



WILMER CUTLER PICKERING HALE AND DORR LLP

WEBINAR

*Antitrust in 2020:
What is in Store for the
Fall and Beyond?*

September 22, 2020

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

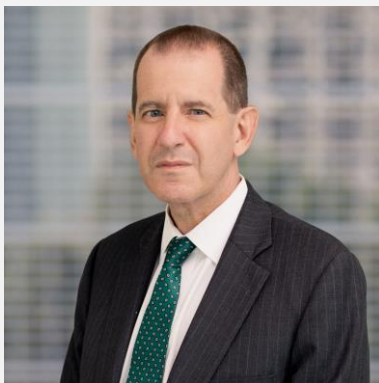


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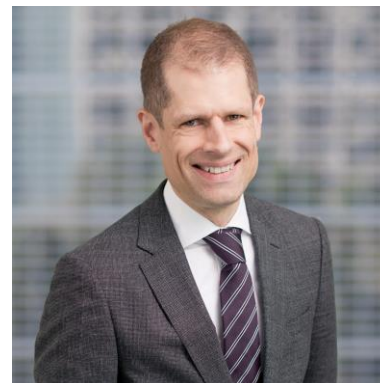
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WEBINAR

Speakers

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Key Events in 2020

District court rejects states' attempt to block
T-Mobile/Sprint Merger

February 11

FTC clears \$63 billion *AbbVie/Allergan* deal, marking the fourth 3-2 split vote in a merger case at the FTC

May 5

Supreme Court grants cert in case challenging FTC's authority to seek restitution

June 22

DOJ and FTC issue updated vertical merger guidelines

June 30

April 13

DOJ and FTC issue joint statement on COVID-19 and competition in the labor markets

May 9

4th Cir. hears appeal from divestiture order in a private merger challenge

June 29

Congress holds Big Tech antitrust hearing



Merger Trends

Significant fluctuation in the number of **HSR filings** during 2020

- Steep drop in filings in Q2 2020 due to COVID-19 crisis, reaching a low of 73 filings in May
- Filings rebounded to a high of 182 filings in August
- 997 total filings to date as of August 2020, compared to 2,030 in 2019

Continued active **enforcement against mergers** with substantive issues

- So far in 2020, **20** mergers have been challenged or settled
 - FTC challenged or settled **14** mergers; another **7** mergers were abandoned
 - DOJ challenged or settled **6** mergers; another **1** merger was abandoned

DOJ and FTC issue new merger guidance

- **FTC/DOJ Vertical Merger Guidelines** updated for the first time since 1984; mostly reflects agency practice without groundbreaking changes
- **DOJ Merger Remedies Manual** replaced 2004 Policy Guide to Merger Remedies; clarifies certain practices and provides important guidance



Merger Enforcement: Examples



Sabre/Farelogix

- Nascent competitor concerns

Novelis/Aleris

- First use of arbitration in a merger

London Stock Exchange/Refinitiv

- Rare statement by DOJ about decision not to challenge; rejecting various vertical theories after extensive investigation



Altria Group/JUUL Labs

- Challenge to consummated acquisition (35% ownership stake in JUUL)

Axon/VieVu

- Challenge to constitutionality of FTC's administrative process

Edgewell/Harry's

- Disruptive/nascent competitor concerns, notwithstanding low combined shares

AbbVie/Allergan

- \$63 bn pharmaceutical acquisition
- Another 3-2 FTC split; disagreement over adequacy of remedies



Non-Merger Enforcement

DOJ on track for lowest number of **criminal enforcement** actions in the last ten years

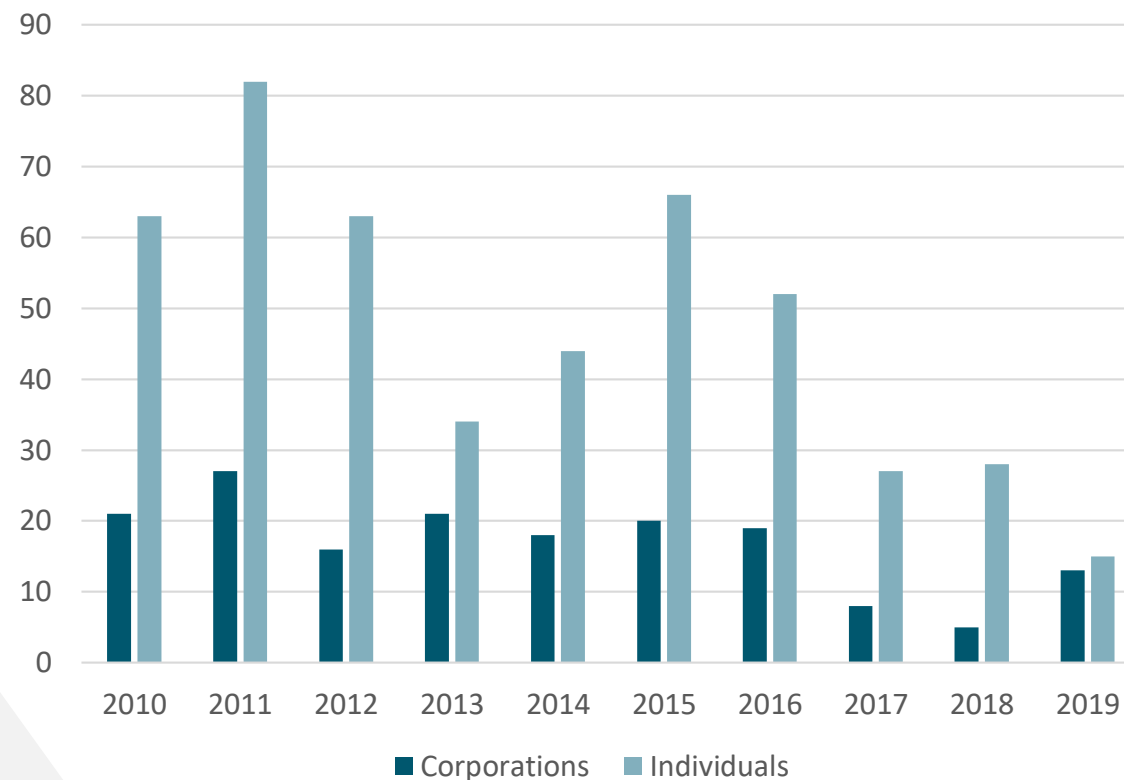
- Continued enforcement against pharmaceutical companies, including **7** new cases filed
- Sandoz agreed to pay \$195 million in criminal penalties—the largest in history for a domestic antitrust violation

Antitrust and IP

- DOJ leadership continues to advocate patent owner-oriented “New Madison” approach
- Speeches, *amicus* briefs, amendment of IEEE Business Review Letter

DOJ announced it will start providing notice in all CIDs and depositions that it may use information provided in any other matters

DOJ Criminal Enforcement Trends





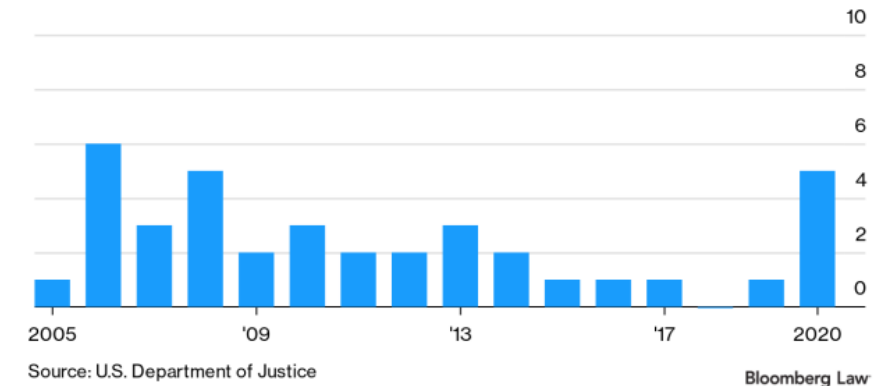
Effect of COVID-19: Trends and Developments

COVID-19 effects on antitrust **depend on topic**

Flexible approach to **competitor collaboration** aimed at addressing the crisis

- New 7-day expedited “business review letter” procedure
- Three letters published thus far, with DOJ announcing it would not challenge collaborative efforts to:
 - Distribute Personal Protective Equipment
 - Respond to pork supply shortage
 - Share production capacity information for antibody treatment for COVID-19

DOJ Business Letters Issued Annually



But strict enforcement against companies and individuals who use COVID-19 “as an opportunity to subvert competition or prey on vulnerable Americans”



Major Antitrust Court Cases

<p><i>New York v. Deutsche Telekom AG</i></p>	<ul style="list-style-type: none"> • Federal district court rejected States' suit to block T-Mobile/Sprint merger • Court relied heavily on fact witnesses over expert testimony; observed that post-merger effects are "not necessarily guided by theoretical forces or mathematical models."
<p><i>Steves and Sons, Inc. v. Jeld-Wen, Inc.</i></p>	<ul style="list-style-type: none"> • First divestiture order in a private challenge to consummated merger • DOJ filed amicus brief supporting plaintiff • Fourth Circuit heard oral arguments for appeal in May
<p><i>FTC v. Qualcomm</i></p>	<ul style="list-style-type: none"> • Ninth Circuit reversed district court holding that Qualcomm's licensing and sales practices for baseband chipsets violated antitrust laws
<p><i>FTC v. Credit Bureau Center, LLC and AMG Capital Management, LLC v. FTC</i></p>	<ul style="list-style-type: none"> • Supreme Court will resolve circuit court split over whether FTC has authority to seek restitution in court under Section 13(b) of FTC Act (which authorizes injunctive relief but is silent as to restitution)

State Enforcement

Continued trend of state AGs acting as aggressive enforcers in merger and conduct cases, often independent of federal agencies

- Coalition sued to block ***T-Mobile/Sprint Merger***, despite DOJ/FCC clearance
- Multi-state groups collaborating to investigate **Facebook, Google** and **Amazon**
- Individual state AGs pursuing their own enforcement priorities—*e.g.*, employment markets, state-specific merger effects, pharmaceuticals

Active State legislatures:

- CA bars certain generic pharmaceutical settlements (2019)
- CO repeals bar on AG state law actions against federally reviewed mergers
- NY considering adding unilateral conduct, abuse of dominance to Donnelly Act



Bob Ferguson
Washington AG (D)



Letitia James
New York AG (D)



Xavier Becerra
California AG (D)



Ken Paxton
Texas AG (R)



Looking Ahead

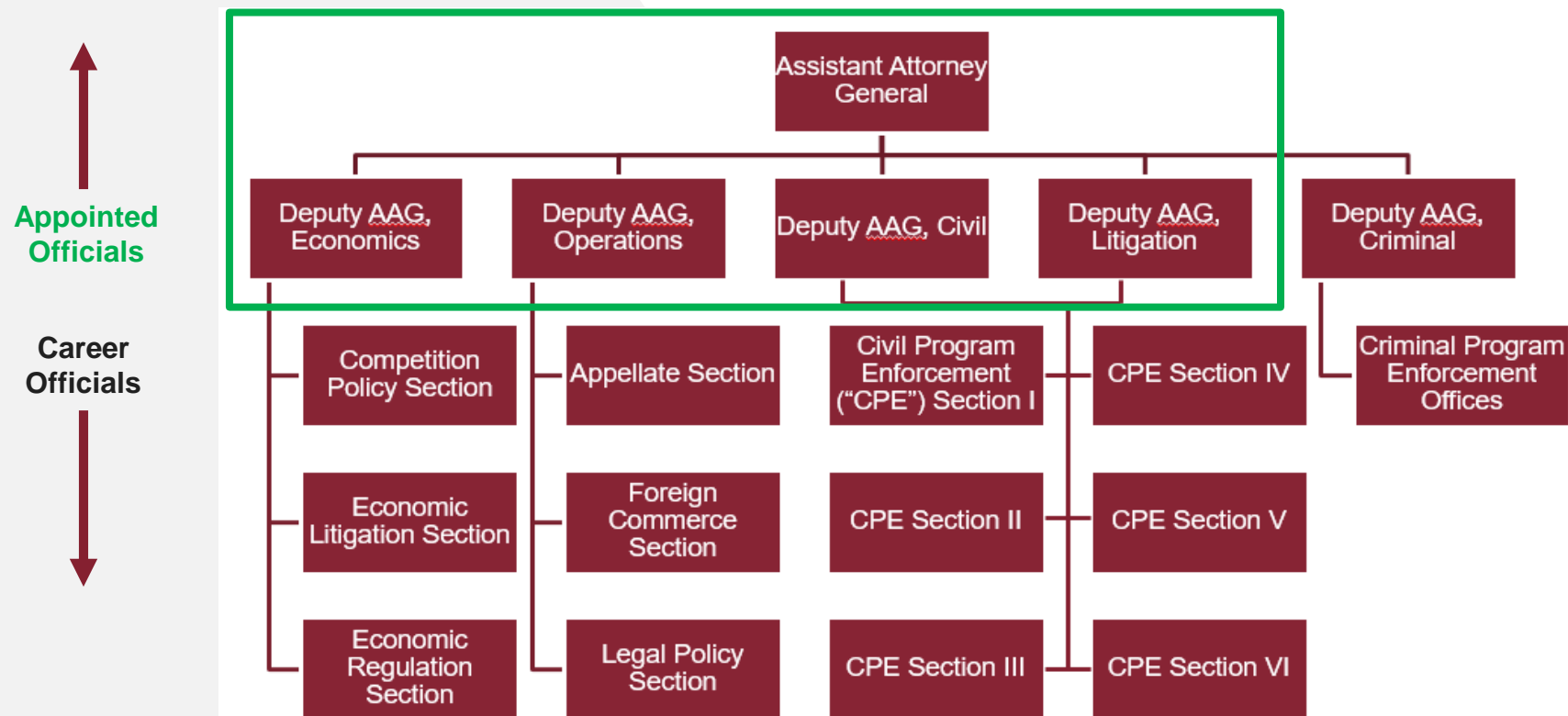
What the 2020 Election Could Mean for Antitrust

- Potential divergent paths based on election outcome
- If Democratic nominee **Joe Biden** wins:
 - Robust antitrust enforcement likely to be core part of agenda
 - Antitrust populism movement may directly influence enforcement
 - Way forward will depend substantially on appointments to agencies (center-left or antitrust populists)
- If **President Trump** wins, expect continued focus on technology and robust enforcement with existing tools, but no fundamental policy changes



WH *Changes at DOJ*

- Assistant Attorney General for the Antitrust Division requires Senate confirmation
- Confirmation process likely to take several months post-inauguration



**Makan Delrahim
AAG**



Changes at the FTC

- Unless a Republican Commissioner resigns, 3-2 Republican majority will continue into 2023
- If Biden is elected, one of the two Democratic Commissioners will likely become Chair, at least for near term
- New Chair may replace key Bureau leadership positions



**Commissioner
Christine S. Wilson**

Term Expires:
09/25/2025



**Commissioner
Noah J. Phillips**

Term Expires:
09/25/2023



**Chairman
Joseph J. Simons**

Term Expires:
09/25/2024



**Commissioner
Rohit Chopra**

Term Expired:
09/25/2019



**Commissioner
Rebecca K. Slaughter**

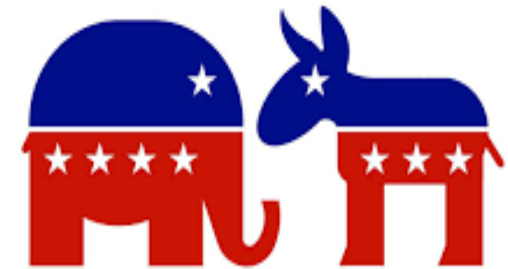
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Potential Impact of Changes at the FTC

Shift to Democratic majority could well change outcomes in controversial merger and conduct cases

- So far in 2020, **5** votes were split 3-2, continuing trend from 2018-19
- Democratic Commissioners wrote spirited dissents, which may presage new outcomes:
 - Challenging sufficiency of merger investigation and wisdom of outcomes (especially in vertical cases)
 - Objecting to majority determinations that structure of remedies or divestiture buyers would fully restore competition lost through merger
 - Arguing that remedies in conduct cases are too lenient
 - Focus on alleged under-enforcement in pharmaceuticals and healthcare



Philosophy of any new Democratic Commissioner likely to be pivotal



U.S. Congress

- Expect **continued scrutiny of high-profile mergers**
- Expect policy plans and **proposed legislation** designed to:
 - Limit high levels of concentration
 - Make it easier to block proposed mergers
 - Break up existing monopolies
- Expect Democrats to start with **more modest proposals** to gain as much bipartisan support as possible
- Whether Congress can move legislation will depend significantly on whether **Democrats** take control of the **Senate** (and potentially on the future of the filibuster)





Looking into the Crystal Ball

- Depending on election outcome, antitrust enforcement could see its most significant transformation in decades
- If Democrats win, likely pressure to apply interventionist theories to actual merger and conduct cases; composition of agency leadership will be crucial
- Regardless of election results, expect continued agency focus on high-tech and other priority areas
- Intensive Congressional focus likely to continue or increase:
 - Continued aggressive oversight of antitrust agencies
 - Congressional report on competition in digital markets—and possibly legislation
 - Potential efforts to supplement open-ended statutes with more prescriptive legislation
- State AGs likely to continue to play aggressive role independent of federal enforcers





Questions

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