

WEBINAR

*Antitrust Enforcement:  
What Do the 2019 Trends  
Mean for 2020 and Beyond?*

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MARCH 3, 2020

Presented by Lee Greenfield, Perry Lange, Hartmut Schneider,  
and Nicole Callan

Attorney Advertising



## *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



**Lee Greenfield**  
Partner  
Antitrust and Competition



**Hartmut Schneider**  
Partner  
Antitrust and Competition



**Perry Lange**  
Partner  
Antitrust and Competition



**Nicole Callan**  
Senior Associate  
Antitrust and Competition



# *DOJ Leadership*



**Makan Delrahim**  
Assistant Attorney General  
for the Antitrust Division



**Bernard A. Nigro**  
Principal DAAG



**Rene I. Augustine**  
DAAG (Intl Affairs)

*Appointed in 2019*



**Michael Murray**  
DAAG



**Alexander P. Okuliar**  
DAAG (Civil)

*Appointed in 2020*



**Richard Powers**  
DAAG (Criminal)



**Jeffrey M. Wilder**  
Acting DAAG (Economics)



## *FTC Leadership*



Joseph Simons (R)  
Chairman



Noah Phillips (R)



Christine Wilson (R)



Rohit Chopra (D)



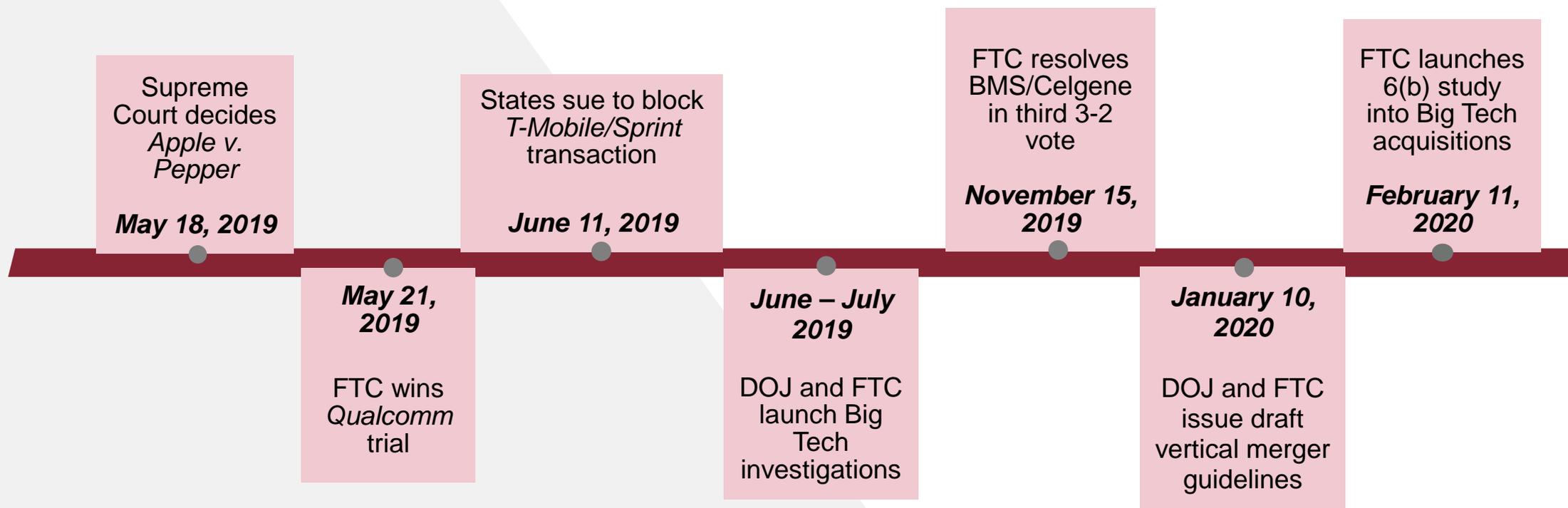
Rebecca Kelly Slaughter (D)

### Current Bureau leadership:

- Ian R. Conner, Bureau of Competition (appointed in December 2019)
- Andrew Smith, Bureau of Consumer Protection
- Andrew Sweeting, Bureau of Economics



## *Key Events in 2019 and Early 2020*





## *Merger Trends*

- **25** mergers challenged in 2019, compared to **22** in 2018
  - In **7** challenges, the agencies sued to block the transaction – the most since 2015
  - The FTC brought **4** of the 7 cases, and the DOJ brought **3**
- The FTC has already brought **4** merger challenges in 2020
- The average length of merger reviews continues to increase, despite efforts to streamline the review process
- DOJ issued at least **7** second requests in cannabis mergers



## *Mergers Trends: Vertical Enforcement*

- Robust debate within the FTC on threshold for enforcement for vertical mergers (e.g., 3-2 decisions in *Fresenius/ NxStage*, joint statement from Democratic Commissioners in *United/DaVita*)



Rohit Chopra   
@chopraftc

The FTC didn't obtain a remedy to protect seniors, patients, and competition in Colorado. Fortunately, the State's Attorney General [@pweiser](#) took action. This is a great example of a State AG stepping up when federal law enforcement stands down.



## *Mergers Trends: Vertical Enforcement*

- FTC and DOJ published draft vertical mergers guidelines
  - Quasi-safe harbor: agencies are “unlikely” to challenge a vertical merger for firms with less than 20% market share
  - The guidelines do not break new doctrinal ground and offer little practical guidance to businesses and practitioners about how the agencies will analyze vertical deals
  - Commissioners Chopra and Slaughter abstained from the vote releasing the draft and issued critical statements
- The agencies will hold two public workshops in March 2020 to solicit public input



## Merger Enforcement: Examples



### Sabre/Farelogix

- Nascent competitor concerns

### Novelis/Aleris

- First use of arbitration in a merger

### CVS/Aetna

- Settlement approved after a two-day Tunney Act evidentiary hearing

### AT&T/Time Warner

- DOJ lost its appeal in the D.C. Circuit



### Axon/VieVu

- Challenge to constitutionality of FTC's administrative process

### Evonik/PeroxyChem

- First FTC merger trial loss in 5 years

### Edgewell/Harry's & Illumina/PacBio

- Disruptive/nascent competitor concerns

### BMS/Celgene

- Resolved in 3-2 decision
- Commissioner statements reflect potential doctrinal divergence

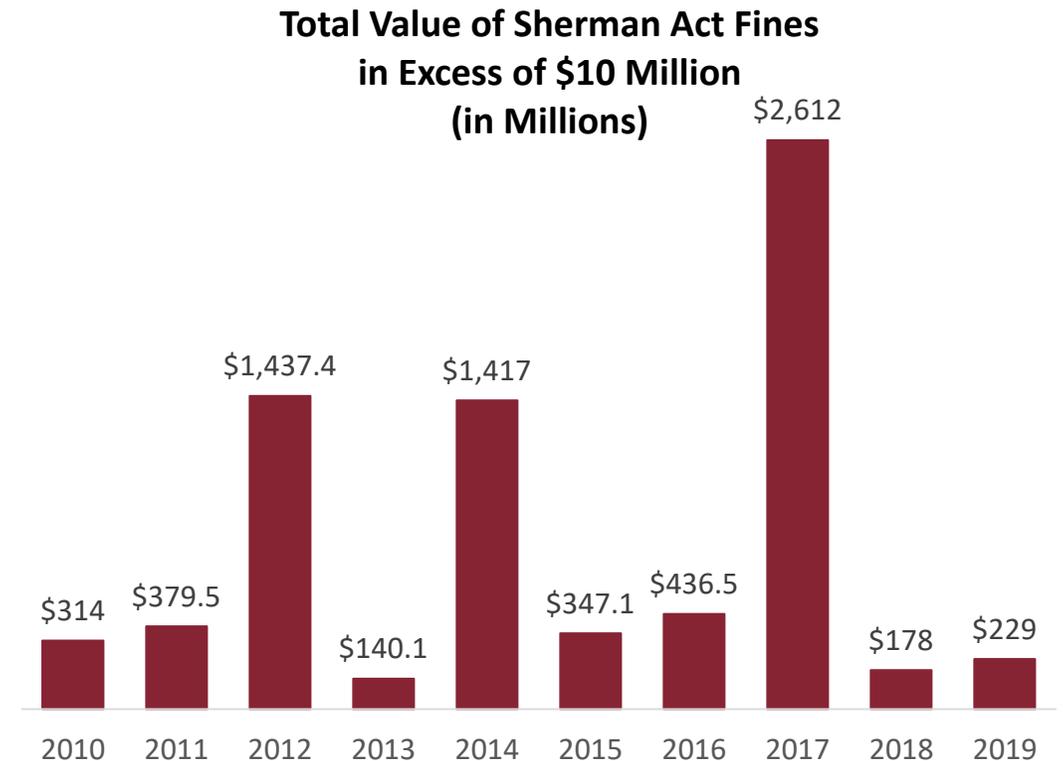
### Fresenius/NxStage

- Horizontal merger with vertical aspects; resolved in 3-2 decision



## *Cartel Enforcement: Trends and Developments*

- No new major cartel investigations made public
- DOJ updated its policy on compliance programs in April 2019
  - Deferred prosecution agreements may be available to companies with effective compliance programs
  - Prosecutors will consider compliance program at the sentencing stage
- DOJ launched a Procurement Collusion Strike Force in November 2019
- DOJ secured extradition of former Martinair executive Maria Ullings, who was indicted in 2010, from Italy



Source: <https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more>



## Major Court Cases

<p><i>Apple v. Pepper</i> (Indirect Purchaser)</p>	<ul style="list-style-type: none"> <li>• Apple argued app consumers lack standing to sue for allegedly inflated app store charges under the Court's 1977 <i>Illinois Brick</i> decision because app developers, not Apple, set retail price</li> <li>• 5-4 majority found that iPhone app consumers are not indirect purchasers and have standing to sue Apple</li> <li>• May increase antitrust risk for platforms with third party vendors</li> </ul>
<p><i>Continental v. Avanci</i> (SEP Licensing)</p>	<ul style="list-style-type: none"> <li>• Continental, a supplier of cellular components to car manufacturers, challenges patent pool's practice of exclusively licensing to car manufacturers and basing its licensing demand on vehicles rather than much lower cost components</li> </ul>
<p><i>FTC v. Credit Bureau</i> (Monetary Relief)</p>	<ul style="list-style-type: none"> <li>• Seventh Circuit opinion reversed prior decision and held that Section 13(b) of FTC Act does not contain an implied restitution remedy; splits with 8 other circuits.</li> </ul>
<p><i>FTC v. Qualcomm</i> (Duty to License)</p>	<ul style="list-style-type: none"> <li>• District court found that Qualcomm has an antitrust duty to license SEP to rival suppliers and that Qualcomm engaged in anticompetitive conduct by using royalties to impose a surcharge on competitor chips.</li> <li>• Appeal pending in the Ninth Circuit.</li> </ul>
<p><i>FTC v. Surescripts</i> (2-Sided Platform)</p>	<ul style="list-style-type: none"> <li>• In April 2019, the FTC filed a complaint alleging Surescripts used vertical and horizontal agreements to maintain its market power over e-prescribing.</li> </ul>



## *Intellectual Property & Antitrust*

- *FTC v. Qualcomm* comes closer to ending
  - District court found for the FTC in May
  - DOJ split from the FTC and intervened on behalf of Qualcomm on appeal
  - FTC's public internal dissent
- Cross appeal in *FTC v. AbbVie*
  - The FTC appealed dismissal of pay-for-delay claim
  - AbbVie appealed a \$448 million sham litigation penalty
- FTC and NY AG challenge “blocking” in *FTC v. Viera Pharmaceuticals*
- Intel and Apple sue PAE Fortress
  - Plaintiffs allege defendants engaged in anticompetitive patent aggregation scheme



## *State Enforcement: Key Leaders*



**Ken Paxton**  
**Texas AG (R)**



**Bob Ferguson**  
**Washington AG (D)**



**Letitia James**  
**New York AG (D)**



**Xavier Becerra**  
**California AG (D)**



## *State Enforcement*

- Coalition of state AGs challenge T-Mobile/Sprint merger
  - Unprecedented suit against national merger despite DOJ and FCC clearance with remedies
  - Brought before DOJ settlement was filed
  - SDNY Court rejects challenge after two week trial
- Large multi-state groups are investigating Facebook and Google
- Washington State AG Ferguson is leading campaign against no-poach
  - State effort has included CIDs, settlement agreements, and national advocacy
- Colorado AG Wiser expanded antitrust team and negotiated remedy in *United/DaVita*
- California enacted first state law prohibiting reverse payments



## *International Enforcement*

- UK CMA prepares for larger role post Brexit
  - Increasing scrutiny of mergers
  - Active on platform/nascent competition issues
- EC continues to focus on tech companies
  - In March, the EC fined Google \$1.7 billion over online advertising practices
  - Google appeal of fine in 2017 search self-preferencing investigation may clarify DG Comp's ability to pursue enforcement actions against digital platforms
- In December 2019, China's SAMR issued draft compliance guidelines to encourage companies to establish compliance systems



## *Big Focus on Big Tech*

- DOJ, FTC, States AGs, and Congress are all investigating Big Tech
  - DOJ is investigating all four companies
  - FTC is investigating Facebook and Amazon and conducting a 6(b) study on acquisitions by Amazon, Apple, Google, Facebook and Microsoft
  - House Judiciary Committee is conducting bipartisan investigation and plans to hold additional hearings
- DOJ and FTC both implemented organizational changes
  - DOJ Antitrust Division adding leadership and staff for technology investigations
  - FTC created the Technology Enforcement Division (TED)





## *Political Headwinds: Uncertainty Ahead*

- Split votes within the FTC likely to continue
- Expect continued scrutiny of enforcement agencies on the Hill
  - Lawmakers criticized dual investigations into Big Tech by FTC and DOJ
  - Democratic Members questioned DOJ's investigation into four automakers that agreed to abide by California's emission standards
- Expect a congressional report on competition in the digital markets—and possibly legislation—in 2020
- States divergence from federal outcomes may continue in 2020
- Antitrust enforcement will play a role in the 2020 election
  - Enforcement priorities will differ depending on the election outcome



## *Conclusions*

- The probability and intensity of in-depth merger review is not likely to change
  - Still critical to assess antitrust risk before agency engagement
  - Agency leadership dynamic will continue to impact staff
- Federal civil enforcement unlikely to change in focus or frequency (aside from big tech)
  - But agencies face increasing pressure to apply new thinking
- Aggressiveness, frequency, and independence of State AG investigations likely to increase
- Congressional influence is increasing
  - Use of bully pulpit and potential legislation are wild cards

*Questions?*

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