphs came from abandonments by merging parties choosing to walk away from their transactions rather than pursue or continue litigation with the agency, such as in Visa-Plaid (online debit transactions), Cengage-McGrawHill (textbooks), and Quad-LSC (printing).⁶⁰ As the charts below show, each agency's rate of Second Requests and merger enforcement actions (as a percentage of HSR filing eligible for a Second Request) declined slightly versus the high periods of the Obama administration (from January 20, 2009, to January 20, 2017) but stayed within one or two percentage points, with the FTC having a more active record than the DOJ.⁶¹



A. Horizontal Mergers

The agencies investigated and pursued many horizontal merger cases during the Trump years, but a few cases and trends stand out: the merger of T-Mobile and Sprint, which was cleared by DOJ with an intricate remedy package yet challenged by state attorneys general, a string of challenges

to nascent competitor acquisitions, and a several attempts to unwind consummated mergers.

T-Mobile/Sprint. The T-Mobile-Sprint transaction combined the nation's third and fourth mobile network operators. It was notable on several fronts. First, the transaction had been floated and discouraged several times during the Obama administration, which expressed concerns about the 4-to-3 structure and loss of close competition between the parties. This shows that regulatory risk can change not just with market circumstances but with political turnover, as well. Deals viewed as nonstarters under one president or set of agency leadership may become achievable under others.

Second, DOJ accepted a detailed, stitched-together divestiture and behavioral remedy package⁶² designed to enable third party DISH Network – a satellite pay TV provider that did not operate any wireless network before – to replace Sprint as a fourth major network operator.⁶³ This shows that agencies can be persuaded to accept divestiture remedies that combine various assets that were not operated as a standalone business before to empower a single new market entrant, even though their guidelines indicate that is not their preferred approach. If the DISH divestiture proves successful, the case could provide a model for crafting creative remedies for seemingly unfixable deals, although it is unclear if the agencies under the Biden administration would likewise accept this sort of mix-and-match arrangement.

Third, several states, led by New York, filed suit against the merger in June 2019, before DOJ announced in July that it would settle the case. This made good on states' promise that they would step in if they disagreed with the Trump administration's handling of a matter. The states lost at trial. The court showed 'some deference' to the judgment of and remedies accepted by DOJ and the Federal Communications Commission, making clear that DOJ's remedy package was a significant factor in its decision.

The court also credited several defenses that have rarely succeeded elsewhere. In particular, the 'flailing firm'⁶⁴ defense prevailed, with defendants persuading the court that Sprint was in a death spiral and had exhausted efforts to reverse course. The court also credited the defense that mobile wireless is an especially dynamic and complex industry that

59 Press Release, U.S. Dep't Of Justice, Justice Department Wins Historic Arbitration of Merger Dispute (Mar. 9, 2020), available at <https://www.justice.gov/opa/pr/justice-department-wins-historic-arbitration-merger-dispute>.

60 See Press Release, U.S. Dep't Of Justice, Visa and Plaid Abandon Merger After Antitrust Division's Suit to Block (Jan. 12, 2021), available at <https://www.justice.gov/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block>; Press Release, U.S. Dep't of Justice, Cengage and McGraw-Hill Terminate Merger Agreement in Response to Antitrust Concerns (May 4, 2020), available at <https://www.justice.gov/opa/pr/cengage-and-mcgraw-hill-terminate-merger-agreement-response-antitrust-concerns>; Justice News, U.S. Dep't Of Justice, Quad/Graphics and LSC Communications Abandon Merger After Antitrust Division's Suit to Block (July 23, 2019), available at <https://www.justice.gov/opa/pr/quadgraphics-and-lsc-communications-abandon-merger-after-antitrust-division-s-suit-block>.

61 Hart-Scott-Rodino Annual Report FY 2019, U.S. Dep't Of Justice & Fed. Trade Comm'n, <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino-p110014hsrannualreportfy2019.pdf>.

62 The remedies included the divestiture of Sprint's prepaid mobile brands, certain wireless spectrum assets, thousands of cell sites, and hundreds of retail locations, as well as an agreement to provide DISH with wholesale access to T-Mobile's network for seven years while DISH built out its own 5G network.

63 *Id.*; Competitive Impact Statement, *United States v. Deutsche Telekom AG*, No. 1:19-CV-02232 (July 30, 2019), <https://www.justice.gov/atr/case-document/file/1189501/download>.

64 The 'flailing firm defense' is similar to the 'failing firm defense' in some respects, but notably distinct in that it: (i) is subject to less stringent requirements to succeed than the 'failing firm defense,' and, in part for that reason, (ii) is not an absolute defense like the 'failing firm defense' (which, if successful, can even be a defense to a merger to monopoly), but rather just a factor in the overall assessment whether a merger is likely to substantially less competition or not. The 'flailing' in this context refers to a firm not having significant competitive vigor going forward, such that its acquisition will not eliminate substantial future competition between the merging parties.

defies conventional economic analysis. While these defenses therefore may have some more currency now than they had before, given the general push towards more aggressive antitrust enforcement, we expect these arguments to continue to remain ‘last resort’ rather than ‘main show’ defenses when before the agencies. In court, in the right circumstances, they may carry more weight.

Nascent Competition Theories. One of the most notable merger control trends since 2016 has been a rise in challenges to acquisitions of nascent competitors, sometimes referred to as ‘killer acquisitions.’ The target companies in these acquisitions have had little to no presence in the relevant market, but the agencies deemed them a significant threat to the acquiring firm’s market position in cases where they intervened in such transactions. In most such cases, the acquirer’s market share was alleged to have exceeded 50 percent⁶⁵ or the market allegedly was highly concentrated with only two or three competitors holding most of the share.⁶⁶

Most of these transactions, such as Visa-Plaid, Edgewell-Harry’s, Procter & Gamble-billie, and Pacific Biosciences-Illumina, were abandoned within months of the agency complaint being filed. DOJ’s challenge to Sabre-Farelogix, discussed above, is among the only ‘killer acquisition’ cases to be fully litigated and decided on the merits. The DOJ’s loss in that case has not deterred the agencies from bringing these kinds of cases. But it is worth noting that the legal basis for these challenges, sometimes brought as monopolization cases, rather than traditional merger challenges,⁶⁷ is relatively untested in court.

This trend will likely continue, if not accelerate, under the Biden administration. Companies with a significant presence in concentrated markets should be mindful that acquiring even the smallest of competitors could present greater antitrust risk than before. This is especially likely

if the target has already disrupted the market or provoked competitive responses, or if it is uniquely positioned to enter or take share.⁶⁸

In advising clients in such transactions, it is important to closely vet an acquirer’s deal rationale documents and buy/build analyses, as well as the target company’s documents. Where internal documents suggest that the acquiring company may build a competing product itself absent an acquisition, agency staff may be tempted to believe that the acquisition is anticompetitive, disregarding that an acquisition may well bring a product to market or grow adoption faster or better than an organic build would. Internal documents from a small startup, meanwhile, may raise the risk profile because smaller players often focus their efforts on chasing market leading companies and discuss such efforts in overly heroic terms, in part to attract investors or buyers.

Consummated Merger Challenges. Unlike in most other jurisdictions, the U.S. agencies can challenge transactions that have already been consummated, whether or not they went through HSR review. And, they have not hesitated to use that power to challenge closed transactions. This trend accelerated under Trump, gradually eroding the certainty and confidence private parties can attain for a transaction after closing.

The most significant example is the FTC’s challenge to Facebook’s acquisitions of Instagram and WhatsApp, which had undergone HSR review by the FTC before closing and since been integrated for over five years each.⁶⁹ The FTC has also challenged a number of non-reportable transactions that had been consummated for shorter periods of time.⁷⁰ The agency signaled its willingness to unwind long-consummated non-reportable transactions in February 2020 with its demand for information on prior acquisiti-

65 Complaint, *United States v. Visa, Inc.*, Case No. 3:20-cv-07810 (N.D. Cal. Nov. 5, 2020) (“Visa is a monopolist among providers of online debit services, with a durable market share of approximately 70%.”), <https://www.justice.gov/atr/case-document/file/1334736/download>; Complaint, *In the Matter of Illumina, Inc. and Pacific Biosciences of Cal., Inc.*, No. 9387 (Dec. 17, 2019) (“Illumina is the dominant manufacturer of NGS systems in the United States, where it enjoys a market share of more than 90%.”), https://www.ftc.gov/system/files/documents/cases/d9387_illumina_pacbio_administrative_part_3_complaint_public.pdf.

66 Complaint, *United States v. Sabre Corp.*, 452 F.Supp.3d 97 (D.Del. 2019), <https://www.justice.gov/opa/press-release/file/1196816/download>; Complaint, *In the Matter of Edgewell Pers. Care Co. and Harry’s Inc.*, No. 9390 (Feb. 2, 2020), https://www.ftc.gov/system/files/documents/cases/public_p3_complaint_-_edgewell-harrys.pdf; Complaint, *In the Matter of Procter & Gamble Co. and Billie, Inc.*, No. 9400 (Dec. 8, 2020), https://www.ftc.gov/system/files/documents/cases/d09400_administrative_part_3_complaint_public600214.pdf.

67 Complaint, *United States v. Visa, Inc.*, Case No. 3:20-cv-07810 (N.D. Cal. Nov. 5, 2020), <https://www.justice.gov/atr/case-document/file/1334736/download>; Complaint, *Federal Trade Comm’n v. Facebook*, Case No. 1:20-cv-03590-JEB (D.D.C. Jan. 13, 2021), https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_complaint.pdf.

68 See, e.g., Complaint, *In the Matter of Edgewell Pers. Care Co. and Harry’s Inc.*, No. 9390 (Feb. 2, 2020), https://www.ftc.gov/system/files/documents/cases/public_p3_complaint_-_edgewell-harrys.pdf; Complaint, *In the Matter of Procter & Gamble Co. and Billie, Inc.*, No. 9400 (Dec. 8, 2020), https://www.ftc.gov/system/files/documents/cases/d09400_administrative_part_3_complaint_public600214.pdf; Complaint, *United States v. Visa, Inc.*, Case No. 3:20-cv-07810 (N.D. Cal. Nov. 5, 2020), <https://www.justice.gov/opa/pressrelease/file/1334726/download>.

69 Proposed Final Judgement, *United States v. TransDigm Group, Inc.*, Case No. 1:17-cv-02735 (D.D.C. Dec. 21, 2017), <https://www.justice.gov/opa/press-release/file/1019821/download>; Modified Final Judgement, *United States v. Parker-Hannifin Corp. and CLARCOR, Inc.*, Case No. 1:17-cv-01354 (D. Del. April 30, 2018), <https://www.justice.gov/atr/case-document/file/1059391/download>; Stipulated Order for Permanent Injunction and Equitable Monetary Relief, *Fed. Trade Comm’n v. Mallinckrodt, Inc.*, Case No. 1:17-cv-00120 (D.D.C. Jan. 30, 2017), https://www.ftc.gov/system/files/documents/cases/stipulated_order_for_permanent_injunction_mallinckrodt.pdf.

70 See Complaint, *In the Matter of Otto Bock HealthCare North America, Inc.*, No. 9378 (Dec. 20, 2017), https://www.ftc.gov/system/files/documents/cases/otto_bock_part_3_complaint_redacted_public_version.pdf; Complaint, *In the Matter of Axon Enterprise, Inc. and Safariland, LLC*, No. D9389 (Jan. 3, 2020), https://www.ftc.gov/system/files/documents/cases/d09389_administrative_part_iii_-_public_redacted.pdf; Complaint, *In the Matter of Altria Group, Inc. and JUUL Labs, Inc.*, No. 9393 (Apr. 1, 2020), https://www.ftc.gov/system/files/documents/cases/d09393_administrative_part_iii_complaint-public_version.pdf.

ons of certain technology firms going back to 2010.⁷¹ The results of that review process are not yet known, so there may be additional attempts to unscramble the eggs forthcoming under Biden.

DOJ advocated in a private litigation for the unwinding of a 2012 merger that it had investigated but not challenged.⁷² A court of appeals ordered the divestiture of the acquired assets in 2021, nearly a decade after the original transaction.⁷³ This is another data point that securing HSR clearance does not mean a deal is immune to antitrust scrutiny, and that it is important to self-monitor post-closing whether the merged entity engages in practices that could invite new scrutiny of the deal.

B. Vertical Mergers

The Trump era was also an eventful period for vertical mergers, with a number of high-profile transactions, rising skepticism of vertical mergers and behavioral remedies, and the issuance of new Vertical Merger Guidelines.⁷⁴

Policy Change. Enforcers from both political parties have criticized ‘behavioral remedies,’ increasingly preferring structural remedies such as divestitures even in vertical mergers. Under Trump, the AAG, in particular, made opposition to behavioral remedies a priority at DOJ from the time he took office.⁷⁵ In a speech detailing his views, he emphasized that ‘antitrust is law enforcement, it’s not regulation,’ and that behavioral remedies were ‘fundamentally regulatory, imposing ongoing government oversight.’⁷⁶ He also noted concerns with the efficacy of such remedies and signaled his intent to cut back on their use.⁷⁷

AT&T / Time Warner (DOJ).⁷⁸ The DOJ demonstrated its new merger remedy policy in its challenge of AT&T’s proposed acquisition of Time Warner. AT&T had announced

its proposed acquisition of Time Warner Inc. in October 2016. Time Warner operates a portfolio of major cable television networks, and AT&T distributes this and other networks’ programming through its pay-TV services, DirecTV (satellite) and U-Verse (fiber). The merger raised similar issues to Comcast Corp.’s 2011 acquisition of NBCUniversal, which was resolved with behavioral remedies in a consent decree during the Obama administration.⁷⁹ The Trump DOJ declined to accept the same types of behavioral remedies to resolve its vertical foreclosure concerns in AT&T/Time Warner, and instead filed a lawsuit. According to some reports, DOJ insisted on divestiture of certain Time Warner TV networks.⁸⁰

In its complaint, DOJ alleged that the merged firm would have increased incentive and ability to harm competition in the market for pay-TV services due to the importance of Time Warner programming to AT&T’s distribution competitors. The suit marked the first contested challenge to a vertical merger in decades.⁸¹ AT&T decried the apparent change in antitrust enforcement policy,⁸² which can be viewed as another important reminder of how much policy and enforcement can change with agency leadership and the presidency. As discussed earlier, DOJ’s challenge of this transaction invited allegations of improper White House interference.

Soon after DOJ filed its lawsuit, AT&T extended a unilateral remedy offer to its pay-TV distribution competitors, modeled on terms from the 2011 Comcast-NBCU consent decree. This move muddied the waters for DOJ during the litigation because they now had to ‘litigate the fix’ at trial. DOJ officials have since warned that they will approach such post-challenge offers differently in the future, with greater opposition,⁸³ but defendants in other cases have continued to follow AT&T’s lead. Companies facing a merger challenge should contemplate what remedies they can implement unilaterally or in negotiation with third parties, but also be prepared for pushback and response from the agency if they do so.

The district court ruled against DOJ in June 2018, and the outcome was upheld on appeal in February 2019. AT&T closed its acquisition, but recently announced a proposed spinoff of the Time Warner assets, to be merged with Discovery Communications, another cable television programmer, into an independent company.

71 See *supra* Part V on Digital Platforms.

72 Brief for the United States of America as Amicus Curiae in Support of Appellee Steves and Sons, Inc., *Steves and Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690 (4th Cir. 2021), <https://www.justice.gov/atr/case/steves-sons-inc-v-jeld-wen-inc>.

73 *Steves and Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690 (4th Cir. 2021).

74 Andrew Saba, *Antitrust Scrutiny of Vertical Mergers Under the Trump Administration*, Cornell J.L. & Pub. Pol’y, The Issue Spotter (Mar. 17, 2018), <http://jlp.org/blogzine/antitrust-scrutiny-of-vertical-mergers-under-the-trump-administration/>; Dave Lefort, FTC, DOJ Issue Modernized Guidance on Vertical Mergers, Compliance Week, Regulatory Policy (July 1, 2020), FTC, DOJ issue modernized guidance on vertical mergers | Article | Compliance Week.

75 Assistant Attorney General Makan Delrahim, U.S. Dep’t Of Justice, Keynote Address at American Bar Association’s Antitrust Fall Forum (Nov. 16, 2017), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar>.

76 Asst. Attorney General Makan Delrahim, Keynote Address at American Bar Association’s Antitrust Fall Forum (Nov. 16, 2017), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar>.

77 *Id.*

78 For a comparison of this case with EU-merger control, see further: J.W. Fanoy, M. Lanter, ‘Verticale concentraties: groeien in de lengte als het in de breedte niet meer mag?’, MP 2021/6.

79 See Competitive Impact Statement, *United States v. Comcast*, No. 1:11-cv-00106 (Jan. 18, 2011), <https://www.justice.gov/atr/case-document/competitive-impact-statement-72>.

80 Brent Kendall and Drew FitzGerald, *Justice Dept. Files Lawsuit Challenging AT&T-Time Warner Deal* (Nov. 20, 2017), <https://www.wsj.com/articles/justice-department-expected-to-file-lawsuit-challenging-at-t-time-warner-deal-1511210955>.

81 Complaint, *United States v. AT&T, Inc.*, No. 1:17-cv-02511 (Nov. 20, 2017), <https://www.justice.gov/atr/case-document/file/1012916/download>.

82 Michael Merced et al., *Justice Department Says Not So Fast to AT&T’s Time Warner Bid*, N.Y. Times (Nov. 8, 2017), <https://www.nytimes.com/2017/11/08/business/dealbook/att-time-warner.html>.

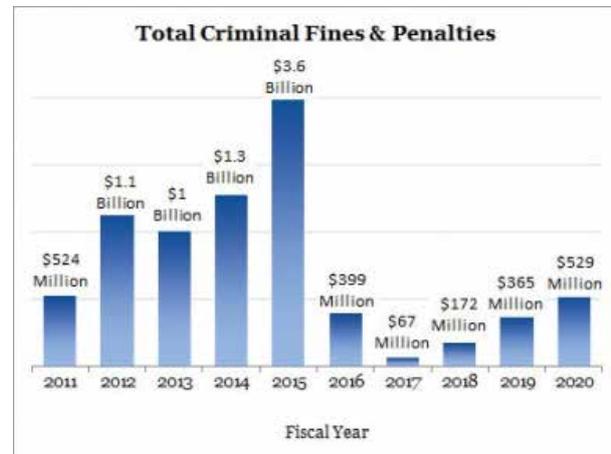
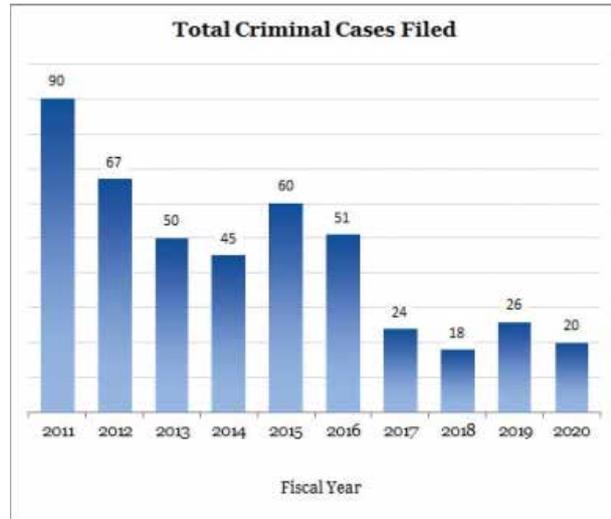
83 *AT&T-Time Warner’s Mid-Merge Tactic Still Haunts DOJ*, Law360 (Mar. 26, 2019), <https://www.law360.com/articles/1142849/at-t-time-warner-s-mid-merge-tactic-still-haunts-doj>

Northrop Grumman-Orbital (FTC). While the FTC Chairman had agreed with the AAG’s concerns about the efficacy and administrability of behavioral remedies in vertical mergers, the FTC nevertheless accepted such remedies in clearing the Northrop Grumman-Orbital ATK transaction. The FTC allowed missile system supplier Northrop to acquire a key input supplier, subject to a consent decree imposing a firewall and non-discrimination provisions.⁸⁴ However, the results did further feed skepticism about the efficacy of behavioral remedies. A year after the deal was cleared, the Department of Defense (DOD) found itself with only one finalist for an \$85 billion program after Northrop’s rival, Boeing, dropped out of the bidding based on alleged harm from the merger.⁸⁵ Boeing complained that an ‘unnecessarily protracted process’ to implement firewalls delayed its work by at least eight months.⁸⁶ The FTC reportedly investigated Northrop’s compliance with the consent decree.⁸⁷ A similar transaction between Lockheed Martin and Aerojet Rocketdyne is now pending. The FTC’s handling of that transaction – whether it seeks a full block or to improve its remedy approach – may shed light on the lessons it has taken from the Northrop-Orbital deal and how it will approach resolution of other vertical mergers.

Vertical Merger Guidelines. Under Trump, the agencies also issued new Vertical Merger Guidelines in June 2020. The Guidelines largely reflected the analytical approach demonstrated in recent agency reviews of vertical mergers.⁸⁸ But Democratic FTC Commissioners Rebecca Slaughter and Rohit Chopra, who are now part of a Democratic majority at the FTC, expressed skepticism about the Guidelines,⁸⁹ and Commissioner Slaughter warned against relying on the Guidelines as reflecting her views or likely outcomes at the agency.⁹⁰

VII. Criminal Enforcement

The Trump DOJ pursued significantly fewer criminal prosecutions (of individuals and corporate defendants) than any previous administration since President Richard Nixon,⁹¹ though notably did prosecute several foreign nationals after extradition requests.⁹² Criminal fines and penalties also took a drastic drop.⁹³



84 Competitive Impact Statement, *United States v. Northrop Grumman Corp.*, No. 1:02-cv-02432 (Dec. 23, 2002), <https://www.justice.gov/atr/case-document/file/506431/download>.

85 Letter from Leanne Caret, President, Chief Executive Officer, Boeing Defense, Space & Security to Will Rober, Assistant Secretary of the Air Force for Acquisition, Technology and Logistics (July 23, 2019), available at <https://www.defensedaily.com/analysis-force-boeing-northrop-grumman-play-nice-gbsd/analysis/>; see also Rachel S. Cohen, Boeing Backs Out of Nuclear Missile Competition, Prompting USAF Choices, AIR FORCE MAGAZINE (July 25, 2019), <https://www.airforcemag.com/Boeing-Pulls-Out-of-Ground-Based-Strategic-Deterrent-Program/>.

86 *Id.*

87 Northrop Grumman Corp., Quarterly Report (10-Q) (Oct. 24, 2019)

88 *Vertical Merger Guidelines*, Dep’t of Just. & Fed. Trade Comm’n (June 30, 2020), *Vertical Merger Guidelines - June 30, 2020* (ftc.gov).

89 *Dissenting Statement of Comm’r Rebecca Kelly Slaughter in Re FTC-DOJ Vertical Merger Guidelines 2*, (June 30, 2020), <https://www.ftc.gov/public-statements/2020/06/dissenting-statement-commissioner-rebecca-kelly-slaughter-re-ftc-doj>; *Dissenting Statement of Comm’r Rohit Chopra Regarding the Publication of Vertical Merger Guidelines 9*, (June 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577503/vmgchopradissent.pdf.

90 *Id.*

91 *Compare DOJ Division Operations*, *supra* note 4, and DOJ Workload Statistics FY 2010-2019, *supra* note 4, with DOJ Workload Statistics FY 2000-2009, *supra* note 4; DOJ Workload Statistics FY 1990-1999, *supra* note 4; DOJ Workload Statistics FY 1980-1989, *supra* note 4; DOJ Workload Statistics FY 1970-1979, *supra* note 4.

92 Although the extraditions already predated the Trump administration. The first and second extradited persons for antitrust charges took place in 2020: a Korean citizen in the automotive cars case <https://www.justice.gov/opa/pr/extradited-former-automotive-parts-executive-pleads-guilty-antitrust-charge> and a Dutch and EU-citizen in the air cargo case <https://www.justice.gov/opa/pr/extradited-former-air-cargo-executive-pleads-guilty-participating-worldwide-price-fixing>; on the latter case, see also: W.W. Geursen, J. Boonstra-Verhaert, 'Uit- en overlevering van EU-burgers bij overtreding van het kartelverbod – op het snijvlak van straf- en mededingingsrecht', *Tijdschrift voor Bijzonder Strafrecht & Handhaving* 2020, p. 297.

93 *Criminal Enforcement Trends Charts*, U.S. Dep’t Of Justice (updated Nov. 23, 2020), <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>.

The DOJ continued its criminal enforcement focus on markets for labor and workforce talent under the Trump administration.⁹⁴ In 2016 (under Obama), DOJ had issued Antitrust Guidance for Human Resources Professionals, which signaled that DOJ may prosecute such conduct criminally in the future, where it had traditionally pursued them as civil matters.⁹⁵ DOJ finally followed through on this threat in December 2020 and January 2021 with its first indictments for wage fixing and no poach agreements, respectively.⁹⁶

VIII. Looking Forward: What to Expect Under Biden

Many signs point towards U.S. antitrust enforcement becoming yet more aggressive and interventionist than it was under Trump, especially if certain currently-pending legislative proposals are enacted. On July 9, 2021, President Biden signed a sweeping Executive Order prescribing 72 initiatives to promote competition across industries.⁹⁷ In addition to many industry-specific provisions, the order urged the FTC and DOJ to consider revising their merger guidelines and to enforce the antitrust laws more vigorously.⁹⁸ The order is not binding upon the agencies but signals the Administration's desire to increase market intervention and drive antitrust policy to a greater extent than has been typical of recent presidents.

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Consistent with that approach, President Biden appointed Lina Khan as the Chair of the FTC.⁹⁹ Ms. Khan has made her

name as a critic of the 'Big Tech' companies, especially Amazon, opposing the consumer welfare standard, and calling for consideration of public interest factors.¹⁰⁰ FTC Chair Khan already has taken several steps that signal a more aggressive enforcement policy and practice, including proposing to rescind an FTC policy so that firms that entered merger clearance settlements with the FTC would have to pre-notify the FTC of subsequent acquisitions even if they are not HSR reportable. Khan also joined with her fellow Democratic commissioners to withdraw a 2015 policy statement about the FTC's approach to 'unfair methods of competition' that she viewed as abrogating the FTC's duties in the area.¹⁰¹ At the same time, Khan signaled that the FTC would consider whether to issue new guidance or propose rules to clarify the types of practices covered by that prohibition.¹⁰² Under Khan, the FTC has also begun warning merging parties at the end of their statutory waiting period that the FTC may still sue to unwind the transaction.¹⁰³ While these letters do not change the FTC's ability to bring such a suit, they do signal that Khan's FTC may be less sensitive to the timelines prescribed by the HSR Act, and to preserving any sense of deal certainty for companies that have completed the merger review process. In addition to Khan, President Biden has also brought in Tim Wu, a Columbia Law professor with similar views to Khan, to help shape competition policy on the National Economic Council.¹⁰⁴ And, recently, President Biden named Jonathan Kanter as his appointee for the AAG position to lead the DOJ Antitrust Division. Mr. Kanter is a more traditional appointee in that he has extensive private sector experience representing corporate clients as antitrust counsel. However, his nomination is consistent with President Biden's more aggressive enforcement agenda and Executive Order, because Mr. Kanter previously has taken the position that the antitrust laws have been insufficiently enforced, and as a private practitioner he has represented corporate clients in criticizing and complaining about certain tech companies. Kanter has expressed concern that antitrust has been too focused on economic theory and that antitrust enforcers have been too 'tied up in formalistic distinctions, like horizontal or vertical.'¹⁰⁵ In 2018 Congressional testimony, Kanter said that government antitrust enforcement 'serves an important deterrent value, and the more it's enforced and the more companies are under-

94 Assistant Attorney General Makan Delrahim, U.S. Dep't Of Justice, Remarks at the Public Workshop on Competition in Labor Markets (Sept. 23, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-public-workshop-competition>.

95 Antitrust Guidance for Human Resource Professionals, U.S. Dep't Of Justice (Oct. 2016), <https://www.justice.gov/atr/file/903511/download>.

96 Axinn Antitrust Insight: DOJ Continues Enforcement in Labor Markets (April 6, 2021), https://sitepilot10.firmseek.com/client/axinn/www/media-articles-DOJ_Continues_Criminal_Enforcement_Labor_Markets.html.

97 Exec. Order No. 14036 on Promoting Competition in the American Economy, 86 FR 36987 (July 9, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy>.

98 See Axinn Antitrust Insight: White House Issues Executive Order Aimed at Increasing Antitrust Enforcement and Promoting Competition (July 12, 2021), https://www.axinn.com/media-articles-White_House_Issues_Executive_Order_Aimed_Increasing_Antitrust_Enforcement.html.

99 See Axinn Antitrust Insight: Lina Khan Sworn In As New FTC Chair (June 17, 2021), https://www.axinn.com/media-articles-Axinn_Antitrust_Insight_Lina_Khan_Sworn_New_FTC_Chair.html.

100 See, e.g., Lina Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710 (2017); Lina Khan, *The End of Antitrust History Revisited*, 133 Harvard L. Rev. 1655 (2020).

101 Statement of Chair Lina Khan on the Withdrawal of the Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf.

102 *Id.*

103 *FTC Letters Warn Merging Parties of Potential Post-Consummation Challenges*, The Capitol Forum (July 30, 2021).

104 Lauren Feiner, *Big Tech Critic Tim Wu Joins Biden Administration To Work On Competition Policy*, CNBC (Mar. 5, 2021), <https://www.cnbc.com/2021/03/05/big-tech-critic-tim-wu-joins-biden-administration-to-work-on-competition-policy.html>.

105 Bryan Koenig, *In Kanter, DOJ Would Get An Aggressive Antitrust Enforcer*, Law360 (July 22, 2021), <https://www.law360.com/articles/1405654/in-kanter-doj-would-get-an-aggressive-antitrust-enforcer>.

standing of where the boundaries lie, that deterrent has meaning.¹⁰⁶

In many areas, companies can expect a much greater willingness under the Biden administration to intervene and less concern about the risks of excessive interference in the market. Scrutiny of digital platforms, two-sided markets, and nascent competitor acquisitions will grow more intense. The same can be said for horizontal and vertical mergers; members of the new Democratic majority at the FTC have repeatedly argued that the agency has been too lenient in its merger reviews. And it remains to be seen how much companies can rely on the new Vertical Merger Guidelines in deal reviews by the FTC since at least two of the three Democratic Commissioners have expressed disagreement with parts of those guidelines. Skepticism towards behavioral remedies will continue, though for different reasons than under Trump: Democratic enforcers have expressed concerns that consent decrees are sometimes ineffective and do not prevent the concentration of economic power. Criminal enforcement, too, will likely increase from the lows seen under President Trump.

Congress has also continued its push towards reform. Senator Amy Klobuchar has introduced sweeping legislation to make enforcement more aggressive and easier to carry out, bringing American competition law more in line with that of the European Commission. Klobuchar's bill would create an abuse of dominance offense, add more market share-based presumptions of illegality, lower the bar for the government in many cases, and shift the initial burden to merging parties in certain circumstances.

Senate Republicans likewise have introduced antitrust reform legislation. Their bill, the Tougher Enforcement Against Monopolies Act, would consolidate enforcement at DOJ, stripping the FTC of its role in antitrust, and increase DOJ's antitrust funding.¹⁰⁷ The legislation aims to make it easier for DOJ to challenge mergers and for indirect purchasers of goods to bring private antitrust suits. It would also codify the consumer welfare standard, which

FTC Chair Khan and others have sought to replace with a public interest standard.

Finally, certain lawmakers in the House of Representatives have introduced legislation targeting digital markets and large technology companies in particular.¹⁰⁸ Those bills would prevent platforms from acquiring competitive threats, preferencing their own services or using their control of multiple business lines to disadvantage competitors, and even require separation of business lines.¹⁰⁹ The Republican lawmakers that support this legislation are particularly concerned, again, with censorship of conservative voices.¹¹⁰

Given the political winds, material changes to the antitrust laws seem more likely than before, though what exactly it would look like is still unclear even if changes are made. Notably, to the extent there are material changes to the antitrust laws, they are likely going to affect all industries, not just digital platforms or markets. Companies in concentrated markets with large market positions should be especially attuned to changes in the law and policy governing their unilateral conduct. Some of the proposed legislative changes would create adverse presumptions for business practices and transactions that traditionally have been considered procompetitive, when undertaken by large firms. Similarly, for successful companies with significant market positions, acquisitions of emerging competitors with no market presence or single-digit shares will present greater risk than in the past.

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Over de auteurs

Mr. D.S. (Daniel) Bitton

Partner in de mededingingsrechtpraktijk van Axinn, Veltrop & Harkrider LLP in San Francisco, CA, USA.

Ms. M. (Melanie) Kiser

Associate in de mededingingsrechtpraktijk van Axinn, Veltrop & Harkrider LLP in Washington, DC, USA.

¹⁰⁶ Bryan Koenig, *Biden Taps Google Critic, Ex-Paul Weiss Partner for DOJ*, Law360 (July 20, 2021), <https://www.law360.com/articles/1404928/biden-taps-google-critic-ex-paul-weiss-partner-for-doj>.

¹⁰⁷ *Republican Sens. Float New Antitrust Reform Bill*, Law360 (June 15, 2021), https://www.law360.com/publicpolicy/articles/1394174?utm_source=rss&utm_medium=rss&utm_campaign=section.

¹⁰⁸ *House Lawmakers Float Bipartisan Big Tech Bills*, Law360 (June 11, 2021), <https://www.law360.com/articles/1393416>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*