

WEBINAR

*Antitrust Enforcement in the
Trump Administration: What's
Happened and What's Next?*

FEBRUARY 7, 2019

Speakers: Lee Greenfield, Perry Lange, Hartmut Schneider
and Nicole Callan



Webinar Guidelines

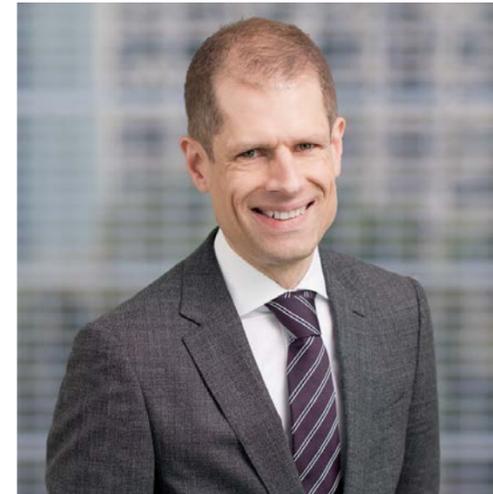
- Participants are in listen-only mode
- Submit questions via the Q&A feature
- Questions will be answered as time permits
- Offering 1.0 CLE credit in California and New York*

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SPEAKERS



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Antitrust and Competition



Hartmut Schneider
Partner
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Perry Lange
Partner
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Nicole Callan
Senior Associate
Antitrust and Competition



DOJ Leadership



Makan Delrahim
Assistant Attorney General
for the Antitrust Division



Andrew C. Finch
Principal DAAG



Roger P. Alford
DAAG (Intl Affairs)



Michael Murray
DAAG

Appointed in 2018



Bernard A. Nigro
DAAG (Civil)



Richard Powers
DAAG (Criminal)

Appointed in 2018



Jeffrey M. Wilder
Acting DAAG (Economics)

Appointed in 2018



FTC Leadership



Joseph Simons (R)
Chairman



Noah Phillips (R)



Christine Wilson (R)



Rohit Chopra (D)



Rebecca Kelly Slaughter (D)

- First time in the Commission's history that all five commissioners were confirmed by the Senate at the same time
- Chairman Simons appointed Bureau leadership in May:
 - Bruce Hoffman, Bureau of Competition
 - Andrew Smith, Bureau of Consumer Protection
 - Bruce Kobayashi, Bureau of Economics



The Shutdown

**THE FTC IS CLOSED DUE
TO THE LAPSE IN
GOVERNMENT FUNDING.**



Due to the lapse in appropriations, Department of Justice websites will not be regularly updated. The Department's essential law enforcement and national security functions will continue. Please refer to the Department of Justice's [contingency plan](#) for more information.

- The DOJ and FTC operated with significantly reduced staff during the 35-day shutdown
 - Approx. 60% of staff were furloughed and the remainder worked without pay
 - The Premerger Notification Office was open but did not respond to questions, and early terminations were not granted
 - Progress on investigations, merger reviews, and litigation was case-by-case, and schedules were stayed insofar as possible
- The agencies are facing a backlog and the threat of another shutdown

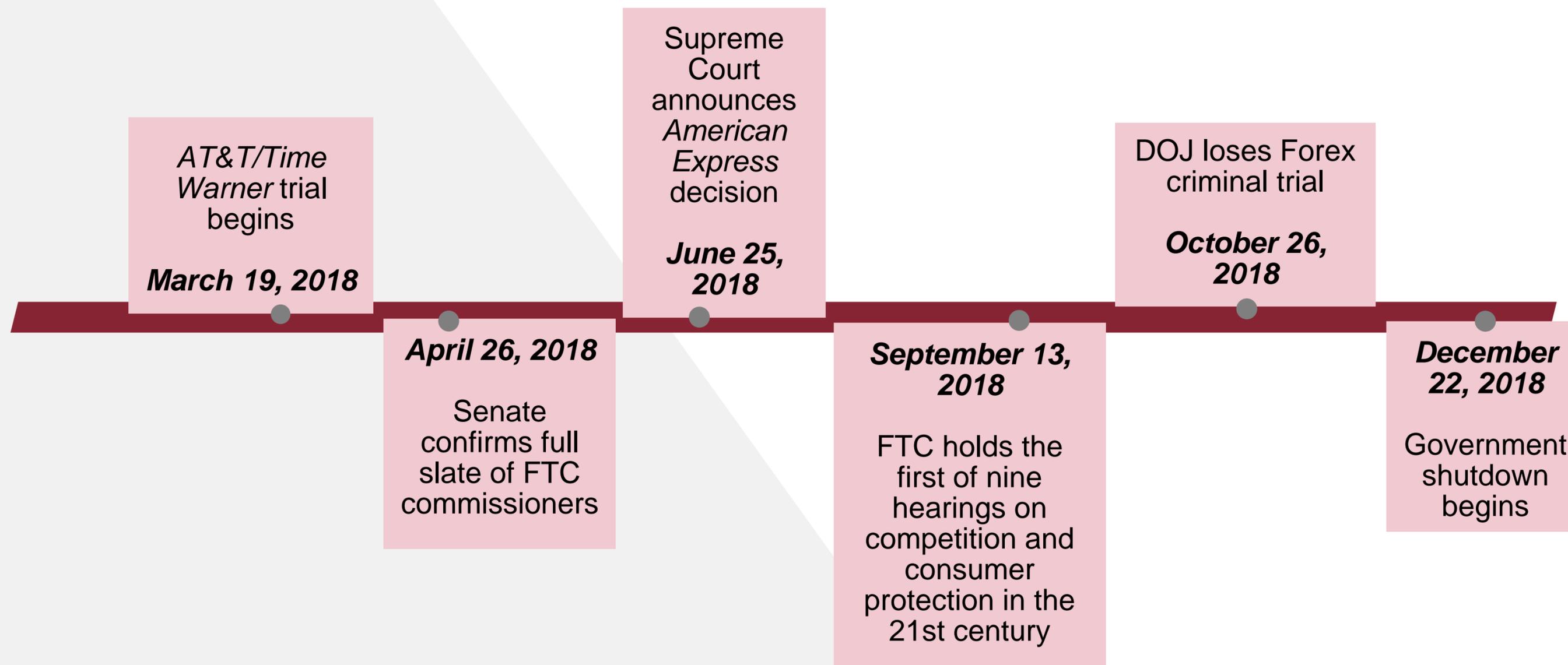


Two Years Into the Trump Administration

- The DOJ has been more vocal on policy positions
 - DOJ pushed an “anti-regulatory” message for remedies in early 2018
 - DOJ continues to advocate positions favorable to patent holders in the IP/antitrust space
- The FTC has been less vocal, but may be the more aggressive enforcer
 - Held 9 public hearings that considered potential changes to competition law
 - Public statements reflect a robust debate within the FTC on foundational principles (e.g., 3-2 decision in *Staples/Essendant*)
- Unclear whether agencies are merely differing in style or diverging on important substantive principles



Key Events in 2018





Merger Trends

- 23 merger challenges resolved in 2018, compared to 27 in 2017
- No marked departure from substantive merger review standards under previous administration
- Efforts to shorten merger review timelines
 - The DOJ and FTC announced plans to expedite merger review process
 - DOJ will aim to resolve most investigations within 6 months
 - FTC announced a new tracking system and goal to reduce length of merger investigations
 - The DOJ published a new model voluntary request letter and model timing agreement, both of which may help expedite merger reviews
 - But the average length of reviews did not change in 2018, and the length of any given review will depend on the circumstances



Merger Trends

- Continued focus on HSR violations
 - Executive fined \$609,810
- Shift in messaging on remedies
 - The DOJ withdrew its 2011 Policy Guide to Merger Remedies, and continues to express a strong preference for structural (or “non-regulatory”) remedies
 - The FTC may be more willing to consider behavioral remedies (e.g., *Northrop Grumman/Orbital*, *Staples/Essendant*, *Corpus Christi Polymers*)
- New vertical merger guidelines?
 - The DOJ announced that it is no longer applying its 1984 non-horizontal merger guidelines, and hopes to issue new guidelines in 2019
 - Several speakers at the FTC hearings on vertical mergers called for updated guidelines, noting that the 1984 guidelines do not reflect current thinking or agency practice



Merger Enforcement: Examples

Litigation

AT&T/Time Warner

- Following a six week trial, Judge Leon ruled for AT&T/Time Warner
- D.C. Circuit heard oral argument on DOJ's appeal on December 6
- AT&T has pledged to manage Time Warner as a separate business until February 28

Otto Bock/Freedom Innovations

- FTC seeking to unwind acquisition of small but "highly competitive" rival of leading prosthetic knee manufacturer

Tronox/Cristal

- Alleged "3 to 2" in titanium dioxide
- D.C. district court issued PI in September
- ALJ upheld FTC's complaint in December



Examples of Significant Settlements

Bayer/Monsanto

- \$9 billion divestiture (largest in DOJ's history) resolved vertical and horizontal concerns

CVS/Aetna

- DOJ negotiated a consent agreement in October 2018, requiring court approval
- Tunney Act review before Judge Leon ongoing

Watson/Actavis

- Sale of 18 overlapping drug lines to resolve concerns about impact in generic drug markets

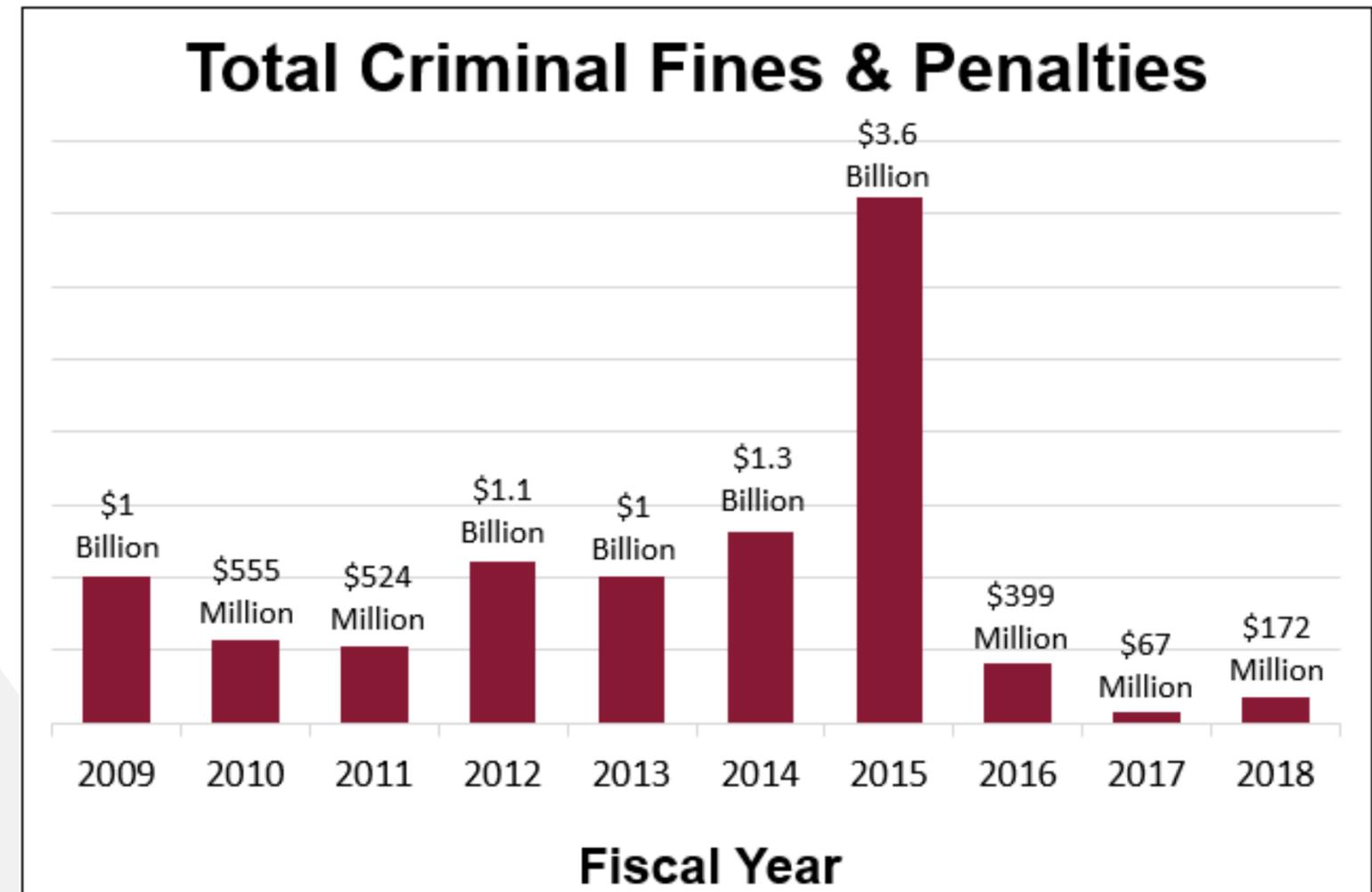
Linde/Praxair

- Proposed transaction announced in June 2017
- FTC settled case in October 2018, requiring divestitures in nine industrial gas product markets



Civil/Criminal Enforcement

- 2018 saw decline in the number of criminal cases filed
- Cartel enforcement predominates
 - DOJ secured guilty pleas in industries including auto parts, capacitors, pulp and paper, and real estate
 - DOJ lost its case against three U.K.-based Forex traders in Oct. 2018
- But criminal fines plummeted
- Big focus on no-poach agreements



Source: DOJ Criminal Enforcement Trends,
<https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>



Civil/Criminal Enforcement

- With fewer global cartel cases, DOJ Criminal Sections investigating conduct where *per se* illegality may be questionable
- DOJ is focused on no-poach agreements
 - DOJ brought civil case against Knorr-Bremse and Wabtec for naked no-poach agreements ending in 2015
 - DOJ will bring criminal charges for naked no-poach agreements that began or continued after the DOJ and FTC's October 2016 guidance on no-poach agreements
 - But DOJ clarified that the no-poach agreements between franchisees and franchisors alleged in fast-food cases likely merit rule of reason analysis
- Expect continued use of documents produced in merger reviews to identify civil non-merger and criminal cases
 - E.g., DOJ discovered information exchanges during *Sinclair/Tribune* merger and later settled claims that Nexstar shared competitively sensitive information with rival television broadcasters
- Expect continued focus on online activities
 - E.g., FTC's decision in *1-800 Contacts*



Intellectual Property & Antitrust

- *FTC v. Qualcomm* continues
 - FTC won partial summary judgment, with Judge Koh ruling that Qualcomm is obligated to license SEPs to competing chipmakers
 - Trial concluded on Jan. 30
 - Judge Koh said her decision would take longer than usual, given the complexity and stakes
- *FTC v. AbbVie* appeal
 - AbbVie is appealing the FTC's \$448 million penalty over alleged sham infringement suits against generics
 - First time a court held that sham litigation violated Section 2 since the Supreme Court's 1993 *Professional Real Estate* decision clarifying legal standard
- Delrahim's "New Madison Approach" suggests more favorable position towards patent holders
 - DOJ focused on collusion concerns at SSOs, less concerned about disputes over FRAND obligations
 - Delrahim urged courts to protect patent holders' right to seek injunctions, even for SEPs



Major Court Cases

- *Ohio v. American Express* (two-sided markets)
 - 5-4 majority found that plaintiffs must show a net harm in transactional two-sided markets--i.e., harm to both merchants and cardholders in the credit card market
 - Many questions remain
 - Expect litigation over how decision applies to various types of two-sided markets
- *Apple v. Pepper* (indirect purchasers)
 - Apple argued consumers are indirect purchasers in the app store, and therefore lack standing to sue for allegedly inflated app store charges under the Court's 1977 *Illinois Brick* decision
 - Some Justices questioned the wisdom of *Illinois Brick* during oral arguments in November
- *Viamedia v. Comcast* (refusals to deal)
 - Viamedia, which represents small cable operators in ad sales, challenged Comcast's refusal to deal
 - The DOJ filed an amicus brief urging the court to hold that a refusal to deal does not violate Section 2 unless the refusal would make "no economic sense" but for its tendency to eliminate or lessen competition



State Enforcement

- State and federal enforcement can diverge; e.g.,
 - 9 states opposed DOJ's appeal in AT&T/Time Warner, arguing that the merger would benefit consumers
 - 5 states opposed the Bayer/Monsanto settlement, arguing the transaction threatened innovation in the already concentrated seed market
- Some states have been particularly aggressive; e.g.,
 - Washington AG obtained consent decrees from fast food franchisors promising to remove no-poach provisions from their contracts
- AGs overall have so far not been as aggressive on antitrust issues as some predicted
- 7 new Democratic AGs in 2018, a majority of state AGs now Democrats



International Enforcement

- Little indication that shifts in U.S. policy resonate abroad
- Non-U.S. regulators are pursuing cases that diverge from U.S. norms
 - E.g., privacy concerns, issues at the intersection of antitrust and IP, and single-firm conduct such as refusals to deal
- Expect continued independence from U.S., particularly for platforms
 - The EC has issued record fines for tech companies
 - EC is closely examining data set acquisitions
 - Commissioner Vestager is expected to detail long-term plan for regulating tech companies during her last year in office
 - Non-U.S. jurisdictions continue to impose behavioral remedies
 - E.g., SAMR imposed behavioral remedies in *Luxottica/Essilor*, *Bayer/Monsanto* and *Linde/Praxair*
 - Especially in China, remedies may diverge from U.S./EC norms (e.g., pricing commitments)



Congress

- Expect more congressional hearings and investigations
 - Spotlight on tech companies and high-profile mergers
- Senate Democrats reintroduced legislation
 - Sen. Klobuchar's bills would toughen standards for reviewing mergers and raise filing fees on large transactions
- With Democrats controlling House, antitrust legislation is on the table
 - Antitrust enforcement featured prominently in Democrats' 2018 "Better Deal" agenda
 - Rep. David Cicilline (D-RI), new chairman of the House antitrust subcommittee, will hold hearings and has signaled a willingness to pass new legislation
- Republicans also may pursue antitrust agenda
 - At Bill Barr's confirmation hearing, Republican Senators asked about antitrust enforcement, including multiple questions related to tech companies



Antitrust Populism

- Antitrust “populism” has potential to shift enforcement and legal doctrine over the longer term
- Areas to watch:
 - Proposals to enforce in novel ways (or ways that harken back to early eras?)
 - Changes in how to weigh over and under-enforcement risk?
 - Will consumer welfare standard be applied in more intervention ways? Might we see push for radical change in decisional benchmark?
- 2020 Campaign Trail
 - Announced and likely Democratic presidential candidates have called on the DOJ and FTC to step up enforcement
 - Concerns about consolidation, entrenchment of monopoly power, and “bigness” will be a major theme on the 2020 campaign trail



Conclusions

- U.S. antitrust enforcement may be less aggressive in some areas
- But the agencies will face pressure to apply new thinking, including lessons learned from the FTC's hearings on competition and consumer protection
- In mergers, the 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
 - Enforcement is generally less aggressive in this area
- U.S. positions may have diminished influence abroad
- Populist influence is growing



Questions

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