# Populist Instincts: A Trump Administration Antitrust Merger Retrospective

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THOUGH NOT MUCH TIME HAS PASSED since the end of the Presidential administration of Donald J. Trump, the Trump administration's merger enforcement legacy already is in plain view.

Initially, at least by midway through 2018, the administration's involvement in antitrust merger enforcement was best described as uneven. On one hand, the Trump administration was less interventionist, consistent with the conventional pro-business, evidence-based approach of recent Republican administrations. Each of the DOJ and FTC pursued policy reforms to streamline investigations, achieve efficiency gains, and eliminate unnecessary time and cost incurred by companies with excessive inquiries and burdensome regulations. And, many merger matters in the first half of the Trump administration were resolved with consent decrees (and a handful of challenges) based on straightforward, uncontroversial theories of harm.

On the other hand, President Trump's various statements condemning the *AT&T/Time Warner* merger on antitrust grounds[1] stood sharply in contrast to a laissez-faire approach. When the DOJ filed its challenge, some critics raised questions as to whether the motivation for the lawsuit was antitrust merit or political pretext. As those critics pointed out, not only was the challenge based on an unproven vertical theory of harm, but it was pursued even after the merging parties made a settlement offer consisting of "final offer arbitration" identical to the remedy that resolved the DOJ's competitive concerns in *Comcast/NBCUniversal* during the Obama administration.

By the end of 2020, the trajectory of merger enforcement seemed to have changed, clearly and decisively pointing towards increased intervention and diverging from recent Republican administrations. Statistics show that after two years of relatively modest enforcement, the number of significant merger enforcement actions in 2019 and 2020, the final years of the Trump administration, were similar to the totals from the final year of the Obama administration. The number of merger challenges in 2020 exceeded any year of the Obama administration, and the number of merger challenges in 2019 equaled the Obama administration's high-water mark in 2015.[2]

Moreover, both federal agencies considered novel theories of competitive harm in the last two years of the Trump administration, as reflected in consent decrees, press releases, and complaints. In pursuing both traditional and novel theories, the agencies dedicated significant resources to litigation preparedness, making good on threats to block deals where proposed remedies were viewed as insufficient. As such, not only the volume, but also the scope and nature of merger enforcement in the second half of the Trump administration seemed to diverge from past Republican administrations.

So, what exactly caused this change in trajectory? At least to some extent, President Trump's populist appeal to the American worker and consumer contributed to enhanced merger intervention. President Trump's self-positioning as an outsider, willing to challenge the status quo, created an atmosphere where the vision of increased, or different, merger enforcement became a reality.

Yet, this explanation misses the bigger picture, and is more of a symptom than a cause. Even when the Trump administration allegedly influenced specific merger investigations, the administration did not appear to be ideologically inclined towards increased merger enforcement or interested in changing standards and rules. While politics played a substantial role in antitrust merger enforcement, more so than in the past, something else happened during the last two years. Namely, a consensus quickly formed among American antitrust regulators that increased consolidation in certain industries has stunted economic growth and that a course correction is necessary and should be more aggressive. In addition, deep concerns about consumer welfare in the age of "Big Tech" and "Big Data" took root among the same group.

As that consensus formed, proposals for fundamental changes to merger enforcement have intensified. A growing group of regulators, scholars, and politicians claim that the current approach to merger enforcement is too lax and particularly ineffective to protect consumers against the perils of digital markets and Big Tech. Whether the group is labeled "hipster antitrust" or something else matters less than its serious, data-based claims for expansive changes to merger enforcement.

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The change in sentiment has come fast. In the last two years of the Trump administration, the idea that the conventional approach to merger enforcement has created an unwanted "gap" graduated to a school of thought. This development perhaps is best captured in two phenomena: the agencies' sea change in preference for divestitures over behavioral remedies in vertical deals, and the sudden proliferation of agency challenges of so-called killer acquisitions, whereby allegedly a dominant incumbent buys a nascent competitor offering an emerging product or service that may threaten to disrupt the incumbent. Theories regarding network effects, conglomerate effects, labor monopsony, and others, while not traditionally staples of U.S. antitrust merger jurisprudence, are close relatives of the "new vertical" approach and killer theory, and the agencies seem to be considering them in some investigations already.

## A Statistical Analysis of Trump Era Enforcement

By the numbers, the Trump administration's four-year merger enforcement record reflects a tale of two halves. As several practitioners and pundits forecasted, the first half marked a retreat in enforcement relative to the Obama administration. However, the second half reflected a significant uptick in enforcement activity, and in particular, in the filing of complaints to block deals.

The Table 1 shows a combination of two data sets, which do not temporally align, but from which directional observations can be drawn. The left-hand side of the table consists of the number of transactions, preliminary investigations, and Second Request investigations in a given fiscal year, which the FTC and DOJ publish annually in the HSR Annual Report.

The right-hand side of the table reflects statistics on the number of significant merger challenges as defined by the Dechert law firm's merger timing and activity tracker, DAMITT.[3] As most practitioners familiar with the resource are aware, it tracks the number of FTC or DOJ consent orders and challenges, as well as closing statements and deal abandonments that the FTC or DOJ publicly acknowledge. However, this resource measures time over the calendar year, so it does not align with the HSR Annual Report that runs from October 1 through September 30.

Between FY 2016 (the final year of the Obama administration) and FY 2017 (the first year of the Trump administration), the number of HSR reportable transactions increased by 220 deals, but the number of Second Request investigations decreased by three. That trend continued into FY 2018, where there were 36 more HSR reportable deals than in FY 2017, but six fewer Second Requests. While the agencies cleared transactions and issued Second Requests in FY 2017 at rates similar to FY 2015 (the second-to-last year of the Obama administration), the percentage of clearances and Second Requests fell off considerably in 2018. The second request issuance rate dropped further from 2.6% in FY 2017 to 2.2% in FY 2018, even as the volume of reported transactions rose.

Similarly, the number of FTC and DOJ court proceedings and consent orders dropped from calendar year 2016 to 2017. And, while the number of court proceedings held steady from calendar year 2017 to 2018, there were seven fewer consent orders. In fact, calendar year 2018 marks the lowest merger investigation rate in the prior eight years.[6]

In addition, the below inset Table 2 shows the percentage of significant enforcement actions relative to Second Requests fell noticeably from 2016 to 2017, and hit a low water mark in 2018. While a comparison for fiscal year Second Requests reported and calendar year significant enforcement actions is not apples-to-apples, the trend is notable and illustrates the reduced enforcement in the beginning Trump administration.

**Table 1**
**Enforcement Activity by Year, 2015-2020**

| | Data Based on FTC/DOJ Fiscal Year[4] | | | | | Data Based on Calendar Year | | | |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | Enforcement Action[5] | | | |
| Year | Adjusted Transactions Reported | Clearances (Preliminary Investigations) | Second Requests | Percentage of Preliminary Investigations with Second Requests | Second Request Rate | Court Proceeding Initiated | Abandoned or Restructured / Closing Statement | Consent Orders / Decrees | Total |
| 2015 | 1,754 | 258 | 47 | 18.2% | 2.7% | 7 | 3 / 3 | 24 | 37 |
| 2016 | 1,772 | 238 | 54 | 22.7% | 3.0% | 6 | 1 / 0 | 26 | 33 |
| 2017 | 1,992 | 277 | 51 | 18.4% | 2.6% | 3 | 1 / 0 | 23 | 27 |
| 2018 | 2,028 | 286 | 45 | 15.7% | 2.2% | 3 | 1 / 3 | 16 | 23 |
| 2019 | 2,030 | 237 | 61 (52)* | 25.7% (21.9%) | 3.0% (2.6%) | 7 | 2 / 2 | 15 | 26 |
| 2020 | | | | | | 8 | 2 / 1 | 22 | 33 |

* Number in parentheses removes 9 Second Requests relating to investigations in the cannabis industry that, according to whistleblower testimony, were issued by the DOJ without competitive concerns. Reprinted courtesy of Dechert LLP.

| Table 2<br>Enforcement Actions (Calendar Year) Relative to Second Requests (Fiscal Year) | | | |
|---|---|---|---|
| Year | Second Requests (Fiscal Year) | Total Enforcement Actions (Calendar Year) | % of Second Requests Resulting in Enforcement Actions |
| 2015 | 47 | 34 | 72% |
| 2016 | 54 | 33 | 61% |
| 2017 | 51 | 27 | 53% |
| 2018 | 45 | 20 | 44% |
| 2019 | 61<br>(52)* | 24 | 39%<br>(46%) |
| 2020 | | 32 | |

* Number in parentheses removes 9 Second Requests relating to investigations in the cannabis industry that, according to whistleblower testimony, were issued by the DOJ without competitive concerns. Reprinted courtesy of Dechert LLP.

FTC and DOJ antitrust enforcement rebounded significantly in the last two years of the Trump administration. In FY 2019, the agencies issued 61 Second Requests, accounting for a rate of 3.0%, returning to 2016 levels.[7] Even putting aside Second Requests in the cannabis industry that, according to whistleblower testimony, the DOJ allegedly issued without competitive concerns (and did not result in enforcement actions), the rate is still 2.6%, a recalibration to 2015 levels.

Looking back to Table 2, the enforcement rate did not increase meaningfully (or, depending on whether cannabis investigations are counted, at all) from 2018 to 2019. However, as Table 1 shows, the agencies brought a considerably higher number of court challenges in 2019, doubling the 2018 calendar year figure and meeting the 2015 figure from the Obama administration.

Moreover, in calendar year 2020, the agencies completed a higher number of significant enforcement actions than in the prior three years and brought eight challenges in 2020, exceeding the high-water mark from the Obama administration and approaching 2016 totals. While the FTC likely will not release the 2020 fiscal year HSR Annual Report until July 2021, the general expectation is that the enforcement rate in Table 2 will likely remain similar or increase again in 2020, consistent with the reported high volume of enforcement activity.

While more data for FY 2020 remains to be gathered to complete the statistical picture, the image of an inverted bell curve emerges, initially dipping but then recovering fully to prior levels. This is hardly the downward-sloping line some antitrust practitioners, economists, and scholars envisioned when President Trump first took office in 2017.

## Politics and Antitrust in the Trump Administration: The Backdrop

With some limited exceptions, the theories underpinning antitrust merger enforcement have remained consistent across administrations for the past few decades. Democratic administrations have tended to bring more enforcement actions and Republican administrations have shown more restraint, but the amplitude of change in enforcement between administrations of different political parties has been marginal.

During the last two years of the Obama administration, however, the FTC and DOJ pursued more aggressive merger enforcement, bringing a significantly higher number of merger challenges than at any point in the prior six. In the first term of the Obama administration, the FTC and DOJ released the new Horizontal Merger Guidelines.[8] In the second half of the second term, the FTC and DOJ successfully pursued merger challenges under those Guidelines, alleging narrow product markets and theories of price discrimination.[9]

Meanwhile, an academic debate about the need for a shift in merger enforcement ideology had been percolating for some time. Around 2016, that debate broke through the mainstream enforcement consciousness. Candidate Hillary Clinton's presidential platform included talking points regarding continued vigorous merger enforcement.[10] And, in May 2016, towards the end of the Obama administration, the Council of Economic Advisors published an issue brief entitled "Benefits of Competition and Indicators of Market Power." The paper argued that increased consolidation across industry sectors had resulted in higher than expected profits for firms without delivering benefits to consumers, suggesting durable market power.[11]

This paper and other academic research identified increased consolidation as a root cause of a decline in competition, and fed a growing populist sentiment that enhanced merger enforcement was necessary for change.[12]

Less than two months later, the U.K. voted to leave the European Union. A few months after that, Lina Khan's now famous *Yale Law Journal* note, *Amazon's Antitrust Paradox*,[13] argued for a fundamental re-thinking of antitrust policy and practice, citing with approval the departing Assistant Attorney General's statement calling into question whether the consumer-welfare standard should be modified in light of empirical evidence.

It is against this backdrop of heightened populism that, in October 2016, AT&T announced plans to acquire Time Warner, months before the presidential election. Then-candidate Trump vowed to block the transaction, characterizing it as "a deal we will not approve in my administration because it's too much concentration of power in the hands of too few."[14] Many in the press looked behind these comments, noting that Time Warner owned CNN, a network that then-candidate Trump claimed carried "fake news" programming.[15] Around the same time, candidate Trump similarly criticized Comcast's vertical acquisition of NBC Universal, which the DOJ approved in 2011, and derided Amazon for having "a huge antitrust problem because [it's] controlling so much."[16] When Trump was elected President in November 2016, these remarks suddenly took on a new level of importance, raising concerns as to whether the administration would seek more vigorous, if less predictable, enforcement.

Such concerns did not immediately materialize. As noted above, enforcement decreased across the board in 2017. But, given the populist calls for changes to antitrust merger enforcement, including from the incoming President, why was this the case? One possibility is the delay in confirming the Assistant Attorney General of the DOJ and the Chairman and Commissioners of the FTC.

## The Era of Two Commissioners and the Maintenance of the Status Quo

On January 25, 2017, only a few days after President Trump's inauguration, FTC Chairwoman Edith Ramirez stepped down. Following the Chairwoman's departure, Commissioner Maureen Ohlhausen stepped into the role of Acting Chairwoman. Ohlhausen held this role for nearly a year and a half, until the Senate confirmed Chairman Joseph Simons, as well as three other commissioners in May 2018. During the entire 18-month period, only two of the five commissioner seats were filled, with Ohlhausen the only sitting Republican Commissioner and Terrell McSweeny the only sitting Democratic Commissioner.

The FTC cannot take administrative action in the event of a tie vote. This meant that both Commissioners effectively held veto power over enforcement actions. As the Acting Chairman remarked towards the end of her tenure, "No case goes forward unless there is a bipartisan consensus."[17] Quite impressively, the commissioners reached consensus on many challenges and deals with consent orders. But the FTC moved towards less interventionist merger enforcement in 2017, at least as a purely statistical matter.

It is possible this was due to practical limitations on bandwidth with only two commissioners and their staffs. Yet, Ohlhausen's speeches during her tenure as Acting Chair were characteristic of a conventional Republican administration, contrasting with Commissioner McSweeny's views. First, Ohlhausen emphasized "regulatory humility," reducing excessive burdens on business in the investigative process and avoiding over-enforcement due to the societal and economic costs. Second, Ohlhausen emphasized an evidence-based approach to merger enforcement and rejected invitations to expand the consumer-welfare standard, as economists from the Obama administration advocated.[18]

In a separate but parallel development, towards the end of 2016 into early 2017, the FTC finalized its *Merger Remedy Study*, which characterized merger remedies as effective, but encouraged greater intervention and stronger remedies moving forward.[19] Interestingly, the study found all vertical remedies analyzed were successful. However, the study found only 66 percent of the relevant horizontal remedies to be successful. The recommendations in the Study gained traction at the FTC and DOJ after the divestitures relating to two transactions cleared by the FTC turned out unsuccessful.[20] These outcomes led to a more skeptical view of divestitures, as illustrated during Acting Chairwoman Ohlhausen's tenure by the FTC's broader approach to structural relief in the *Walgreens Boots Alliance/RiteAid* merger in early- to mid-2017.[21]

The FTC's merger docket during Acting Chairwoman Ohlhausen's tenure reflected a maintenance of the conventional status quo, rather than a deliberate move towards increased or different merger enforcement. For example, in *Broadcom/Brocade*, a vertical merger in the data center industry, the FTC accepted what most would regard as a standard behavioral remedy: a firewall and a commitment not to violate information exchange restrictions.[22] In addition, the FTC investigated, but did not pursue, Amazon's acquisition of Whole Foods in June 2017.[23]

Even in the FTC's 2018 challenge of the *CDK Global/AutoMate* deal, an early application of the killer acquisition theory, certain facts complicated the merging parties' litigation posture: one month prior to the lawsuit, private plaintiffs sued CDK for entering into unlawful agreements with its largest competitor in violation of the Sherman Act. Similarly, the complaints in *Draft Kings/FanDuel* (parties had an alleged combined 90 percent market share of paid daily fantasy sports)[24] and *JM Smucker/ConAgra* (parties had an alleged 70 percent market share of canola and vegetable oils),[25] each of which resulted in subsequent deal abandonments, involved straightforward horizontal theories of harm.[26]

That is not to say, however, that the FTC did not pursue difficult merger challenges in 2017 and 2018. On the contrary, the FTC took the rare step of challenging a consummated deal in its December 2017 complaint against Otto Bock's merger with Freedom Innovations.[27] In addition, the FTC sued to block Tronox's proposed acquisition of Cristal, ultimately resulting in litigation and a settlement involving the sale of Cristal's North American titanium dioxide business to Ineos in April 2019.[28] Finally, in September 2018, the FTC successfully enjoined Wilhelmsen Maritime's proposed acquisition of Drew Marine based on a theory of price discrimination in the provision of certain critical marine services to global fleets.[29]

## Meanwhile, at the Division…

At the DOJ, with the exception of *AT&T/Time Warner*, the same was true. Assistant Attorney General Makan Delrahim was confirmed in September 2017, and in the period between the beginning of the Trump administration and then, the DOJ took a relatively modest approach to merger enforcement. While the DOJ did challenge the consummated *Parker Hannifin/CLARCOR*[30] merger and obtained large divestitures in *Bayer/Monsanto*[31] and *Dow/DuPont*,[32] the remaining civil merger cases involved relatively conventional consent orders with predictable structural relief.

In addition, AAG Delrahim's initial speeches struck a similar chord to Acting Chairman Ohlhausen's, supporting "limited government and a reduction in regulation" and stressing that antitrust should reflect "law enforcement principles to maximize economic liberty subject to minimal government intrusion." In particular, in AAG Delrahim's often-cited speech regarding the "modernization" of the antitrust process, the AAG outlined plans to reduce the length of merger investigations, including by publishing a model voluntary access letter, introducing a revised model timing agreement, and setting forth a number of initiatives designed to reduce the burden of antitrust review on merging parties.[33]

Then, in November 2017, two months after AAG Delrahim's confirmation, the DOJ made the groundbreaking decision to challenge the *AT&T/Time Warner* merger, the first court challenge of a vertical deal in 40 years.

## The Historic *AT&T/Time Warner* Challenge

By the time of the DOJ's lawsuit, vertical merger enforcement had become a politically charged topic. Allegations that political influences motivated the DOJ's review of the deal—in particular, that the administration sought to force the sale of CNN without regard to sound antitrust principles—were immediate and widespread.[34] As *Politico* reported,

> Trump's history of statements about the merger and CNN—including tweeting an edited professional wrestling video that showed him striking a man whose head is replaced by a CNN logo—are expected to be fodder for AT&T's arguments in the court case. Even Democratic lawmakers who oppose the deal on ideological grounds have expressed concern that politics has poisoned the merger's review.[35]

Given the ultimate decision maker at the DOJ, unlike the FTC, is a single person allegations of political influence at the DOJ were particularly acute in the early days of AAG Delrahim's tenure, as well as the interim tenure of Acting AAG Andrew Finch prior to Delrahim's confirmation.

Notwithstanding these allegations, which the Trump administration denied, AAG Delrahim laid the groundwork for a principled stance against behavioral remedies in a number of speeches after being confirmed by the Senate.[36] In AAG Delrahim's September 2018 speech about modernizing the antitrust process, the Division withdrew the 2011 Policy Guide to Merger Remedies, replacing it with the 2004 Policy Guide until the release of an updated policy. And, in a November 2017 speech at the ABA Antitrust Law Section Fall Forum, Delrahim decried the use of behavioral remedies, stating that the "goal in remedying unlawful transactions should be to let the competitive process play out," and that "behavioral remedies often fail" in achieving that goal. According to Delrahim, behavioral remedies would only be appropriate in limited circumstances where the merger results in significant merger-specific efficiencies.

Perhaps not coincidentally, the DOJ filed its complaint on November 20, 2017, two business days after the ABA Speech.[37] Despite having conventional justifications, the DOJ's approach in the complaint was aggressive, portending the increased activity that would follow.

The DOJ's theory was predicated on increased bargaining leverage and raising rivals' costs—that the merger would give the combined firm the ability and incentive to charge higher prices for Time Warner content (i.e., HBO, TNT programming) to AT&T's DirecTV's distribution competitors. Under the theory, the merger would give the combined firm increased clout in content negotiations with competing distributors because of the magnitude of the threat to foreclose "must-have" Time Warner content (i.e., blackouts, leading to customer attrition).[38] In turn, that leverage was forecast to lead to higher prices for Time Warner content, and thus higher prices for consumers (the distributors' customers).

The agencies each tried cases under "actual potential competition," "perceived potential competition," and simple foreclosure vertical theories in the 1970s. But, because Supreme Court precedent requires a fact-specific vertical inquiry under Section 7 of the Clayton Act, the agencies' record on vertical cases is mixed.[39] For this reason, for many years the government focused on litigating horizontal cases—where the government can obtain a structural presumption of anticompetitive effects and thus has a higher historical win rate—and tended to seek settlements in vertical cases. The agencies certainly had not litigated a vertical merger case since the advent of Post-Chicago School economic theory, from which raising rivals' costs sprung as a counterpoint to the elimination of double marginalization through vertical integration.

Moreover, the decision to sue in *AT&T/Time Warner* diverged from the approach taken by the agencies in recent vertical consent orders, such as *Nielsen/Arbitron*[40] and *Comcast/NBCU*.[41] In particular, the concerns of increased bargaining leverage and raising rivals' costs articulated in *Comcast/NBCU* did not seem dissimilar from the concerns stated in the *AT&T/Time Warner* complaint, and based on a review of the FCC docket in *Comcast/NBCU* the issue of foreclosure was not clearly in the DOJ's favor.

Complicating the DOJ's posture, the parties proposed a "final offer arbitration" remedy immediately after the

DOJ filed its complaint. Similar to the behavioral remedy accepted in *Comcast/NBCU*, the proposal consisted of an irrevocable offer to have an arbitrator determine the fair market value of Time Warner content in the event of a carriage dispute with a licensee.[42]

Following a six-month trial before District Court Judge Richard Leon, on June 12, 2018, the D.C. District Court denied the DOJ's requested relief for an injunction and allowed the transaction to proceed.[43] The court gave considerable weight to the parties' behavioral remedy, as well as to an analysis by the defense expert, Professor Dennis Carlton, showing that the same arbitration remedy accepted in *Comcast/NBCU* proved effective at preventing blackouts in the years following its implementation.

The DOJ appealed, arguing that the district court's decision was clearly erroneous on several grounds, including that Judge Leon erred in applying economic principles to the facts of the case, but the D.C. Circuit affirmed the district court order. The D.C. Circuit found Judge Leon was within his discretion in crediting the Nash bargaining model used by the DOJ's expert, Professor Carl Shapiro, to quantify the increased bargaining leverage as a result of the merger, but rejecting its predictive effects in light of other evidence, including Carlton's study and the arbitration offer.[44]

### Politics to the Fore After *AT&T/Time Warner*

The DOJ's loss in *AT&T/Time Warner* had a lasting effect on the remainder of the Trump administration in terms of vertical and horizontal mergers. Most importantly, the defense's success and the DOJ's difficulty litigating the fix (covered in detail in a prior article in this magazine),[45] have complicated the FTC's and DOJ's posture towards vertical merger challenges, as demonstrated by a number of consents during the remainder of the Trump administration. At the same time, however, the DOJ's pursuit of an aggressive vertical challenge set the stage for subsequent vertical merger enforcement actions.

As the *AT&T/Time Warner* saga was playing out in federal court, another large media transaction, Disney's acquisition of 21st Century Fox's content business (consisting of regional sports networks, television and film studios, cable television networks, and Hulu), obtained clearance in nearly six months, subject to comprehensive divestitures of overlapping regional sports networks.[46] Many in the antitrust bar saw the settlement as predictable, including the fast timing of the approval, given AAG Delrahim's recent speech entitled "It Takes Two" about modernizing the antitrust merger process.[47]

While the merger clearance aspect of *Disney/Fox* was unremarkable, the politics were anything but. President Trump reportedly congratulated Rupert Murdoch, then the Executive Chairman of 21st Century Fox, on the deal—a far cry from his reaction to the *AT&T/Time Warner* deal. Not long after, a *New York Times* Op Ed accused President Trump of playing political favorites in antitrust merger enforcement, contrasting the DOJ's "hard line" stance against *AT&T/Time Warner* with its "going so easy on Disney-Fox."[48]

Delrahim responded that blocking the *AT&T/Time Warner* transaction "was not the Division's first choice," and that the DOJ initially offered settlement agreements with divestitures. According to the AAG's response, AT&T and Time Warner refused the offers and demanded "behavioral remedies involving promises to refrain from anticompetitive conduct," which the DOJ would not accept. In contrast, Disney and Fox agreed to divest assets sufficient to resolve competitive concerns immediately, enabling a quicker review.[49]

Delrahim noted that the "politicization" of the two matters as stated in the *New York Times* piece "does a serious disservice to the American Public." Perhaps the DOJ could have spent longer contemplating other theories. Yet, the fact that the media second-guessed the DOJ in what was not, at surface level, a controversial consent order demonstrates how populist sentiments had crept into the discussion of antitrust merger reviews and would stay for the foreseeable future.

### Tearing Down the Curtains: *CVS/Aetna* and the Aftermath of DOJ Consents

As allegations of politicization surrounded DOJ antitrust reviews, the DOJ was also considering CVS-Caremark's announced blockbuster acquisition of health care insurer, Aetna. At the time, many commentators pointed out that *CVS/Aetna* might raise some of the same vertical foreclosure issues as *AT&T/Time Warner*, as well as horizontal overlaps.[50] Yet, the DOJ entered into a settlement agreement with the parties to resolve only horizontal concerns related to Medicare Part D prescription drug plan overlaps. The complaint and consent order did not analyze in detail whether the combined firm would have the ability or incentive to foreclose competing health care plans from access to pharmaceutical benefit management and retail pharmacy services.[51]

As fate would have it, the Tunney Act review of the *CVS/Aetna* consent order was assigned to Judge Leon. Having just presided over a controversial lawsuit involving a vertical merger, Judge Leon looked askance at the lack of detail relating to the vertical issues presented in the *CVS/Aetna* complaint and settlement papers, and raised significant concerns about the settlement at an initial status conference. Judge Leon ordered CVS to hold Aetna as a separate business and maintain the status quo of the parties pending the conclusion of the Tunney Act proceeding.[52]

In most Tunney Act proceedings, the court plays a limited role, fairly assessing the public record but according substantial deference to DOJ's prosecutorial discretion. In the *CVS/Aetna* proceeding, Judge Leon determined the DOJ's responses in the public record were too conclusory, and decided to hold a two-day public hearing on the substantive merits of whether the settlement was in the public interest. This was a major departure from past practice, and seemed to signal that the court was paying attention to potential political forces at play in antitrust merger settlements. Following the hearing, the court determined the settlement was in the public interest. But the damage had been done: the court looked over the DOJ's shoulder in a merger settlement like no court had done in the history of the Tunney Act.

The *CVS/Aetna* review, and particularly the political optics of the judicial branch closely assessing the discretion and judgment of the executive branch, may have had an impact on the DOJ. Since that transaction, each of the DOJ's complaints and competitive impact statements in vertical deals have contained quite thorough articulations of how the Division decided to accept a settlement and how a settlement fully resolves competitive harm. More acutely, a handful of consent orders addressed how structural relief remedied vertical harm identified by the DOJ. Examples include *Waste Management/Advanced Disposal*, *Nexstar/Tribune* and *Gray/Raycom*, and *UTC/Raytheon*.[53]

## In and Beyond 2018: The Rising Tide of Merger Enforcement

***Vertical Divergence: The Impact of* AT&T/Time Warner *at the FTC.*** During Acting Chairwoman Ohlhausen's tenure, the FTC did not bring any high-profile vertical merger enforcement actions aside from the firewall remedy in *Broadcom/Brocade*. However, beginning in late 2018 into 2019, a shift in regulatory approach towards vertical deals began to take place. The DOJ's strong stance against behavioral relief in the *AT&T/Time Warner* case prompted many commentators to ask whether and when the FTC would seek to block vertical deals, as opposed to accepting behavioral remedies. In a January 2018 speech entitled, "Vertical Merger Enforcement at the FTC," Bureau of Competition Director Bruce Hoffman stated, "It's important to remember that the FTC prefers structural remedies to structural problems, even with vertical mergers."[54]

Then, in mid-2018, in the midst of the DOJ's litigation of *AT&T/Time Warner*, the FTC entered into a conventional behavioral consent order resolving its concerns relating to Northrop Grumman's acquisition of Orbital ATK, a purely vertical merger.[55] The consent order contained a firewall and commitment to supply solid rocket motors on non-discriminatory terms. However, in a separate statement accompanying the press release and settlement documents, the FTC carefully warned that its acceptance of this remedy was limited to the facts at hand:

> The Bureau of Competition typically disfavors behavioral remedies and will accept them only in rare cases based on special characteristics of an industry or particular transaction. This settlement does not depart from that policy. The special characteristics of the defense industry play an important role in considering appropriate remedies in many transactions.[56]

This showed superficial alignment with the DOJ on vertical remedies, but the extent of alignment on an as-applied basis was (and remains) still far from clear.

***Changing Faces, Changing Priorities, and Heated Vertical Enforcement Actions.*** Upon the departure of Acting Chairman Ohlhausen and Commissioner McSweeny and the confirmation of five new FTC Commissioners, scrutiny of vertical mergers by the agencies intensified. This happened in earnest towards the summer and fall of 2018. Joseph Simons was confirmed as the new Chairman of the FTC on May 1, 2018, and Commissioners Noah Phillips (R), Rebecca Kelly Slaughter (D), and Rohit Chopra (D) were sworn in the next day. Four months later, Christine Wilson, a Republican, was confirmed, giving the FTC five commissioners for the first time in more than two years. This meant the first merger cases for the newly comprised FTC were up for review in or around late 2018.

Chairman Simons' initial speeches demonstrated ideological differences from Acting Chairman Ohlhausen. In prepared remarks at the Hearings on Competition and Consumer Privacy in the 21st Century, the new Chairman stated: "The broad antitrust consensus that has existed within the antitrust community, in relatively stable form for the last twenty-five years, is being challenged."[57] The Chairman noted the prevalence of economic literature regarding a reduction in competition correlating to an increase in concentration since the 1980s, coinciding with the time the consensus formed in response to the widespread adoption of behavioral economics. He also raised the issue of whether "significant adjustments to antitrust doctrine, enforcement decisions and law would be beneficial to our country," calling into question the consumer welfare standard. For their part, Commissioners Chopra and Slaughter viewed the question as a foregone conclusion, staking out positions as antitrust progressives seeking to change the conventional approach early in their respective tenures.

With the new Chairman openly considering an expanded view of antitrust enforcement that sided with Democratic Commissioners, a change in the FTC's modus operandi quickly became visible. The new Democratic commissioners wasted no time staking out ideologically distinct positions on maintaining the vertical merger enforcement status quo with their Republican colleagues. Three vertical merger enforcement actions considered by the FTC between January and June 2019 were hotly contested, setting the tone for the remainder of the Trump administration at the FTC. Each of them resulted in consent orders with dissenting or separate statements by the Democrats, and two of the three resulted in behavioral remedies, passing by a narrow 3-2 vote over highly critical dissents from Commissioners Slaughter and Chopra.

First, Staples' acquisition of Essendant was not a true vertical merger, but rather a diagonal merger.[58] Staples is a retailer of office supplies to large and mid-market businesses and Essendant is a wholesaler that sells office supplies to independent dealers, who in turn compete with Staples for mid-market customers. Thus, Staples competes with Essendant's customers in a separate channel in the supply chain.

After a thorough review of the merger, the FTC required Staples to implement a firewall between its business-to-business operations and Essendant to eliminate the possibility that Staples would obtain price-per-SKU and other sensitive information about independent dealers with which Staples competes.[59]

While the concept of a firewall remedy to cure a diagonal merger may have seemed uncontroversial to practitioners, Commissioners Slaughter and Chopra voted against the firewall and issued detailed dissenting statements explaining their votes. Commissioner Chopra's statement accused the majority of "jumping to conclusions," because the FTC did not sufficiently rule out monopsony buyer power or raising rivals' cost theories.[60] Commissioner Chopra also cast doubt on efficiencies defenses and firewalls generally, as well as the specific firewall in *Staples/Essendant*.

Similarly, Commissioner Slaughter's dissent expressed skepticism about the sufficiency of the remedy, but more broadly, it advocated for a change in approach to vertical merger enforcement, as well as for future retrospective studies to study the impact of vertical deals where the agencies do not sue to block. Citing a number of recent articles and papers relating to increased vertical consolidation and lax enforcement of vertical deals, Commissioner Slaughter indicated a willingness to challenge more vertical deals in the future:

> I am concerned that our conclusions depend on unreliable assumptions and predictions about how a vertically integrated firm will conduct itself and are too credulous about claimed procompetitive benefits unique to vertical integration. Where the Commission identifies competitive concerns, it should be more willing to challenge and seek to block vertical mergers.[61]

In response, Chairman Simons and Commissioners Phillips and Wilson issued a joint statement, explaining that Staff considered, but rejected, buyer power and raising rivals' cost theories as too speculative and inconsistent with the evidence. Staff also investigated, but found no basis for harm with respect to buyer power and vertical foreclosure.

The joint statement further dismissed the dissenting statements' "generalized" concerns about vertical merger enforcement:

> The dissent seems to suggest that our decision in this case is part of a decades-long, bipartisan pattern of faulty analysis, improper assumptions, unreliable predictions, underweighting evidence of anticompetitive effect, and overweighting evidence of efficiencies. But there is a vigorous debate over whether that assertion has any merit, and the sources cited in the dissent have been subject to substantial criticism for both methodological flaws and irrelevance to competition policy.[62]

One month later, a vertical merger debate was again at the center of a consent order carried by a contested 3-2 vote, in *Fresenius/NxStage*. There, the FTC's consent order required a divestiture of NxStage's overlapping hemodialysis bloodlines business.[63] In addition to the horizontal overlap, the parties were vertically related: Fresenius is a provider of in-clinic outpatient dialysis treatments, NxStage is a provider of in-home hemodialysis machines, and in-clinic providers purchase in-home machines for a subset of patients who qualify for in-home treatment (which everyone agrees results in better patient outcomes). However, the FTC did not require further remedies to address the parties' vertical relationship.

Again, Chairman Simons and Commissioners Phillips and Wilson issued a majority statement, and Commissioners Chopra and Slaughter issued separate dissents.[64] The majority statement pointed out that the Commission carefully considered several vertical theories of harm, but concluded those theories were not supported by the evidence, which showed Fresenius would have the incentive to expand downstream output of in-home machines, improving patient health outcomes.

Commissioner Chopra's dissent articulated a concern that the Commission did not sufficiently consider how customer foreclosure would diminish future potential competition in the market for in-home dialysis machines. Chopra described the market as a "duopsony," with Fresenius and DaVita the two largest in-clinic providers with an 85 percent U.S. patient share, and argued that post-merger Fresenius would have no incentive to buy machines from NxStage's competitors. According to Chopra, this would in turn reduce the incentive to innovate in the in-home machine market because the only realistic option for an in-home machine entrant would be to sell to DaVita. Commissioner Slaughter echoed these concerns.

Finally, in August 2019, the FTC voted 4-0 to clear United Healthcare's acquisition of DaVita Medical Group subject to a divestiture of DaVita's managed care provider organization (MCPO) in Southern Nevada.[65] The 4-0 vote may suggest this was a straightforward consent order, but once again, vertical issues were hotly contested. Chairman Simons was recused from considering the transaction. That left two commissioners who voted for the consents in *Staples/Essendant* and *Fresenius/NxStage* and two who voted against them. Again, the FTC cannot act if there is a tie vote, so the transaction tested the ability of the Commission to reach a compromise.

According to the FTC, the divestiture resolved both horizontal and vertical concerns arising in the Las Vegas geographic area. As described in the complaint, the horizontal concern arose because Optum and DaVita each have competing MCPOs in Las Vegas, and the vertical concern was based on predictions that the merger would have enabled Optum to raise MCPO costs to rival insurers selling Medicare Advantage plans in the same area. However, the FTC did not seek relief in relation to a similar vertical relationship in Colorado involving no horizontal relationship.[66] Namely, in Colorado, DaVita had an MCO, whereas Optum did not have an MCPO but did sell Medicare Advantage plans.

Commissioners Chopra and Slaughter voted in favor of the consent order, but issued a separate joint statement.[67]

In the joint statement, the Commissioners argued there was sufficient evidence that the transaction would provide Optum with the ability and incentive to raise Medicare Advantage plan competitors' costs in Colorado, as well as Nevada. The Commissioners, however, noted they did not take action because the Colorado AG's office was in the process of separately negotiating a consent order requiring behavioral remedies to protect insured patients.

Commissioner Phillips and Wilson issued a joint statement, as well.[68] In their statement, the Commissioners recognized the validity of raising rivals' costs and noted that the decision to block the transaction in Nevada was predicated in part on the theory. However, as their separate statement makes clear, Commissioners Phillips and Wilson believed a federal court would not likely grant an injunction given the evidence of efficiencies and, in particular, the elimination of double marginalization, submitted by the parties. As support, Commissioners Phillips and Wilson cited *AT&T/Time Warner*.

***Three's Company.*** These three decisions exemplified the trend towards increased merger enforcement, as well as the intense internal and inter-agency debate on vertical merger analysis and remedies after the arrival of Chairman Simons and the new slate of FTC Commissioners. One can view the FTC's vertical merger approach in 2019 as a calculated response to the DOJ's loss in *AT&T/Time Warner*. Some commentators characterized the DOJ's hardline position against behavioral relief as a pretextual, post hoc justification for the Trump administration's decision to challenge that deal because of Trump's distaste for CNN.[69] These commentators doubled down on the narrative of political influence when the DOJ did not sue to block CVS's acquisition of Aetna on vertical grounds.

Meanwhile, the FTC stayed somewhat distanced from allegations of political influence compared to the DOJ given the FTC's five-commissioner composition and bipartisan processes. But, at the same time, the FTC substantially ramped up vertical merger enforcement as soon as Chairman Simons' arrived.

Thus, while perhaps unintentional, it is possible to view the DOJ's aggressive vertical position early in the Trump administration (which may or may not have been influenced by political motives) as having paved a path for enhanced vertical merger enforcement at the FTC later in the administration, paradoxically driven by Democratic commissioners (who may have been pursuing diametrically opposed political motives). In 2019, the FTC agreed to a series of vertical consent orders, but which were subject to intense internal debate as to the proper scope of relief. The world certainly looked much different from when the FTC blessed the *Broadcom/Brocade* firewall consent just two years earlier.

## Which Way Is Up? The Ensuing Vertical Merger Guidelines Debate

In the wake of these vertical merger decisions, many commentators observed inconsistency and a divergence of approach between the agencies, and even between different cases within the DOJ. Overwhelmingly, a consensus among the business community formed that vertical merger reviews were a morass, and that the outcome of a given vertical merger was rudderless, often depending on which agency reviewed it.

Critics from all sides called out the FTC and DOJ for failing to update the outmoded 1984 Non-Horizontal Merger Guidelines, which were widely viewed as not reflective of modern economic thinking on vertical merger practice. The topic gained widespread attention at the FTC's Hearings on Competition and Consumer Protection in the 21st Century, starting in June 2018, the same month as the *AT&T/Time Warner* decision, and by November 2018, took center stage.

Thus, in the spring of 2019 and in the midst of much ado, the FTC and DOJ set out to create new Vertical Merger Guidelines (VMGs). As the DOJ stated, the agencies embarked on a collaborative process to establish a common framework for the agencies to analyze vertical mergers, thereby providing the business community and antitrust bar increased transparency into the agencies' methods of evaluating vertical deals.[70] Yet, despite having honorable intentions, the process merely highlighted the partisan divisions that already had become clear.

In January 2020, the DOJ and FTC released draft guidelines for public comment.[71] A small flood of 74 public comments was unleashed, in many cases commending the draft guidance for memorializing the current agency approach to vertical merger enforcement, but more often critical that the guidance was unclear, incomplete, should not have a market share safe harbor, or did not move the needle towards more exacting enforcement. Particularly critical of the draft guidelines were Commissioners Chopra and Slaughter, whose positions on vertical mergers aligned with their 2019 dissents. According to some comments, including those of the Democratic commissioners, the draft guidelines were far too permissive towards vertical merger enforcement and lionized elimination of double marginalization (EDM) and efficiencies without recognizing certain types of legitimate non-horizontal harm.

After several months of refinement, the DOJ and FTC issued the final version of the VMGs on June 30, 2020, and simultaneously repealed the 1984 Guidelines.[72] The VMGs incorporated a number of suggestions from the public comments. Most notably, the VMGs removed the market share safe harbor, which stated the agencies would not challenge vertical deals with market shares below 20 percent, in favor of a statement that concentration is one among many factors to assess. Of course, as the ABA Antitrust Law Section comments pointed out, the agencies have never challenged a vertical deal involving shares in an allegedly constrained market below 40 percent, so the removal of the safe harbor was more symbolic than substantive.[73]

The VMGs recognize, if not embrace, the substantial benefits that can inure to customers from vertical mergers as a result of EDM. Although, in contrast to the draft guidelines, the VMGs require parties to prove EDM and explain the agencies will scrutinize such proof carefully alongside proof of raising rivals' costs (RRC). The VMGs also expound on RRC and add theories of competitive harm not contained in the draft guidelines, including theories relating to diagonal mergers, "two-level entry," and conglomerate effects.

Despite these changes, Commissioners Chopra and Slaughter dissented from the issuance of the VMGs.[74] In terms of process, Commissioners Chopra and Slaughter each criticized the absence of a public comment period following the revisions to the draft. In terms of substance, they claimed the guidelines were flawed in several respects, most notably in giving deferential treatment to EDM in vertical mergers and in failing to outline more clearly existing theories of harm such as RRC or additional theories of non-horizontal harm that may occur, including the suppression of prospective entry.

Some public comments requested the VMGs cover the topic of vertical merger remedies. However, given FTC and DOJ leadership took different approaches to vertical remedies in 2018 and 2019, consensus on remedies was not possible and the topic is not addressed in the VMGs. In September 2020, however, the DOJ released its Merger Remedy Guidelines, which filled the gap left by the DOJ's withdrawal of the 2011 Policy Guide, and updated the 2004 Policy Guide. While the 2020 Manual largely aligned with the lessons of the FTC's 2017 Merger Remedy Study and converged with the FTC's actual approach to horizontal mergers, it also embraced structural relief to remedy concerns in vertical mergers and cautioned that behavioral remedies should only be used in rare, bespoke situations or where behavioral relief is ancillary to structural relief.

Thus, while the VMGs were a milestone accomplishment of the Trump administration, they reflect the increased politicization of antitrust merger review, and an intense ideological debate about the standards applicable to vertical merger enforcement at a time when vertical mergers became an increasingly popular form of business combination.

## Knives Out: Killer Acquisitions and Aggressive Litigation Posture

Although vertical merger enforcement may have stolen headlines during most of the Trump administration, starting in 2019 the agencies ramped up litigation and threats to litigate merger cases, including under the killer acquisition theory.

Of course, successfully litigating cases is not novel for the FTC or the DOJ. Yet, while the agencies seemed to have considered bringing cases under the "elimination of a nascent or potential competitor" theory for some time, the most recent attempt had been the FTC's failed attempt to block the *Steris/Synergy* merger in 2015. In that case, the court did not find compelling evidence of the target's intent to compete in the future and held the FTC did not carry its burden of proof.[75]

That all changed after the FTC's 2018 *CDK/AutoMate* challenge led to abandonment of the deal.[76] Then, in early 2019, an economics article entitled *Killer Acquisitions* theorized that pharmaceutical companies may have an incentive to buy companies with overlapping pipeline or R&D products simply to kill the product and earn a higher profit.[77] This paper caught on, and added fuel to the academic debate about whether the current approach to merger enforcement is too lax. Later, in September 2019, the Senate Antitrust Subcommittee had a hearing on *Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms*.[78] By the time that hearing took place, the killer theory had already started to surface in enforcement actions.

## Murderous Intent at the FTC: Serial Litigation Threats with Tech in the Crosshairs

In the FTC's November 2019 review of Bristol-Myers-Squibb's acquisition of Celgene, the agency's consideration of the killer acquisition theory began to surface in pharmaceutical industry consent orders for the first time. The FTC approved the transaction subject to the largest divestiture ever required, by dollar value, but Commissioners Chopra and Slaughter nevertheless dissented. In both dissents, the Commissioners objected to the FTC's method of analyzing pharmaceutical mergers as potentially hindering innovation in the industry, and urged a new approach to analyzing deals in the sector.[79] The Commissioners fell short of calling the deal a killer acquisition, but one does not need to read between the lines to catch the killer acquisition sentiment in these dissents.

By 2019, even in deciding not to bring a killer case in the pharmaceutical context, the FTC clearly signaled it would be looking out for such deals in the future. In the FTC's review of the *Roche/Spark Pharmaceuticals* transaction in late 2019, the FTC did not find the factual basis to challenge the deal on a killer acquisition theory, and voted 5-0 to approve the deal. However, the full Commission signed a statement that limited the decision not to challenge the *Roche/Spark* deal to its facts, and breathed life into the killer acquisition theory moving forward: "The Commission will continue to closely scrutinize acquisitions by incumbents of emerging competitors, and will not hesitate to bring enforcement actions against them where the facts support such action."[80]

Then, in December 2019, the Commission filed suit to block Illumina's acquisition of Pacific Biosciences. Illumina allegedly held a 90 percent share in the market for next-generation DNA sequencing, and Pacific Biosciences had recently won some customers away from Illumina with its own emerging sequencing system. The Commission alleged that despite Pacific's relatively low market share given its status as an entrant, Illumina intended to acquire Pacific and "extinguish it as a competitive threat."[81] Critically, unlike in *Roche/Spark*, the acquired party in *Illumina/PacBio* had already entered the market with current sales, as opposed to a prospective entrant with none. In *Illumina/PacBio*, the parties abandoned the transaction in January 2020 following the complaint.

Only a couple of months after that, in February 2020, the Commission sued to block Edgewell Personal Care's acquisition of Harry's, a new entrant in the men's razor manufacturing space. The Commission alleged that the acquisition eliminated an emerging competitive threat, which threatened the duopoly between P&G (Gillette) and Edgewell (Schick).[82] The FTC portrayed the market as static and concentrated, but poised to be disrupted by Harry's, which was described as a maverick upstart with sales and marketing acumen. The parties subsequently abandoned the proposed transaction.

Towards the end of 2020, nearly the same story played out in the women's razor manufacturing space, when Proctor & Gamble abandoned its proposed acquisition of Billie's, a razor startup similar to Harry's that allegedly competed as a maverick on sales, marketing, and pricing. The FTC again alleged killer acquisition dynamics.[83]

The FTC's late-2020 complaint against Facebook is premised almost entirely upon a killer acquisition narrative and seeks to unwind consummated transactions.[84] The FTC's killer acquisition approach in the Facebook complaint may portend a new approach to mergers in the Big Tech and Big Data space. Starting in 2018, the agencies began to take a deeper interest in monitoring and, potentially, bringing enforcement actions against so-called Big Tech firms.

In 2019, the FTC established the Technology Task Force dedicated to the investigation of digital platform markets. After a brief stint as a task force, the group became a permanent division of the FTC Bureau of Competition that same year, as the Technology Enforcement Division (TED). The establishment of TED, and its immediate call to action, may be longest-lasting impact of the Simons Commission.[85] By February 2020, within a year of its inception, the Commission unanimously issued subpoenas to Alphabet (Google), Amazon, Apple, Facebook, and Microsoft regarding all their transactions from 2010 to 2019 that fell beneath the HSR reportability threshold.[86] This action signaled the FTC would focus acutely on consolidation within the tech space moving forward, as a matter of bipartisan regulatory consensus.

In December 2020, TED (along with 46 states, the District of Columbia, and Guam) filed a complaint against Facebook alleging that it has engaged in a pattern of conduct in violation of Section 5 of the FTC Act to maintain its monopoly position. The complaint focuses on Facebook's acquisitions of alleged nascent competitors Instagram in 2012 and WhatsApp in 2014.[87] The complaint also alleges that conditions Facebook places on access to its application programming interfaces (APIs) deter its partners from developing competing capabilities. The complaint not only seeks to unwind two consummated transactions, but indeed one (Instagram) in which the Commission unanimously voted to close the investigation without action eight years prior.[88] Challenging a consummated transaction years after it received Commission approval is unprecedented, and many in the antitrust bar have reasonably cautioned against such Monday morning quarterbacking.

### DOJ Pursues a Second Killer After a Near-Death Experience

The DOJ also brought two groundbreaking killer acquisition cases during the Trump administration. In a June 11, 2019 speech in Tel Aviv, AAG Delrahim laid the groundwork for bringing a killer case, just as he had done in his September 2017 speech rejecting behavioral relief prior to suing to block *AT&T/Time Warner*. In particular, Delrahim stated that the DOJ would "note the potential for mischief if the purpose and effect of an acquisition is to block potential competitors, protect a monopoly, or otherwise harm competition by reducing consumer choice, increasing prices, diminishing or slowing innovation, or reducing quality" in digital technology markets.[89] This speech laid the foundation for convergence with the FTC on future use of the theory.

The DOJ first pursued the killer acquisition theory in August 2019, when it sued to block Sabre's acquisition of Farelogix. In its complaint, the DOJ alleged that "Farelogix represent[ed] a significant and growing threat to Sabre's dominance" in the online travel bookings market.[90] Further, the DOJ argued that competition between Farelogix and Sabre had led to innovation in the airline and travel bookings sector, spurring Sabre to develop its own competitive products in response to Farelogix's success in a sector that has traditionally "resisted innovation."

Importantly, the DOJ focused on Farelogix's ability to challenge, if not overtake, Sabre's strong position. The complaint states that Sabre "conservatively" estimated that Farelogix's customer base would "nearly triple" from 2018 to 2020, with the DOJ noting that "Farelogix's competitive significance is . . . not fully reflected in its current market share."[91]

The killer theory was dealt a blow when the Delaware District Court rejected its application, denying the DOJ's injunction. The court found that Sabre competed in a two-sided market (with airlines and travel agencies) but Farelogix did not (it was only present in the airlines side of the market). Thus, the court held "the government only attempted to demonstrate harm to the airlines side of the two-sided market. It has, thus, failed to meet its burden."[92] The DOJ press release mitigated the sting, however. It noted that the Delaware District Court came to that conclusion because it was bound by *Ohio v. American Express Co.*[93] rather than substantive analysis. In fact, the DOJ said the court came to the decision "despite the District Court's own factual findings that Sabre and Farelogix do compete."[94] Ultimately, the transaction was abondoned after the UK's Competition and

Markets Authority issued an adverse decision finding that the transaction was anticompetitive.[95]

The DOJ also pursued blocking Visa's acquisition of Plaid under a killer acquisition theory, alleging Plaid would threaten Visa's position in the online debit market. In November 2020, the DOJ filed a complaint in the Northern District of California, alleging that the merger would violate Section 7 of the Clayton Act and Section 2 of the Sherman Act.[96] With respect to the Sherman Act, the DOJ alleged the transaction would allow Visa to unlawfully maintain monopoly power by choking off emerging competition. The DOJ characterized Visa as a "monopolist" facing competition from only one other provider with much lower penetration. The complaint alleges that Visa maintains its high market share through expansion, high barriers to entry due to network effects, and restrictive agreements with major financial institutions.

The DOJ further identified Plaid as "uniquely positioned" to challenge Visa's dominance. Plaid provided the foundational technology for financial technology apps such as Acorns, Betterment, and Venmo. Plaid's access to user information and bank accounts allowed it to create an expansive network of individual consumer accounts and financial institutions, which positioned Plaid to enter the online debit market. The DOJ explicitly stated that "Plaid's existing technology [did] not compete directly with Visa," but that Plaid was "planning to leverage that technology" and its growing network to meaningfully compete with Visa in the online debit market. The Visa CEO told another Visa executive that the Plaid acquisition would act as an "insurance policy to protect" its US online debit business.[97]

Visa and Plaid ultimately abandoned the transaction on January 12, 2021, ahead of the June 28, 2021 trial date. AAG Delrahim called the abandonment "a victory for American consumers and small businesses."[98] He further noted that Plaid was "free to develop potential alternatives to Visa's online debit services," which would result in "lower prices and better services."

### A Busy Conventional Horizontal Docket for the FTC and DOJ

Aside from killer acquisitions, the FTC and DOJ remained busy litigating horizontal deals using price discrimination theories in narrowly defined product markets, a strategy popularized during the Obama administration. While this strategy led to a substantial number of deal abandonments and litigation victories in 2019 and 2020, it also showed that when the government litigates more cases, some losses are inevitable.

In August and September 2019, the FTC sued to block the combination of Evonik and PeroxyChem in a chemical merger, and Fidelity National and Stewart Information Services in a merger of title insurers for commercial customers.[99] Whereas the parties abandoned the transaction in *Fidelity/Stewart*, the parties in *Evonik/PeroxyChem* took the challenge to court. After a trial before the D.C. District Court, the FTC was handed its first loss in a non-hospital merger case in years, and its first loss involving a litigated fix since the early 2000s.

According to the court, the FTC's proposed product market definition—all "non-electronic grade" hydrogen peroxide—failed because it conflated distinct grades of hydrogen peroxide that customers do not actually view as reasonable substitutes into a single product market. Without a proper product market, the court found the FTC could not meet its burden of proving the transaction would substantially lessen competition and denied the FTC's motion. The FTC did not appeal and the parties closed the transaction on February 3, 2020.

Notwithstanding the loss in *Evonik/PeroxyChem*, the FTC also won a number of challenges in court and through deal abandonments. In December 2019, the FTC challenged Post Holding's acquisition of TreeHouse Foods' ready-to-eat cereal business, causing a 2020 abandonment.[100] One year later, CoStar and RentPath abandoned their merger over FTC concerns.[101] The FTC also successfully litigated the *Arch Coal/Peabody* case in late 2020, reviving a theory that failed in 2004 because the parties successfully litigated the fix.[102] And the lawsuit to enjoin Altria's acquisition of the remaining stake in JUUL remains pending in administrative court after an April 2020 complaint alleging violations of Section 7, as well as Section 1.[103]

The FTC also challenged two consummated transactions. In January 2020, the Commission unanimously filed an administrative complaint to unwind the May 2018 consummated merger of Axon and VieVue, which each offer competing police body-cams.[104] Axon filed suit against the FTC in the District of Arizona alleging that the FTC's administrative procedures were unconstitutional; the district court dismissed its complaint but its appeal before the Ninth Circuit is still pending. The Ninth Circuit stayed the FTC's evidentiary hearing pending its decision regarding the appeal.

In a more straightforward case, Ossur hf agreed to divest the myoelectric elbow business of College Park after Ossur hf had acquired College Park in a non-reportable consummated deal.[105]

In addition to these cases, the DOJ also litigated and threatened to litigate cases causing abandonments. For example, Quad and LSC abandoned their merger after the DOJ sought to block the deal, alleging that the parties were each other's closest competitors in magazine, catalog, and book printing.[106] Similarly, Cengage and McGraw-Hill abandoned their proposed transaction following Division concerns in the market for textbooks.[107] In addition, the DOJ won a historic arbitration of a merger dispute in *Aleris/Novelis*, successfully establishing its proposed market definition in arbitration, resulting in a pre-stipulated divestiture.[108]

### The Politics of *Sprint/T-Mobile*

Perhaps the most notable horizontal deal at the DOJ during the second half of the Trump administration was Sprint's successful acquisition of T-Mobile, which was subject to extensive remedies, including a substantial divestiture, to DISH. Given the Division's lack of success in *Sabre/Farelogix*, some critics retroactively questioned the DOJ's decision to litigate that case—a killer acquisition case in a two-sided market—while settling the *Sprint/T-Mobile* case over strenuous objections by several state AGs. Moreover, the media and some members of the Senate alleged AAG Delrahim helped facilitate concurrent approvals from the DOJ and Federal Communications Commission through back channel dealings and cronyism.

According to the complaint in *Sprint/T-Mobile* (which contains ten total pages of text), the parties were two of only four "national mobile facilities-based carriers services" in the U.S. and, thus, the transaction allegedly would harm competition in the "national retail mobile wireless service market."[109] The complaint further alleged the parties held a combined one-third share of this market and were particularly close competitors in the prepaid mobile wireless segment, resulting in lower prices and enhanced features for customers.

The DOJ simultaneously settled its complaint with a consent order requiring the parties to divest to DISH Network Sprint's prepaid mobile wireless business (including Boost Mobile, Virgin Mobile, and Sprint prepaid), spectrum assets, and more than 20,000 cell sites (e.g., cell towers) and hundreds of retail locations.[110] The order also required the parties to agree to provide DISH access to T-Mobile's network under a seven-year transition services agreement. As the competitive impact statement explains,

> The primary purpose of the proposed Final Judgment is to facilitate DISH building and operating its own mobile wireless services network. . . . . The proposed Final Judgment thus obligates DISH to build out its own mobile wireless services network and offer retail mobile wireless service to American consumers."[111]

As the DOJ's press release headline stated, the "Divestiture Will Enable DISH's Entry as a Fourth Nationwide Facilities-Based Wireless Competitor and Expedite Deployment of High-Quality 5G for American Consumers."[112]

Some commentators criticized the remedy as insufficient to replace the competition lost from the merger, allegedly consisting of a cobbled-together package of assets (i.e., divested assets, spectrum, and other assets DISH already owned or operated) with the complicating entanglement of a long-term transitional service agreement. Others pointed out with skepticism that the behavioral components of the remedy (i.e., Dish's commitment to build out a competing 5G network) were not merely ancillary to the divestiture, but rather a linchpin to ensure that the divestiture buyer would be able to replace competition in the race for ubiquitous high-speed 5G wireless service.[113] On the other hand, those who supported the settlement (including its behavioral aspects), pointed out the divestiture was robust and protected low-income consumers, and that the DOJ would not have been able to prove harm to competition in the race for 5G, particularly given Sprint's position as a laggard competitor.

Attorneys General from nine Democratic-led states, including New York, California, and the District of Columbia sued to block the transaction in July 2019 in federal district court. The State AGs' complaint (later joined by other Democratic State AGs for a total of 14 states) alleged that, notwithstanding the DOJ consent order, the transaction would harm competition in the form of higher prices, reduced innovation and service quality, and the loss of thousands of American jobs.[114] The DOJ and FCC issued statements of interest with the court opposing the challenge as overreaching and, in a later speech, AAG Delrahim issued a warning to State AGs that seek to challenge transactions over federal settlements.[115]

While the case was being tried in December 2019, the 14 State AGs presented evidence linking AAG Delrahim to communications with T-Mobile CEO John Legere, Sprint board chair Marcelo Claure, and Dish CEO Charlie Ergen that, according to the State AGs, facilitated a settlement. The evidence did not appear intended to discredit the substance of the settlement, but rather the DOJ's credibility given the government's role brokering the deal.[116]

On February 11, 2020, the the Southern District of New York denied the State AGs' injunction in a 173-page opinion.[117] The court's opinion leaned heavily on the dynamic changes occurring within the alleged market, Sprint's fading position in that market, and the viability of the proposed divestiture to DISH.

After the decision, politicians reprimanded AAG Delrahim for having given "lobbying advice" to merging parties.[118] Thus, even in a moment of substantive vindication for the Division, allegations of politicization lingered. AAG Delrahim's unusual congratulatory press release to DISH upon its successful completion of the Boost divestiture was perhaps a fitting end to a tumultuous merger review that came to exemplify the second half of the Trump-era merger enforcement legacy at the DOJ.[119]

## Closing Thoughts on a Key Transitional Era

Statistically, antitrust merger enforcement in the Trump administration converged with the Obama administration, particularly after a full slate of FTC Commissioners was confirmed. However, the politics of merger enforcement was drastically different in the Trump era. Perhaps coincidentally, President Trump came into office just as an intense academic debate about horizontal and vertical merger enforcement theories and outcomes burst into the mainstream consciousness, propelled by contested, high-profile FTC and DOJ litigations and consent orders. When President Trump's populist instincts led the DOJ to intervene in merger cases (most pointedly, in the episodes of *AT&T/Time Warner*, *CVS/Aetna*, and *Sprint/T-Mobile*), allegations that political motivation influenced the DOJ's intervention, leading to inconsistent or unprincipled results, followed in tow. As this occurred at the DOJ, the FTC gradually ramped up merger enforcement, resulting, however, in several substantial inter-agency disputes on legal theory and principle and without drawing sharp allegations of politicization.

As the Trump era fades in the rearview, its merger enforcement legacy likely will be defined by increased enforcement, but more importantly, the changing and increasingly politicized nature of enforcement. ■

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[1] *See* Andrew Ross Sorkin, *The Political Legacy of a Failed Challenge to the AT&T-Time Warner Deal*, N.Y. Times: DealBook (June 12, 2018), https://www.nytimes.com/2018/06/12/business/dealbook/att-time-warner-legacy.html.

[2] *DAMITT 2020 Report: Antitrust Merger Enforcement Trends Amid the Pandemic, U.S. Elections and Brexit*, Dechert LLP (Jan. 27, 2021), https://www.dechert.com/knowledge/publication/2021/2/damitt-2020–year-in-review-u-s–and-eu-merger-review-durations.html [hereinafter 2020 DAMITT Report].

[3] *Id.*

[4] Fed. Trade Comm'n, Hart-Scott-Rodino Annual Report: Fiscal Year 2019, App. A, https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf [hereinafter 2019 Annual Report].

[5] Cornerstone Research, Trends in Merger Investigations and Enforcement at the U.S. Antitrust Agencies: Fiscal Years 2010–2019 at 12, https://www.cornerstone.com/Publications/Reports/Trends-in-Merger-Investigations-and-Enforcement-2010-2019.pdf [hereinafter Cornerstone Report]

[6] *DAMMIT 2018 Year in Review: No Trump Effect Yet, but Some EU Durations Decrease; Brexit Looms with Potentially Significant Implications*, Dechert LLP (Jan. 24, 2019), https://www.dechert.com/knowledge/onpoint/2019/1/damitt-2018-review–no-trump-effect-yet–but-some-eu-durations-d.html.

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