

Antitrust in the Trump Administration: A Tough Enforcer That Believes in Limited Government

BY JOHN D. HARKRIDER

GIVEN THE BROAD BIPARTISAN support for antitrust, changes between administrations typically tend to be at the margins. Historically, Republican administrations were expected to be less regulatory and more deal friendly than Democratic administrations. Empirically, this has manifested itself in a decline in the frequency of Second Requests in some Republican administrations. It is too early in the Trump administration to assess whether the frequency of Second Requests—or the burdens they impose—will decline. However, recent actions in both antitrust agencies appear to favor aggressive antitrust enforcement.

While enforcement levels may or may not change, what is clear, even at this early stage, is that the focus of antitrust merger enforcement is shifting at both agencies from regulation to law enforcement. The clearest indication of this can be found in the Department of Justice decision to bring suit in the proposed AT&T/Time Warner vertical merger and not to accept a behavioral consent decree, in large part, because such decrees impose significant conduct obligations on the industry and force the DOJ to become a de facto regulator of such provisions.¹ No less significant, however, is the decision of the agencies to move away from the more regulatory approach taken by the Obama Administration with respect to Standard Essential Patents.

Given these initial trends, one would expect that the new administration is likely to focus on areas where harm to consumer welfare is clear and established, and less likely to trod new ground where harm to consumer welfare is more ambiguous.

The Players and Governing Philosophy

The DOJ's Antitrust Division is now led by Makan Delrahim. He also served as a Deputy AAG in the Antitrust Division during the Bush Administration. Other familiar faces, such as

Andrew Finch, Luke Froeb, and Barry Nigro, each of whom was at the FTC or DOJ during the Bush administration, now serve in the Antitrust Division. The FTC now has a full staff of Commissioners for the first time in over two years following the recent confirmations of Joseph Simons, who is serving as the Chairman, Noah Phillips, Rohit Chopra, and Rebecca Slaughter. Christine Wilson was confirmed to replace Maureen Ohlhausen and will likely take that position soon, pending Ohlhausen's upcoming hearing to be a Judge of the United States Court of Federal Claims. Joseph Simons and Christine Wilson were at the Commission under Chairman Timothy Muris during the Bush administration.²

AAG Delrahim has made clear the Division's position that "antitrust is law enforcement" and "not regulation."³ This is consistent with the position taken by former Acting Chairman Maureen Ohlhausen, that the Commission should be governed by "regulatory humility."⁴ This does not mean that the antitrust agencies will not take aggressive action to protect consumer welfare, but rather that "vigorous antitrust enforcement" can "play[] an important role in building a less regulated economy in which innovation and business can thrive."⁵ Or, put another way, "proper and timely antitrust enforcement helps competition police markets instead of bureaucrats in Washington, D.C. doing it."⁶

During the FTC nomination hearings, Simons indicated his intention to vigorously police anticompetitive conduct and prevent anticompetitive consolidation to safeguard consumer welfare.⁷ Throughout the course of the hearing, Simons indicated that he will be attentive to anticompetitive monopolization in consolidated sectors and anticompetitive conduct in the pharmaceutical industry, focusing FTC resources on areas where the potential for harm is the greatest. Wilson raised similar concerns about the pharmaceutical industry and drug pricing, recognizing that the FTC has been an active enforcer in the pharmaceutical space.

Notably, some of Simons' answers seem to show a willingness to bring cases under Section 2 of the Sherman Act,⁸ which have not been a focus of previous Republican administrations. For example, Simons expressed a desire for the FTC to vigorously attack conduct by firms with market

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power using anticompetitive means to stay big. Wilson also indicated her belief that “anticompetitive or exclusionary conduct can and should be closely scrutinized by the FTC.”⁹ It will be important to watch for changes in the scope of Section 2 enforcement once the new leadership is installed at the FTC.

Merger Review

The frequency of Second Requests is often used as an indication of the expected level of antitrust enforcement.¹⁰ Numerical comparisons, however, must be made with some caution. The fact that an agency issues more Second Requests does not mean that it is better protecting consumer welfare. Indeed, enforcement can actually harm consumer welfare where the challenged deal creates significant efficiencies.

In any event, the numbers for 2017 are not out yet, but as the current administration has not suggested that merger enforcement was too aggressive during the Obama administration, there is no indication that the frequency of Second Requests will decline.

The administration has made clear that it wants to reduce the merging parties' burden in responding to Second Requests.¹¹ That being said, the current Model Second Request has gotten longer.¹² The DOJ's updated Model Second Request dated November 28, 2016, increased the number of specifications from 20 to 38, though a number of the additional requests are optional. Many of the additional questions are significant, even if not especially burdensome, because they seek disclosure of the parties' strategy for getting clearance. For example, the DOJ Second Request now asks for information on the parties' contacts with other branches of government (which would disclose the parties' lobbying efforts), as well as efforts to remedy the antitrust issue (which may make it more difficult to “litigate the fix” because the government will have a window into the parties' strategy in developing a remedy that may address a district court's concern—though not the agencies' concerns).

Similarly, the FTC's previous Model Second Request from 2010 was 20 pages, compared to the current 31-page version. Among other things, the new Model also requires parties to indicate all other antitrust jurisdictions that the parties notified or will notify and the timing of those investigations, which is certainly a fair question given the rise of multi-jurisdictional review.

That said, these model Second Requests were issued before the Trump administration was in place and it is not at all clear

that they reflect the new administration's interest in streamlining the merger review process. In fact, former Acting Chairman Ohlhausen suggested the FTC should narrow the scope of Second Requests.¹³ With the new leadership at the FTC now installed, it remains to be seen whether the antitrust agencies are serious about reducing the burden of Second Requests.

Merger Remedies

Another notable distinction of this administration's antitrust enforcement may be a greater willingness to challenge vertical mergers instead of accepting behavioral remedies. In previous administrations, the DOJ accepted non-discrimination provisions to address anticompetitive concerns involving vertical mergers. The DOJ's 2011 case against Comcast's vertical merger, for example, relied upon behavioral remedies, specifically non-discrimination provisions, which included requiring Comcast to treat all Internet traffic the same, to address its concerns.¹⁴ Moreover, the DOJ's Merger Remedies guidelines explicitly state that “conduct remedies often can effectively address anticompetitive issues raised by vertical mergers.”¹⁵ This is especially true in telecom deals.

The DOJ under the current administration, however, was not willing to agree to non-discrimination and must-supply provisions to allow the AT&T/Time Warner transaction to be consummated. While some have suggested political reasons for doing so,¹⁶ this claim has not been substantiated. Perhaps a more likely explanation is that the administration does not want the DOJ to become a regulator with an ongoing role policing market conduct. This seems to be a principled conservative approach.

Furthermore, the DOJ has taken the position that it disfavors conduct remedies in vertical mergers.¹⁷ Indeed, AAG Delrahim explained that antitrust is at its best when “it supports reducing regulation.”¹⁸ The fact that there were significant concerns about violations of the behavioral remedies that occurred after the Comcast merger lends support to the DOJ's position regarding the difficulty of behavioral remedies.

AAG Delrahim has described the problems with accepting behavioral remedies from the DOJ's standpoint. In a recent speech he explained that monitoring the parties' compliance with behavioral remedies is inefficient, hard to police, and can lead to anticompetitive effects if the requirements no longer reflect the marketplace dynamics.¹⁹

That said, Delrahim was clear that the DOJ may accept behavioral remedies where an otherwise “unlawful vertical transaction generates significant efficiencies that cannot be achieved without the merger or through a structural remedy,” though he noted it would be “a high standard to meet.”²⁰

The Director of the FTC's Bureau of Competition, Bruce Hoffman, has also reiterated that structural remedies are preferred, even in vertical mergers. Hoffman echoed the DOJ's position, stating, “First and foremost, it's important to remember that the FTC prefers structural remedies to struc-

tural problems, even with vertical mergers But in some cases we believe that a behavioral or conduct remedy can prevent competitive harm while allowing the benefits of integration.”²¹ A current FTC matter involving Northrop/Orbital’s merger may indicate how closely aligned the FTC and DOJ will be on this point.

The DOJ has also taken the position that asset carve-outs are inherently suspect.²² The FTC has similarly expressed concern about asset carve-outs and, in its 2016 suit challenging Valeant Pharmaceuticals’ acquisition of Paragon Holdings, it required that Valeant divest assets outside of the business to restore competition.²³ While this is not a new position, it is a sign that this particular Republican administration may be less accommodating than previous administrations in the sale of less than an ongoing business to remedy a merger.

Minority Ownership

The current administration’s potentially strict approach to antitrust enforcement is also seen in its position on minority ownership. For example, in Red Ventures’ acquisition of Bankrate, the FTC prevented Red Ventures, an Internet marketing firm, from acquiring a senior citizen referral site (Caring.com) because two private equity investors in Red Ventures (which collectively owned about 34 percent of the company) had just acquired a competing senior citizen referral site (A Place for Mom).²⁴ The FTC’s action was unusual in that it did not accept board recusal, a firewall, or other behavioral remedy and, instead, required divestiture of Caring.com. The FTC also included a “nurturing provision” that prevented Red Ventures from having any commercial relationship with A Place for Mom for a period of time, on the theory that Red Ventures had learned something about Caring.com, demonstrating the FTC’s concerns about information exchanges in the context of minority ownership in competing companies.

Consent Decrees

The DOJ is also making it easier to sue for violations of consent decrees. Specifically, it has added three provisions to decrees: first, reducing the burden of demonstrating a violation of the decree from clear and convincing to preponderance of the evidence; second, requiring the acquiring party to agree to pay the Division’s attorneys’ fees in the case of a violation; and third, allowing the DOJ to extend or terminate the term of the decree.²⁵

It also does not appear that there are any differences as yet in the HHIs that trigger antitrust enforcement. Comparing the average HHIs in deals with consent decrees from 2017 and 2016 shows only slight differences. For example, in 2016 the agencies entered into 25 consent decrees. Nine of those did not discuss market share or HHI information. The average post-merger HHI in the remaining 16 consents was approximately 7,600, and 7 involved mergers to monopoly. In comparison, in 2017, the agencies also entered 25 consent

decrees. Five did not discuss market share or HHI information. The average post-merger HHI in the remaining 20 consents was approximately 7,100. Ten involved mergers to monopoly. That said, the FTC entered a consent decree in 2018 in a merger involving HHIs in the 2,500 HHI range, with a delta of roughly 500 points.²⁶ Again, it is too early to tell, but there does not seem to be a material difference in the types of horizontal deals that the current DOJ is challenging.

Contact with Witnesses

It is not unusual for merging parties to contact customers to give them notice that their names were given to the reviewing agency in responding to a Voluntary Access Letter or Second Request. Nor is it unusual for the buyer to contact the customer to give its view of the market and the rationale for the deal and to see if there is any way to address its customer’s concerns with the merger, such as a long-term supply agreement (in the case of a vertical merger) or a new contract conditioned upon deal closing that passes some of the synergies on to the customer.

In the FTC’s view, some contacts with non-parties have crossed the line during merger reviews. The Director of the FTC’s Bureau of Competition indicated that the FTC will be attentive to any efforts to threaten witnesses.²⁷ Thus, merging parties should be mindful that their contacts with non-parties, including customers, should be narrowly tailored to give customers notice of the deal, to explore commercial ways of addressing their concerns, and to give the customers the merging parties’ view of the marketplace and rationale for the transaction. While this type of contact is completely appropriate, merging parties should be careful not to suggest or imply that they will retaliate against customers that complain or do not support the merger.

Litigation

The Trump administration’s litigation track record demonstrates that they have no fear of litigation. The DOJ has brought litigation against the mergers of Time Warner/AT&T,²⁸ noteworthy because it is a vertical acquisition, and Parker Hannifin/Clarcor,²⁹ also noteworthy because the DOJ brought the case after the HSR waiting period expired. In the wake of the DOJ’s aggressive litigation approach, the recently proposed Sprint/T-Mobile merger is being scrutinized in the media,³⁰ while it remains to be seen what the agency’s position will be. The FTC has also pursued litigation against mergers in several industries, including fantasy sports,³¹ physician services,³² microprocessor prosthetic knees,³³ titanium dioxide manufactured through the chloride process,³⁴ and most recently, canola and vegetable oils.³⁵

Noerr-Pennington

Yet another example of the current administration’s seemingly stricter antitrust enforcement—at least relative to other Republican administrations—is the FTC’s stance on the *Noerr-Pennington* doctrine. In February 2017, the FTC filed

a case against Shire ViroPharma seeking to narrow the immunity under *Noerr-Pennington*.³⁶ Part of the FTC's reason for bringing this case is to further cement the *California Motor*³⁷ "pattern of petitioning" exception to the *Professional Real Estate Investors* decision's "objectively baseless" test.³⁸ Narrowing the scope of immunity is very much in line with a policy objective Muris set out in the 1980s and early 2000s. With recent nominations of individuals who were at the FTC under Muris, the case against Shire ViroPharma is a good indication that the future full Commission will have a similar policy objective.

Illinois Brick and Hanover Shoe

Further in line with the current administration's emphasis on increasing antitrust enforcement, the DOJ has signaled a willingness to argue against *Illinois Brick*³⁹ and *Hanover Shoe*,⁴⁰ two Supreme Court decisions that bar indirect purchasers' rights to seek damages for federal antitrust violations and prohibit a pass-through defense to direct purchaser suits.⁴¹ Delrahim's principal deputy assistant attorney general (Finch) said that the Antitrust Division is considering arguing that the decisions should be overruled, either by Congress or the Supreme Court. Finch supported the position by pointing to confusion created by the Court's rule and the states' "*Illinois Brick* repealers." Before Finch's speech, Delrahim also indicated that the Antitrust Division is looking into the possibility of recovering damages for taxpayers in price-fixing cases.⁴² That approach would be consistent with Finch's remarks because the federal government is frequently an indirect purchaser and it is unclear whether it would be able to bring claims under state law.

Economic Liberty

Former Acting Chairman Ohlhausen recently focused significant attention on economic liberty, which refers to the elimination or reform of burdensome licensing restrictions that needlessly raise barriers to entry. She emphasized this in several speeches over the past year, specifically addressing occupational licensing reform.⁴³ Additionally, the FTC established an Economic Liberty Task Force that is working with the states to reform licensing requirements and fees to reduce these barriers and costs.⁴⁴ Whether Chairman Simons will similarly pursue this focus is unknown, but the policy demonstrated the agency's willingness to promote consumer welfare by using its authority beyond just enforcing the antitrust statutes.

International Antitrust Enforcement

The Trump administration's antitrust agencies are also becoming increasingly active on the international scene. The revised International Guidelines were published in 2017,⁴⁵ updating and expanding the previous Guidelines published in 1995. Negotiations for the competition chapter of NAFTA were completed in October 2017, providing increased procedural fairness in competition law enforcement.⁴⁶

The DOJ in particular has publicly emphasized international antitrust enforcement. The Foreign Commerce Section has been renamed the International Section, and their budget and staff have been increased. Delrahim has focused upon the importance of international cooperation among agencies.⁴⁷ He has also advocated for adherence to principles of due process and non-discrimination in antitrust enforcement, i.e., not favoring domestic companies over foreign companies or unfairly disadvantaging foreign companies.⁴⁸ In addition, Delrahim's international affairs deputy, Roger Alford, has discussed the importance of adhering to principles of international comity, especially with regard to extra-territorial remedies.⁴⁹

It remains to be seen, however, whether divergence between the United States and international enforcement will occur in the future. There are two possible areas of divergence. One area is abuse of dominance, where the EC has found that large technology companies like Google are liable for what the FTC has previously found is procompetitive behavior.⁵⁰ It is also possible that efforts by foreign agencies to change the rules regarding the licensing of Standard Essential Patents (SEPs), in light of the current administration's new position, may create divergence in the future.

Antitrust-IP Policy

The new administration's antitrust enforcement at the intersection of intellectual property rights is another area of recent activity. Regarding SEPs, the administration is concerned that implementers will "hold out" and use SEPs without a license, which the DOJ has claimed reduces incentives for innovators to invest in foundational and essential technology.⁵¹

This is a departure from the Obama administration, which was concerned about SEP holders like Qualcomm increasing the costs of implementers like Apple, which the FTC and DOJ claimed would increase the costs of consumer products and lead to reduced incentives to invest in devices that implemented SEPs. The new administration has signaled lukewarm support for the FTC's pending suit against Qualcomm. In addition, in a speech by Delrahim, it has signaled a potential investigation of the IEEE patent policy,⁵² expressing concern that the DOJ's earlier Business Review Letter approving the new policy had been interpreted in ways "totally inconsistent with modern antitrust law."⁵³ Notably, the new administration's policy position on SEPs also appears to be contrary to the positions of several agencies in other jurisdictions, such as the European Commission and certain agencies in Asian jurisdictions.

Thus, it is at least possible that the rule developed by the Obama administration against obtaining injunctions on SEPs may be abandoned by the administration. Such a shift, however, may have limited impact given the decisions by the Federal Circuit that limit the ability of SEP holders to seek injunctions when they have made a FRAND commitment and have a history of licensing their patents.⁵⁴

Criminal Enforcement

The DOJ's views on criminal enforcement are aligned with a traditional Republican focus. Aggregate fine levels are expected to decline in the short term as the auto parts cases wind down, but that does not reflect any policy to reduce criminal antitrust enforcement. In fact, after the European Commission handled those cases, its fine levels similarly declined.

Another indicator that aggressive criminal enforcement will remain a priority under the new administration is the DOJ's position of criminalizing no-poach agreements.⁵⁵ While this is not a new position, it is a display of willingness to enforce the law aggressively. Further evidence of a possible expansion of the scope of criminal liability comes from the fact that Delrahim suggested that a patent transfer to Native American Tribes may be subject to criminal liability where the transfer was an attempt to take advantage of sovereign immunity.⁵⁶

Conclusion

Looking at the first year of activity at the antitrust agencies under the Trump administration, it is hard to come up with support for the narrative that Republican antitrust enforcement is more lax or permissive than it is under Democratic administrations. Instead, the actions of the current leadership and the pronouncements of the incoming leadership at both the FTC and the DOJ's Antitrust Division show a desire to vigorously enforce antitrust laws. Not only has

merger enforcement continued actively following the Obama administration, but the agencies are also focusing on many other antitrust concerns.

A notable difference between Obama and Trump antitrust appears to be the Trump administration's recognition that antitrust is law enforcement rather than regulation. Consistent with an approach that disfavors government intervention, the Trump administration seems to be backing off from efforts by the Obama administration (and agencies in other jurisdictions) to police standard-setting organizations' contracts and shift the bargaining power in SEPs from innovators to implementers.

It appears antitrust enforcement during this administration will continue to be active, but more focused, and remedies sought will tend to be structural, rather than behavioral or involving continued oversight of business conduct by the antitrust agencies. The administration's position on behavioral remedies could have the following practical implications: sellers in vertical deals may be more likely to insist on hell-or-high-water protection, commitments to make divestitures, and/or higher reverse break fees, as well as commitments to litigate. Further, buyers should document and quantify with specifics the efficiencies from vertical integration that would be lost if the merger were to be blocked.

The Trump administration's antitrust enforcement appears to take a more hands-off approach to regulating business conduct, while still adhering to, and enforcing, evidence-based, economically sound antitrust law. ■

¹ Complaint, *United States v. AT&T*, 1:17-cv-02511 (D.D.C. filed Nov. 20, 2017), ECF No. 1.

² Simons made an interesting comment in a questionnaire submitted to the Senate Commerce Committee, noting "significant concerns" that merger enforcement has been too permissive, and also noting that the FTC needs to assess whether merger enforcement has gotten too lax. See Joseph Simons, Nominee, Fed. Trade Comm'n, Initial Questionnaire (Jan. 31, 2018), https://www.commerce.senate.gov/public/_cache/files/6c4149af3023-4825-90f1-3c38e279fd0d/6A0CCF409AF89DC8D5C0A84CE8730012-confidential--simons--committee-questionnaire-redacted.pdf.

³ Makan Delrahim, Assistant Att'y Gen., Antitrust Div., Dep't of Justice, Antitrust and Deregulation, Remarks as Prepared for Delivery at American Bar Association Antitrust Section Fall Forum at 1 (Nov. 16, 2017), <https://www.justice.gov/opa/speech/file/1012086/download> [hereinafter Delrahim Fall Forum Remarks].

⁴ See Maureen K. Ohlhausen, Acting Chairman, Fed. Trade Comm'n, Competition Policy at the FTC in the New Administration at 1 (Sept. 11, 2017), https://www.ftc.gov/system/files/documents/public_statements/1253063/ohlhausen_-_competition_policy_at_the_ftc_in_the_new_administration_gw_9-11-17.pdf [hereinafter Ohlhausen, New Administration].

⁵ Delrahim Fall Forum Remarks, *supra* note 3, at 1.

⁶ *Id.*

⁷ Joseph Simons, Nominee, Fed. Trade Comm'n, Prepared Statement (Feb. 14, 2018).

⁸ 15 U.S.C. § 2.

⁹ Christine S. Wilson, Nominee, Fed. Trade Comm'n, Majority QFRs (Feb. 14, 2018).

¹⁰ See John D. Harkrider, *Antitrust Enforcement During the Bush Administration—An Economic Estimation*, ANTITRUST, Summer 2008, at 44; Deborah L. Feinstein, *Recent Trends in U.S. Merger Enforcement: Down But Not Out*, ANTITRUST, Summer 2007, at 74; see also FED. TRADE COMM'N & DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT (2016), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014_fy_2016_hsr_report_final_october_2017.pdf.

¹¹ See Andrea Hamilton et al., *The LATEST: FTC "Second Requests" to Be Narrower in Scope Under Ohlhausen's Leadership*, ANTITRUST ALERT, McDERMOTT WILL & EMERY (Feb. 17, 2017), <https://www.antitrustalert.com/2017/02/articles/mergers-acquisitions/the-latest-ftc-second-requests-to-be-narrower-in-scope-under-ohlhausens-leadership/>; Kirk Victor, *Lots of Changes Ahead at FTC Regardless of Trump's Pick for Chairman*, FTCWATCH (Feb. 3, 2017), <https://www.mlexwatch.com/articles/2648/lots-of-changes-ahead-at-ftc-regardless-of-trump-s-pick-for-chairman>.

¹² See DEP'T OF JUSTICE, REQUEST FOR ADDITIONAL INFORMATION AND DOCUMENTARY MATERIAL ISSUED TO WEEBYEWE CORPORATION (MODEL SECOND REQUEST) (Nov. 28, 2016), <https://www.justice.gov/atr/file/706636/download>; FED. TRADE COMM'N, MODEL REQUEST FOR ADDITIONAL INFORMATION AND DOCUMENTARY MATERIAL (SECOND REQUEST) (Aug. 2015), <https://www.ftc.gov/system/files/attachments/merger-review/guide3.pdf>; cf. DEP'T OF JUSTICE, REQUEST FOR ADDITIONAL INFORMATION AND DOCUMENTARY MATERIAL ISSUED TO WEEBYEWE CORPORATION (MODEL SECOND REQUEST) (Mar. 2012), <https://www.justice.gov/sites/default/files/atr/legacy/2012/06/01/220239.pdf>; FED. TRADE COMM'N, MODEL REQUEST FOR ADDITIONAL INFORMATION AND DOCUMENTARY MATERIAL (SECOND REQUEST) (June 2010), <https://www.ftc.gov/sites/default/files/attachments/merger-review/guide3.pdf>.

¹³ See Maureen K. Ohlhausen, Acting Chairman, Fed. Trade Comm'n, Antitrust

- Policy for a New Administration (Jan. 24, 2017), https://www.ftc.gov/system/files/documents/public_statements/1051993/antitrust_policy_for_a_new_administration.pdf.
- ¹⁴ United States v. Comcast Corp., 1:11-cv-00106, Competitive Impact Statement (D.D.C. filed Jan. 18, 2011), ECF No. 4, <http://www.justice.gov/atr/cases/f266100/266158.pdf>.
- ¹⁵ See U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 2 (2011), <https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf>.
- ¹⁶ See Derek Thompson, *Why the Trump Administration Is Suing to Block the AT&T-Time Warner Merger*, ATLANTIC (Nov. 20, 2017), <https://www.theatlantic.com/business/archive/2017/11/trump-att-time-warner/546443/> (“The main reason this lawsuit seems suspicious, though, is that it would appear quite out of character for the Trump administration, which has hailed the need for deregulation.”).
- ¹⁷ See Delrahim Fall Forum Remarks, *supra* note 3.
- ¹⁸ *Id.* at 1.
- ¹⁹ *Id.* at 5.
- ²⁰ *Id.* at 8.
- ²¹ See Bruce Hoffman, Acting Dir., Bureau of Competition, Fed. Trade Comm’n, Vertical Merger Enforcement at the FTC, Remarks at Credit Suisse 2018 Washington Perspectives Conf. (Jan. 10, 2018), https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf.
- ²² See Charles McConnell, *US DOJ Official: Asset Carve-Outs Are “Inherently Suspect”*, GLOBAL COMPETITION REV. (Feb. 2, 2018), <https://globalcompetitionreview.com/article/1153335/us-doj-official-asset-carve-outs-are-inherently-suspect>.
- ²³ See Andrea Zach, *Taking a Hard Look at the Asset Package*, COMPETITION MATTERS (Nov. 9, 2016), <https://www.ftc.gov/news-events/blogs/competition-matters/2016/11/taking-hard-look-asset-package>.
- ²⁴ See FTC Press Release, Parties Agree to Divestiture of Senior Living Facilities Referral Service Caring.com as a Condition of Red Venture’s Acquiring Bankrate (Nov. 3, 2017), <https://www.ftc.gov/news-events/press-releases/2017/11/parties-agree-divestiture-senior-living-facilities-referral-service>.
- ²⁵ Makan Delrahim, Assistant Att’y Gen., Antitrust Div., Dep’t of Justice, Improving the Antitrust Consensus, Remarks Delivered at N.Y. State Bar Ass’n (Jan. 25, 2018), <https://www.justice.gov/opa/speech/remarks-assistant-attorney-general-makan-delrahim-delivered-new-york-state-bar> (“[T]he Division believes that by contracting with settling parties to apply a preponderance standard to contempt proceedings, it will significantly increase the efficacy and efficiency of decree enforcement . . . The goal of fee shifting is to encourage speedy resolution of decree violation investigations, and to compensate taxpayers for the costs associated with investigation and enforcement necessitated by the violation.”); United States v. Entercom Commc’ns Corp., 1:17-cv-02268-JEB (D.D.C. filed Jan. 31, 2018) (final judgment), ECF No. 13, <https://www.justice.gov/atr/case-document/file/1030176/download> (“The United States retains and reserves all rights available to it under applicable law to enforce the provisions of this Final Judgment . . . Any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of this order shall be evaluated under a preponderance of the evidence standard.”); United States v. Parker-Hannifin Corp., 1:17-cv-01354-JEJ (D. Del. filed Dec. 18, 2017) (final judgment), ECF No. 29, <https://www.justice.gov/opa/press-release/file/1018596/download> (“Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry, except that after five (5) years from the date of its entry, this Final Judgment may be terminated upon notice by the United States to the Court and defendants.”).
- ²⁶ Tronox Ltd., FTC Docket No. 9377 (Dec. 5, 2017), https://www.ftc.gov/system/files/documents/cases/docket_no_9377_tronox_cristal_part_3_administrative_complaint_redacted_public_version_12072017.pdf.
- ²⁷ See Bruce Hoffman, Acting Dir., Bureau of Competition, Fed. Trade Comm’n, It Only Takes Two to Tango: Reflections on Six Months at the FTC, Remarks at GCR Live 7th Annual Antitrust Law Leaders Forum (Feb. 2, 2018), https://www.ftc.gov/system/files/documents/public_statements/1318363/hoffman_gcr_live_feb_2018_final.pdf (“I also want to underscore that we will treat with the utmost seriousness any attempt to impede our investigations or enforcement actions—mergers or conduct-by tampering with evidence, including threatening or retaliating against witnesses.”).
- ²⁸ Complaint, United States v. AT&T, 1:17-cv-02511 (D.D.C. filed Nov. 20, 2017), ECF No. 1.
- ²⁹ Complaint, United States v. Parker-Hannifin Corp., 1:17-cv-01354-UNA (D. Del. filed Sept. 26, 2017), ECF No. 1.
- ³⁰ See, e.g., Tara Lachapelle, *Opinion, Sprint, T-Mobile: Three Big Takeaways*, BLOOMBERG, Apr. 29, 2018, <https://www.bloomberg.com/gadfly/articles/2018-04-29/sprint-t-mobile-merger-takeaways>.
- ³¹ DraftKings Inc., FTC Docket No. 9375 (June 19, 2017), https://www.ftc.gov/system/files/documents/cases/docket_no_9375_draftkings_fan_duel_part_3_complaint_final_redacted_public_version.pdf.
- ³² Sanford Health, FTC Docket No. 9376 (June 21, 2017), <https://www.ftc.gov/system/files/documents/cases/d9376sanfordmiddakotacomplaint.pdf>.
- ³³ Otto Bock HealthCare North Am., Inc., FTC Docket No. 9378 (Dec. 20, 2017), https://www.ftc.gov/system/files/documents/cases/otto_bock_part_3_complaint_redacted_public_version.pdf.
- ³⁴ Tronox Ltd., FTC Docket No. 9377 (Dec. 5, 2017), https://www.ftc.gov/system/files/documents/cases/docket_no_9377_tronox_cristal_part_3_administrative_complaint_redacted_public_version_12072017.pdf.
- ³⁵ See Press Release, Fed. Trade Comm’n, FTC Challenges Proposed Acquisition of Conagra’s Wesson Cooking Oil Brand by Crisco Owner, J.M. Smucker Co. (Mar. 5, 2018), https://www.ftc.gov/news-events/press-releases/2018/03/ftc-challenges-proposed-acquisition-conagras-wesson-cooking-oil?utm_source=govdelivery.
- ³⁶ See Complaint for Injunctive and Other Equitable Relief ¶ 49, FTC v. Shire ViroPharma Inc., 1:17-cv-00131-UNA (D. Del. Feb. 7, 2017), https://www.ftc.gov/system/files/documents/cases/170216viropharma_unredacted_sealed_complaint_.pdf.
- ³⁷ California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).
- ³⁸ Prof’l Real Estate Inv., Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49 (1993).
- ³⁹ Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).
- ⁴⁰ Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).
- ⁴¹ See Andrew Finch, Principal Deputy Assistant Att’y Gen., Antitrust Div., Dep’t of Justice, Trump Antitrust Policy After One Year, Remarks Delivered at the Heritage Found. (Jan. 23, 2018), <https://www.justice.gov/opa/speech/file/1028906/download> (“We are looking at whether or not it might be worthwhile to revisit those rules and revisit the same to the Supreme Court.”); see also Charles McConnell, *DOJ Looks at Overturning Illinois Brick*, GLOBAL COMPETITION REV. (Jan. 24, 2018) (“Stephen Weissman, who served under the Obama administration as deputy director of the Federal Trade Commission’s bureau of competition, called the decision to review Illinois Brick “interesting [and] odd” and not typical of a Republican DOJ.”).
- ⁴² See Charles McConnell, *DOJ Looks to Recover Damages for Price-Fixing*, GLOBAL COMPETITION REV. (Jan. 22, 2018).
- ⁴³ See, e.g., Ohlhausen, *New Administration*, *supra* note 4; Maureen K. Ohlhausen, Acting Chairman, Fed. Trade Comm’n, Death by a Thousand Haircuts: Economic Liberty and Occupational Licensure Reform, Keynote at Heritage Foundation (July 26, 2017), <https://www.ftc.gov/public-state-ments/2017/07/death-thousand-haircuts-economic-liberty-occupational-licensure-reform>; Maureen K. Ohlhausen, Acting Chairman, Fed. Trade Comm’n, Advancing Economic Liberty, Remarks at the George Mason Law Review’s 20th Annual Antitrust Symposium (Feb. 23, 2017), <https://www.ftc.gov/public-statements/2017/02/advancing-economic-liberty>.
- ⁴⁴ See *Economic Liberty*, FED. TRADE COMM’N, <https://www.ftc.gov/policy/advocacy/economic-liberty>.
- ⁴⁵ U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Guidelines for International Enforcement and Cooperation (2017), https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf.
- ⁴⁶ See Press Release, Office of U.S. Trade Rep., USTR Lighthizer Welcomes Start of NAFTA Round 4, Announces New Developments (Oct. 2017),

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- <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/october/ustr-lighthizer-welcomes-start>.
- ⁴⁷ Makan Delrahim, Assistant Att’y Gen., Antitrust Div., Dep’t of Justice, International Antitrust Policy: Economic Liberty and the Rule of Law, Remarks as Prepared for Delivery at Antitrust in Developing Countries: Competition Policy in a Politicized World, NYU School of Law and Conferences (Oct. 27, 2017), <https://www.justice.gov/opa/speech/file/1007231/download>.
- ⁴⁸ *Id.*
- ⁴⁹ See Roger P. Alford, Deputy Assistant Att’y Gen. for International Affairs, Antitrust Div., U.S. Dep’t of Justice, Antitrust Enforcement in an Interconnected World, Remarks at the American Chamber of Commerce in South Korea (Jan. 29, 2018), <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-roger-p-alford-delivers-remarks-american-chamber>.
- ⁵⁰ See Case AT.39740—Google Search (Shopping), Comm’n Decision (June 27, 2017), http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf. *But see* Fed. Trade Comm’n, Statement Regarding Google’s Search Practices, FTC File No. 111-0163 (Jan. 3, 2013).
- ⁵¹ See Makan Delrahim, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Competition, Intellectual Property, and Economic Prosperity, Remarks at the U.S. Embassy in Beijing (Feb. 1, 2018), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-us-embassy-beijing>; Makan Delrahim, Assistant Att’y Gen., Antitrust Div., Dep’t of Justice, Take It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law, Remarks as Prepared for Delivery at USC Gould School of Law (Nov. 10, 2017), <https://www.justice.gov/opa/speech/file/1010746/download> (“[W]e as enforcers have strayed too far in the direction of accommodating the concerns of technology implementers who participate in standard setting bodies and perhaps risk undermining incentives for IP creators, who are entitled to an appropriate reward for developing break-through technologies.”).
- ⁵² IEEE-SA Standards Board Bylaws (Dec. 2017), https://standards.ieee.org/develop/policies/bylaws/sb_bylaws.pdf.
- ⁵³ See Charles McConnell, *Delrahim Hints at IEEE Probe*, GLOBAL COMPETITION REV. (Jan. 23, 2018), <https://globalcompetitionreview.com/article/usa/1152963/delrahim-hints-at-ieee-probe>.
- ⁵⁴ Commonwealth Sci. & Indus. Research Org. v. Cisco Sys., Inc., 809 F.3d 1295 (Fed. Cir. 2015); Apple Inc. v. Motorola, Inc., 757 F.3d 1286 (Fed. Cir. 2014).
- ⁵⁵ See Finch, *supra* note 41 (“[T]he Division expects to initiate multiple no-poach enforcement actions in the coming months.”).
- ⁵⁶ See Charles McConnell, *Delrahim: Patent Transfer May Have Been a Crime*, GLOBAL COMPETITION REV. (Jan. 19, 2018), <https://globalcompetitionreview.com/article/1152913/delrahim-patent-transfer-may-have-been-a-crime>.