

# A Year into the Trump Administration – Implications for Antitrust Enforcement

February 6, 2018

Lee Greenfield, Partner

Perry Lange, Partner

Hartmut Schneider, Partner

*Attorney Advertising*



WILMER CUTLER PICKERING HALE AND DORR LLP



# Speakers



Leon Greenfield, Partner  
Antitrust and Competition



Perry Lange, Partner  
Antitrust and Competition



Hartmut Schneider, Partner  
Antitrust and Competition



# Webinar Guidelines

- Participants are in listen-only mode
- Submit questions via the Q&A box on the bottom right panel
- Questions will be answered as time permits
- Offering 1.0 CLE credit in California and New York\*
- WebEx customer support: +1 888 447 1119, press 2

*\*WilmerHale has been accredited by the New York State and California State Continuing Legal Education Boards as a provider of continuing legal education. This program is being planned with the intention to offer CLE credit in California and non-transitional CLE credit in New York. This program, therefore, is being planned with the intention to offer CLE credit for experienced New York attorneys only. Attendees of this program may be able to claim England & Wales CPD for this program. WilmerHale is not an accredited provider of Virginia CLE, but we will apply for Virginia CLE credit if requested. The type and amount of credit awarded will be determined solely by the Virginia CLE Board. Attendees requesting CLE credit must attend the entire program.*



# Overview of 2018 and Beyond

- Agency transition remains in transition
  - DOJ filled out; FTC remains in flux
  - Trends so far
    - Messaging energetic enforcement
    - DOJ focus on avoiding “regulatory” remedies
    - IP/Antitrust remains locus of controversy and potential divergence
- SCOTUS developments bear watching
  - *Ohio v. Amex* – First antitrust case since 2015
  - First antitrust case for Gorsuch as justice
- Potential wildcards
  - DOJ and FTC interest in “shaping the law” – e.g. amicus briefs
  - Greater international divergence/state activism
  - Mid-term elections



## Transition Developments: DOJ



- Assistant Attorney General for Antitrust Division – Makan Delrahim
  - Confirmed on September 27, 2017
  - Previously served as Deputy Assistant to the President and Deputy White House Counsel.
  - Served in DOJ Antitrust Division from 2003 to 2005 as a DAAG overseeing the Appellate, Foreign Commerce, and Legal Policy sections
  - Member of Antitrust Modernization Commission 2005 to 2007



# Transition Developments: DOJ



Andrew C. Finch  
Principal DAAG



Roger P. Alford  
DAAG (Intl Affairs)



Luke M. Froeb  
DAAG (Econ)



Donald G. Kempf, Jr.  
DAAG (Litigation)



Bernard A. Nigro  
DAAG (Civil)



Marvin N. Price Acting  
DAAG (Criminal)



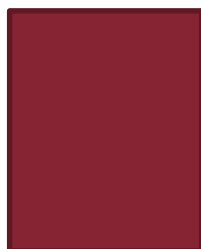
# Transition Developments: FTC

- Still in transition

- 1 to 1 Democratic-Republican split continues (for now)
- Ohlhausen nominated to Court of Federal Claims
- Acting Director of Bureau of Competition (Bruce Hoffman); three acting directors since Trump took office
- Commission nominees have recently been announced and will result in entirely new Commission



Maureen  
Ohlhausen (R)  
Acting Chair



Republican



Republican



Democrat



Terrell McSweeney (D)



# Transition Developments: FTC

## ■ Commissioner Nominees

- Four nominees sent to the Senate on Jan. 25: Simons (chair) (R), Phillips (R), Wilson (R), Chopra (D)
- Senate Commerce hearings not yet scheduled
- GOP nominees named to seats with longest remaining terms
- Present configuration would create 3-1 GOP majority on confirmation
- Confirmation could lag until second Democrat is named



Joseph Simons (R)  
Nominee for Chair



Noah Phillips (R)  
Nominee



Christine Wilson (R)  
Nominee



Democrat  
TBD



Rohit Chopra (D)  
Nominee





# What Do We Know After One Year?

- A year ago, we considered three antitrust enforcement scenarios

Scenario	WH Prediction
Populist antitrust revolution (“Big is bad!”)	Very unlikely
Laissez faire antitrust revolution (“Antitrust? What antitrust?”)	Unlikely
Traditional Republican antitrust agenda	Likeliest

- So far: substantive positions are consistent with mainstream agenda, but tone is noteworthy
  - Messaging energetic enforcement
  - DOJ focus on avoiding “regulatory” remedies
  - IP/Antitrust remains locus of controversy and potential divergence
- Past positions of announced FTC chair also are consistent with mainstream antitrust agenda
- **But:** very small sample set on which to base conclusions



## Merger Enforcement: Trends

- About 30 merger challenges in 2017, roughly in line with number of challenges in prior years
  - Several litigated matters *other* than AT&T/Time Warner
- No marked departure from substantive merger review standards under previous administration
- But DOJ expressed strong preference for structural (or “non-regulatory”) remedies, and was willing to go to court for it
- Additional DOJ emphasis on effectiveness on consent decrees



# Merger Enforcement: Examples



## Litigation

### AT&T/Time Warner

- DOJ sued in November 2017
- Alleges AT&T could use popular TW programming to harm distribution rivals (both traditional and online)
- D.D.C. trial to begin March 19

### Tronox/Cristal

- Alleged “3 to 2” in titanium dioxide
- Theories include coordinated interaction and capacity closure
- Part III hearing to begin May 18

### Otto Bock/Freedom Innovation

- Consummated merger (microprocessor knees)
- Part III hearing to begin May 22

### Sanford Health/Mid Dakota Clinic

- Physician group merger
- Prel. injunction Dec. 15 (D.N.D.) (on appeal to 8<sup>th</sup> Cir.)

## Settlements

### Parker-Hannifin/Clarcor

- Challenged after HSR review, then settled

### Danone/Whitewave

- Theories included monopsony

### Consent Decree Changes

- E.g., *Parker-Hannifin*;  
*Vulcan/Aggregates*;  
*Transdigm/Takata*

### Potash/Agrium

- Facilities divestiture

### Gas Station Mergers

- *Alimentation Couche-Tard/CST*;  
*Alimentation Couche-Tard/Cross America*;  
*7-Eleven/Sunoco*



# Civil/Criminal Enforcement

## ■ Civil non-merger enforcement

- DOJ has filed no new conduct cases under new administration
- 5 FTC cases, including Louisiana Real Estate Appraisers Board (state action defense); Shire ViroPharma (abuse of government process, serial sham petitions)
- DOJ opposed cert in *Ohio v. Amex*, but then filed merits brief consistent with theory Obama Administration litigated below
- DOJ may seek damages on behalf of United States in State AG generic pharmaceuticals civil case

## ■ Criminal enforcement

- Criminal fines down significantly in 2017, but likely unrelated to new administration
- Cartel enforcement remains a priority
- AAG has indicated support for challenges to employee no-poach agreements (prominent in Obama era) and suggested first criminal case coming



# Intellectual Property & Antitrust

- *FTC v. Qualcomm* continues
- Delrahim statements on IP/antitrust suggests possible shift toward licensor interests
  - Views licensee “hold-out” as more likely problem for the economy and innovation than licensor “hold-up”
  - Concern about potential for SSOs to become buyer-side “cartels” that force royalties below competitive levels
  - Contract or tort remedies more appropriate than antitrust to address SEP abuses
  - Injunctive relief should be available in certain circumstances, notwithstanding FRAND commitment
- Press reports of investigation into IEEE DensiFi group working on wi-fi standards
- Potential divergence between DOJ and FTC
- Potential increased divergence from EU and other non-US jurisdictions



# Federal Judiciary

- SCOTUS has granted cert in first antitrust case since 2015
  - *Ohio v. American Express* – Argument Feb. 26, 2018
    - Potential to be first significant rule of reason case in years
    - Could clarify analysis of two-sided markets, market power, pro-competitive justifications, and burden-shifting framework
- Two other antitrust cases before the court on procedural or evidentiary issues
  - *Salt River Project v. SolarCity* – Argument March 19, 2018
    - Whether order denying state action immunity to public entity is immediately appealable under collateral order doctrine
  - *Animal Science Prods. v. Heibei* (“Vitamin C”) – Argument TBD
    - Whether, as matter of comity, court is bound to defer to foreign government’s interpretation of its laws when that foreign government appears before court
- Justice Gorsuch’s first antitrust cases on the Court



# Federal Judiciary

## Lower court cases to watch in 2018

- *United States v. Kemp & Associates*, No. 17-4148 (10th Cir.)
  - DOJ appealed dismissal of criminal customer allocation indictment, based on indictment’s failure to allege per se offense
- *HiQ Labs, Inc. v. LinkedIn Corp*, No. 17-16783 (9th Cir.)
  - LinkedIn appealed preliminary injunction under California UCL barring it from preventing rival from scraping content from its website
- *Capital One Financial Corp. v. Intellectual Ventures* (Fed Cir.)
  - Capital One appealed grant of summary judgment on Section 2 claim challenging aggregation of banking technology patents



## Wildcards: State Enforcement

- State enforcement can diverge from federal enforcement
  - CA AG sued to block Valero's acquisition of petroleum terminals after FTC closed investigation
  - MO AG opened investigation into Google and possible violation of MO antitrust laws
- Certain states may be particularly aggressive (e.g. CA, NY, CT, MA)
- Blue states may be distracted by fighting Administration on other issues
- Some red states have signed on to challenges to Administration in other areas – e.g. DACA



# Wildcards: International Enforcement

- General perception that U.S. is less likely to be a global antitrust leader
- Potential reaction
  - Greater willingness to diverge among leading non-US jurisdictions such as EU, MOFCOM, CADE etc. (at least with DOJ)
    - Potential IP/Antitrust issues such as “hold-up” versus “hold-out,” breach of FRAND, injunctions based on FRAND-encumbered SEPs
    - Other single firm conduct such as refusals to deal, privacy issues, treatment of Big Data, etc.
    - Behavioral vs. structural remedies
    - Gap-filling by EU and others if U.S. domestic antitrust enforcement wanes in global markets
  - Spillover from U.S. trade and foreign policy decisions into antitrust enforcement against U.S. multinationals
    - E.g. MOFCOM in China



# Wildcards: Elections & Antitrust Populism

- Realistic possibility that Democrats take the U.S. House; a smaller possibility that Senate flips
- Antitrust enforcement is prominent in Democrats' talking points and electoral agenda – “A Better Deal”
  - If in the majority, legislation (e.g. more aggressive merger enforcement) could get some traction, but unlikely to pass the Senate
  - Democrats may continue to be distracted by immigration; resisting Trump
- Antitrust “populism” has potential to shift enforcement and legal doctrine over the longer term
  - Moderates open to certain mergers receiving stricter scrutiny, especially in concentrated markets; potentially greater focus on harm to innovation, longer-horizon effects, and less weight to efficiencies and potential entry
  - Likeliest in future Democratic administrations
  - But: Courts set legal backdrop and have last word in litigated challenges.



# Conclusions

- U.S. antitrust agencies remain aggressive enforcers
- In mergers, probability and intensity of in-depth review is not likely to change
  - As always, critical to assess facts and antitrust risk before agency engagement
  - But agencies (especially DOJ) may demand structural remedy where behavioral remedy might have sufficed in past
- In civil enforcement:
  - Continued focus on Antitrust/IPR, particularly conduct at SSO
  - Sample too limited for other clear themes
- U.S. positions may have diminished influence abroad
- Longer term (2020+), possibility of populist influence



# Questions?

**Leon Greenfield, Partner**

leon.greenfield@wilmerhale.com

**Perry Lange, Partner**

perry.lange@wilmerhale.com

**Hartmut Schneider, Partner**

hartmut.Schneider@wilmerhale.com

*\*WilmerHale has been accredited by the New York State and California State Continuing Legal Education Boards as a provider of continuing legal education. This program is being planned with the intention to offer CLE credit in California and non-transitional CLE credit in New York. This program, therefore, is being planned with the intention to offer CLE credit for experienced New York attorneys only. Attendees of this program may be able to claim England & Wales CPD for this program. WilmerHale is not an accredited provider of Virginia CLE, but we will apply for Virginia CLE credit if requested. The type and amount of credit awarded will be determined solely by the Virginia CLE Board. Attendees requesting CLE credit must attend the entire program.*

Wilmer Cutler Pickering Hale and Dorr LLP is a Delaware limited liability partnership. WilmerHale principal law offices: 60 State Street, Boston, Massachusetts 02109, +1 617 526 6000; 1875 Pennsylvania Avenue, NW, Washington, DC 20006, +1 202 663 6000. Our United Kingdom office is operated under a separate Delaware limited liability partnership of solicitors and registered foreign lawyers authorized and regulated by the Solicitors Regulation Authority (SRA No. 287488). Our professional rules can be found at [www.sra.org.uk/solicitors/code-of-conduct.page](http://www.sra.org.uk/solicitors/code-of-conduct.page). A list of partners and their professional qualifications is available for inspection at our UK office. In Beijing, we are registered to operate as a Foreign Law Firm Representative Office. This material is for general informational purposes only and does not represent our advice as to any particular set of facts; nor does it represent any undertaking to keep recipients advised of all legal developments. Prior results do not guarantee a similar outcome. © 2004-2018 Wilmer Cutler Pickering Hale and Dorr LLP