Essays on the Transition

How and why do Presidential transitions matter for antitrust and consumer protection? Has there historically been a shift in merger enforcement? What about conduct enforcement? What did the Obama administration get right and/or wrong and what hopes are there for the Trump administration? The essays in this issue represent the diverse, wide-ranging, and enlightening perspectives of practitioners, economists, and academics. As with all the material published in *The Antitrust Source*, the essays and comments represent the views of the authors alone and do not reflect the views of the American Bar Association.

Click on the authors' names to read the comments of these experts on antitrust and consumer protection. Dennis Carlton; James Cooper; Eleanor Fox; Deborah Garza; Andrew Gavil; Michael Hausfeld and Michael Lehmann; William Kolasky and Madison Arent; Gregory Leonard; Tad Lipsky; Janet McDavid and Logan Breed; A. Douglas Melamed; Ellen Meriwether; Christine Meyer; David Meyer; Amy Ralph Mudge; Timothy J. Muris and Keith Klovers; Janusz Ordover; Dana Rosenfeld and Donnelly McDowell; Steven Salop and Carl Shapiro; Scott Sher; Tim Wu.

Free Speech Versus Fair Markets: Will Credit-Card Surcharge Cases Supercharge the First Amendment?

Matthew Moloshok explores whether, when a state prohibits overcharges or institutes other conduct-related commercial regulations, it has violated the First Amendment. That is the issue, in substance, now before the U.S. Supreme Court in *Expressions Hair Design v. Schneiderman*, a case involving state laws that prohibit imposing credit card surcharges but allow merchants to charge lower prices for customers who pay cash.

Paper Trail: Working Papers and Recent Scholarship

Subramaniam Ramanarayanan and Bryan Ray review a paper by Dafny, Ody, and Schmitt at the forefront of efforts to rigorously quantify the effects of branded drug manufacturers' use of copay coupons for prescription drugs.
Hopes for Antitrust Policy Under the Trump Administration

Dennis W. Carlton

Over at least the last ten years, complaints that antitrust policy is too lax have grown steadily in volume. Some critics have even suggested that the U.S. economy has become less competitive as a result, which they argue has led to slowing economic growth and increasing income inequality. I hope that the Trump administration’s response to such claims will be to ask for the evidence that supports these views before altering antitrust enforcement. This does not mean that the complaints should be ignored. To the contrary, it means that the Trump administration should alter antitrust policy to address concerns only when those concerns are based on evidence—not rhetoric—and only when those concerns can be appropriately addressed by antitrust policy.

In the wake of these criticisms of antitrust policy, President Obama called not only for the government antitrust agencies to pursue vigorous antitrust enforcement but also for regulators to intervene in the industries they regulate to make them more competitive. I hope that the Trump administration will ask for specific evidence that any proposed regulatory intervention would likely improve competitive conditions in particular industries. The experience of regulation shows that often (though not always) regulatory intervention harms rather than helps competitiveness and economic performance, sometimes by making it more difficult for new firms to enter an industry.

Some have called for antitrust policymakers to take into account the effects of antitrust policy on income inequality and unemployment. My hope is that the Trump administration will use antitrust policy only for what antitrust does best—protection of the competitive process. Goals such as reducing poverty or decreasing unemployment are important but antitrust policy is ill-suited to achieve those goals. Over time, competition raises living standards by allocating resources to new, higher valued uses. Attaching other goals to antitrust enforcement can interfere with that process.

There are many antitrust topics that the Trump administration can usefully address. It can encourage the use of retrospective studies to evaluate past mergers as well as the techniques used to evaluate those mergers. Did past mergers systematically raise prices and do our techniques identify such cases or not? Noting that price goes up in some mergers is not a sufficient analysis unless one also takes into account that prices go down in other mergers. The issue is whether we see a systematic bias in what our government agencies are doing. A small sampling of other important topics would include guidance on the antitrust analysis of two-sided markets, bundled discounts, and tie-in cases. Finally, the FTC should think hard about its consumer protection mission, especially with regard to privacy.

A Return to Antitrust Populism?

James C. Cooper

It's widely reported that the 2016 election was about change. President Trump, it is said, rode a populist wave to office. Let's hope that this wave doesn't drown modern antitrust.

Years ago, antitrust was incoherent. It was focused on notions like “big is bad,” and protecting small businesses from competition. Efficient practices were proscribed, and the results were predictably bad for consumers. Beginning with a series of cases in the 1970s, the Supreme Court adopted a consumer welfare goal for antitrust. Antitrust would condemn those practices that were likely to raise prices, reduce output, or otherwise hinder the competitive process. Indeed, the most recent revision to the Horizontal Merger Guidelines—which moves away from presumptions based on market shares to examine the actual impact of a transaction on consumers—makes clear that preventing concentration is not the *raison d’être* of antitrust. There is wide bipartisan agreement, reflected in the relative stability of antitrust policy across administrations, that a focus on consumer welfare, guided by economic analysis, has been a boon.

Some of the rhetoric from the campaign (from both sides, to be fair) hinted at a retreat from modern antitrust analysis and an embrace of the populist antitrust of yore. For example, President-elect Trump said his administration would block the AT&T/Time Warner merger because it would “put too much concentration of power into the hands of too few,” and threatened “antitrust problems” for Amazon because it controls “so much.” Hopefully, statements like these were only campaign bluster and do not presage the onset of a populist antitrust. Consumers are not served if practices are condemned out of hand based on the size of the companies involved, or if antitrust is used as a tool to pursue political goals like preserving American jobs or protecting small businesses from competition.

This may have been a change election, and there is certainly a lot in Washington that would benefit from significant transformation. Antitrust's focus on consumer welfare, however, is not one of them.

Change

Eleanor M. Fox

President Donald Trump purports to be the agent of change. Change can be good. Shaking up the establishment can be good—good for consumers and for feisty entrepreneurs. Established business has learned how to game antitrust law and policy. Huge mergers of leading competitors win agency approvals by promising spin-offs, and owners of life-saving drugs jack up prices hundreds-fold. “I’m going to bring down drug prices,” Trump told the press.1 “[I’m going to] remove barriers to entry [of] imported safe and dependable drugs from overseas.”2 And, in the face of notoriously high procurement costs paid by a passive U.S. government, Trump has already set Lockheed and Boeing into competition with one another to get the U.S. a fair price for fighter jets. (Never mind that their products may not be good substitutes.)

But change can be bad. To be sure, competition experts have substantive differences. But there are some principles we, across the antitrust spectrum, all hold dear. Competition law is color blind. It pays no regard to ethnicity, nationality, or the source of goods. It is not America first; it is cosmopolitan. The Japanese electronics case is a proud example.3 The Japanese electronics producers out-performed the American producers in the late 1970s. The Japanese firms were demolishing the American competitors by offering better goods and lower prices. The struggling American firms sued the Japanese firms on antitrust grounds. They lost in the district court and ultimately in the Supreme Court of the United States. While experts disagree on the substantive merits of the case, none disagrees on the cosmopolitan principle. Japanese, Chinese, Europeans, Americans are all treated equally. Cosmopolitan antitrust makes American business stronger, consumers better off, and the world more peaceful. The consensus fundamental principle of country-blind antitrust should never change. But will it?

There is alarming handwriting on the wall, and the handwriting keeps getting bolder. It suggests a new era of nationalist trade and competition policy. Trump has named a China critic to be head of the newly created White House Council on Trade and Industrial Policy, and another China critic to be the U.S. Trade Representative—the nation’s chief trade negotiator. The President wants to prevent “unfair competition” (low prices) from Chinese manufacturers.4 He has threatened a 45 percent tariff on Chinese imports.5 Moreover, Trump’s tweets and his meetings with CEOs of merg-

5 Id.
er hopefuls show his disregard for principle and process—i.e., letting agencies do their work free from political pressure or preemption. His meetings with the CEOs, extracting promises to keep jobs in America and invest in America, imply favorable antitrust treatment in return. There have been counter-signals, but these signals have been weak and unconvincing. Despite Trump’s vow that his administration would never approve an AT&T/Time Warner merger (and before the job promises) the Trump transition team assured AT&T that the deal would be scrutinized by the experts with open minds. The public needs confidence that all mergers and all conduct will be reviewed on their merits by the experts with open minds.

Here is to good change, and against bad change, in 2017. It is something to fight for.

---

The new U.S. President ran a non-traditional, “outsider’s,” campaign that challenged Republican orthodoxy, raising questions (for example) about the U.S.’s continued commitment to international free trade and sounding a populist alarm about corporate consolidation, at least in the media. What, if anything, does this tell us about antitrust enforcement in a Trump administration?

The U.S. has not tended to experience wide swings in antitrust enforcement from one administration to another, even with changes to the political party in control. There is general consensus for an enforcement paradigm “grounded in contemporary economic principles” with consumer welfare as its lodestar.¹

This is a good thing. Consistency—along with transparency and adherence to the rule of law—provides the clarity and certainty U.S. businesses need to innovate and compete within the bounds of the law. It also enables the U.S. to persuade other nations to adhere to the same sound enforcement principles.

Nevertheless, antitrust enforcement has become increasingly aggressive over the last several years. Citing an asserted popular “surge of enthusiasm” for antitrust enforcement, Obama administration officials questioned a supposed “unfounded . . . presumption that mergers often benefit competition,” opined that enforcers had been overly concerned about the costs of erroneous enforcement and too insistent on concrete evidence of harm to competition, and began to emphasize notions of “economic fairness” over evidence of harm to consumer welfare.²

There is reason to believe that the new administration will revert to a course that hews more closely to the recent Republican approaches to antitrust enforcement.

Antitrust enforcement theoretically could go off the rails—for example, if decisions were made to prosecute a particular company or companies ahead of a well-reasoned factual basis to do so. Or if decisions were made based on deals trading clear consumer harm in one market for dubious gains elsewhere.³ Or if the U.S. began to use antitrust law to achieve industrial policy objectives (as some believe other jurisdictions have done).

But confirmation hearing testimony by Attorney General nominee Senator Jeff Sessions is reassuring. Senator Sessions stated his view that U.S. antitrust policy must be consistent, “as clear as


possible,” and free of politicization or mixed agendas. He added that the Antitrust Division is an “important Division that requires great integrity and ability . . . in [its] leadership.”¹ I am optimistic about the strength of the new administration’s appointments to both the Antitrust Division and the FTC.

On the Value of Antitrust Diplomacy

Andrew I. Gavil

Competition policy today is a global enterprise. The number of countries engaged in that enterprise has steadily and rapidly grown since the 1990s. As a result, the membership of the International Competition Network (ICN), founded in 2001 by 14 jurisdictions, now boasts a membership of 132 competition agencies from 120 jurisdictions.

The Federal Trade Commission and the Antitrust Division of the Department of Justice have played prominent roles in fostering and guiding that growth. Cognizant of the value of consistent competition rules to a healthy and successful global economy, the agencies have been deeply committed to supporting the development of sound antitrust principles and practices around the world during this period of unprecedented expansion. Across administrations and with bipartisan support from agency leaders, American competition policy enforcement agencies have promoted reliance on economic analysis of competitive effects and discouraged enforcement based on policies unrelated to competition. They have also cautioned against selective use of antitrust enforcement against specific sectors or “foreign” firms. These efforts have been evident in the agencies’ approaches to both enforcement and competition advocacy as they have provided extensive technical assistance, actively participated in the work of international competition-focused organizations, such as the ICN and the Organization for Economic Co-operation and Development (OECD), and engaged in many kinds of formal and informal bi- and multi-lateral consultations.

As is true in the political sphere, this kind of thoughtful antitrust diplomacy requires patience, persistence, and a long-term perspective. The day-to-day work of the antitrust diplomat proceeds quietly, often through soft advocacy and consultations that build trust through personal and

---

1 For a brief history of the ICN, see http://www.internationalcompetitionnetwork.org/about/history.aspx.
3 Although support for international cooperation has been uniform, the specific messages, have not always been consistent and the U.S. agencies have not been above public criticism of the enforcement matters brought by agencies in other jurisdictions, especially when U.S. firms are involved. For a discussion of two examples that arose during the parallel prosecutions of Microsoft, see Andrew I. Gavil & Harry First, The Microsoft Antitrust Cases: Competition Policy for the Twenty-First Century 227–33 (2014).
inter-institutional relationships that develop over time. Also as is true in the political sphere, one’s actions often matter more than one’s words—and what goes around comes around. Other jurisdictions, especially those that can still fairly be characterized as being in the formative stage, carefully observe U.S. enforcement decisions, study U.S. enforcement guidelines, and listen attentively to the pronouncements of U.S. antitrust policymakers. The European Commission, too, has been an important source of guidance, and has been especially influential with respect to institutional design, due in large part to similarities and shared traditions. Nevertheless, the U.S. has been an important source of leadership in ideas, analytical models, and policies. As a result, an extraordinary amount of progress has been made in the international arena, especially with respect to the pursuit of better practices. The shared language of antitrust pervades at international antitrust conferences and cross-jurisdictional cooperation is now commonplace.

There is reason to be concerned, however, that the progress made through the painstaking work of the world’s antitrust diplomats could be easily upended if a new administration seeks abruptly to change course. Such changes could easily unsteady the steady hand that has guided U.S. policy toward international competition development. U.S. antitrust agencies might be encouraged, if not directed, to follow a path of antitrust imperialism, rather than antitrust diplomacy, seeking to dictate approaches rather than to engage in genuine discourse. With respect to enforcement, they might themselves become more selectively interventionist, targeting “disfavored” industries, especially those associated with political dissent; they might target foreign firms, opening themselves up to the criticism that they are invoking antitrust to protect “national champions.” And if the new administration follows through on its promise of more protectionist policies generally, those policies might infect antitrust enforcement. What message would protectionist policies send about the U.S.’s commitment to competition as a guiding principle for organizing economies? U.S. leadership with respect to the role of competition advocacy might also be undermined if U.S. antitrust officials appear to endorse an ideologically infused anti-regulation agenda, rather than one that acknowledges the role of and supports smart regulation as the basis for its competition advocacy program.

In all of this the U.S. “example” would change, inviting imitation and encouraging conduct that until now the U.S. has consistently discouraged. Doubtless, this would be rightly perceived as hypocrisy if the administration is viewed as preaching one approach to antitrust while more broadly practicing another. Even mixed messages and the inability to speak with a single and consistent voice could prove confounding and hence disruptive. The most likely results would be retrenchment abroad, a loss of credibility, and a diminished role for U.S. antitrust leadership in the world. Such a change of course would also greatly complicate the international dealings of U.S. firms doing business abroad. It could, in short, encourage retaliatory or rogue enforcement, especially in countries where U.S. firms have already faced challenges. It could set in motion destructive tendencies that will take years to undo.

Of course, this is a worst-case scenario and is far from certain. It remains to be seen whether new leadership at the agencies will pursue the more typical course corrections that characterize changes of administrations, as opposed to a major change of course. In the short term, uncertainty and lack of predictability may themselves take a toll. But it is also possible, if not more likely, that the rhetoric will exceed the reality, leaving antitrust diplomacy and antitrust diplomats unencumbered to continue their valuable work.
Antitrust Enforcement in the Trump Administration: An Unclear Forecast

Michael D. Hausfeld and Michael P. Lehmann

In the last four years, the U.S. Department of Justice’s Antitrust Division has focused on prosecuting cartels in various industries—financial services, automobile parts, generic drugs—and the executives in those industries who have been engaged in cartelist behavior. The Obama administration did increase antitrust enforcement compared to its predecessor. And it has exhibited a willingness to prosecute individuals for cartel offenses. The shift toward greater prosecution of individuals might be viewed as a broad change imposing personal fines and prison sentences for active individual cartel participants. The enforcement efforts with respect to specific industries are more incremental, demonstrating the effectiveness of the DOJ leniency program and ACPERA in leading to the identification of cartels, their members, nature, scope, and affected products or services. The former has led cartelists to seek leniency from antitrust regulators in exchange for confessing to cartel activity; the latter has solidified the benefit of being the first to seek leniency by providing benefits to the leniency applicant in follow-on civil litigation.

Antitrust enforcement in the Trump administration has an unclear forecast. During the election campaign, Donald Trump said he would block AT&T’s acquisition of Time Warner and would consider breaking up the 2011 merger of Comcast and NBC/Universal, and he indicated he might investigate Amazon for monopolistic conduct. His campaign published a piece inveighing against the monopoly power of new media conglomerates, invoking former Presidential trustbuster Teddy Roosevelt. Mr. Trump has criticized foreign cartels like OPEC. And he is the only President-elect ever to have been a plaintiff in an antitrust suit. Mr. Trump’s nominee for Attorney General, Senator Jeff Sessions, has supported legislation that would end pay-for-delay agreements between branded and generic drug manufacturers, argued in favor of increased competition in the health care industry, sponsored a bill that would have made ACPERA permanent, criticized how Major League Baseball has conducted business in light of its judicially recognized antitrust exemption, and attacked OPEC. These are signs that there is some possibility that the next administration might be a relatively more aggressive enforcer of federal antitrust laws than critics might perceive.

On the other hand, meaningful antitrust enforcement by the DOJ requires cooperation with international competition authorities. Some of the current expressions by the incoming administration of diminished working relationships with international authorities may chill such cooperation. Likewise, recent Cabinet selections appear to presage a period of diminished or more limited government regulation in certain areas, such as environmental protection or protection of civil rights, and an emphasis on strengthening a favorable business climate with, for example, the banking and securities industry. Although blatant capital and market excesses may not be tolerated, enforcement of conduct short of the egregiously obvious is uncertain.

Based on global statistics, there presently is no shortage of worldwide agency enforcement of competition infringements. If there is any shortfall of such activity in the United States, private enforcement may well play even a more important role during the next administration.
What to Expect from the Trump Administration: A Historical Perspective

William Kolasky and Madison Arent

We Americans are hard to please. Over the last century, with just one exception at the time of World War II, we have changed the party occupying the White House almost like clockwork every eight or twelve years. These shifts from one party to the other have often led to marked shifts in both antitrust doctrine and enforcement policy. During my youth, from 1946 to 1968, we saw a shift from strong enforcement against international cartels during the Truman administration, to relatively little enforcement during the Eisenhower years, and then back to what many viewed as over-enforcement in the 1960s under Kennedy and Johnson.

Increasingly aggressive antitrust enforcement toward the end of Johnson’s term was followed by a period of retrenchment that began in the early 1970s and continued for nearly 20 years until the end of Reagan’s second term in 1989. One key to this retrenchment was the appointment by Presidents Nixon and Ford during their eight years in office of a majority of Justices on the Supreme Court. These new Justices almost immediately began to reinterpret the antitrust laws—moving away from the “big is bad” approach of the 1960s to a more economically oriented approach based in large part on learning coming out of the University of Chicago economics department, but with support from Harvard law professors Donald Turner and Phillip Areeda.

This retrenchment gained momentum with the election of Ronald Reagan in 1980. Reagan appointed Chicago-oriented antitrust scholars to lead both the FTC and the Antitrust Division at the beginning of his first term. But as with all good things, this correction began to overshoot the mark toward the end of Reagan’s second term when his later appointments led to a sharp falloff in civil antitrust enforcement at both agencies during his last years in office.

As Democratic state attorneys general began attempting to step in to fill the vacuum, President George H.W. Bush, who succeeded Reagan in 1988, tried through his appointments to both agencies to move antitrust enforcement back to the center. The pendulum shifted further in favor of stronger antitrust enforcement with the election of Bill Clinton in 1992. Supported by a substantial increase in their budgets, both antitrust enforcement agencies pursued an increasingly aggressive enforcement program throughout the 1990s, culminating in the DOJ’s successful monopolization action against Microsoft.

In 2000, American voters (with a boost from the Supreme Court) changed horses again, installing George W. Bush in the White House. While both agencies continued reasonably active enforcement programs, especially in the criminal area, they brought fewer of the headline-grabbing cases that had characterized the Clinton administration’s antitrust enforcement agenda and more often than not sided with the defendants in amicus briefs they filed in antitrust cases before the Supreme Court.

In reaction, the Democratic candidate for President in 2008, Barack Obama, vowed during his campaign “to reinvigorate antitrust enforcement” if elected. Eight years later, I think most antitrust
lawyers would agree that President Obama delivered on this campaign promise. His administration has compiled an impressive enforcement record that has included blocking some of the largest mergers to come before it, successfully prosecuting major investment banks for colluding to manipulate important financial benchmarks, and winning major victories in court in both merger and non-merger cases.

Had Hillary Clinton been elected, it is virtually certain she would have continued the Obama administration’s strong antitrust enforcement program. It is much harder to know what a Trump administration’s antitrust enforcement program will look like. The populist rhetoric of his campaign might suggest a continuation of strong antitrust enforcement, but some of his early appointments to the Cabinet and his antitrust transition team would seem to suggest otherwise.

One area, however, in which we can be fairly certain that the change in administration will move us back toward less interventionist antitrust enforcement is his likely judicial appointments, especially to the Supreme Court. Like Nixon and Ford, President Trump may well end up appointing several Justices to the Court, perhaps even a majority if he serves two terms. During his campaign, Trump promised that he would nominate someone to replace Justice Antonin Scalia who is cut from the same cloth. Not surprisingly, several of the names he floated as potential nominees are graduates of the University of Chicago and almost all could be expected to follow the same Chicago School approach to interpreting the antitrust laws as Justice Scalia did.

The difference that even one or two Justices can make can be seen by the shift in the outcome of antitrust cases before the Supreme Court since President Obama’s appointments of Justices Sonia Sotomayor and Elena Kagan. Before their appointments, the Supreme Court had ruled in the defendants’ favor in 16 straight antitrust cases over a 15-year period from 1993 to 2008. By contrast, since Justice Sotomayor’s appointment in 2009, the Court has ruled in the plaintiffs’ favor in all five substantive antitrust cases to come before it, including a five-to-four landmark victory for the FTC in its action challenging Actavis’s allegedly “pay-for-delay” settlement with a generic pharmaceutical manufacturer.

Although it remains to be seen what type of antitrust enforcement record the incoming Trump administration will have, the outcome of the 2016 election may well mark yet another turning point in antitrust enforcement. If so, that would be no different from what we have experienced over the past century when, every eight or twelve years, the voters have replaced one party with the other in the White House. ●
The most likely outcome for antitrust policy under the incoming Trump administration is a return to the traditional Republican enforcement regime. This is certainly indicated by President Trump's choice of who to manage the antitrust aspects of the transition.

Such a prospect is a rather boring one to contemplate, however, particularly for anyone fascinated by the many ways in which the recently concluded election deviated substantially from the conventional. It is much more entertaining to consider ways in which President Trump could take antitrust in unconventional directions. To be clear, I think there is very little likelihood of any of these outcomes actually coming to pass. (Of course, I was saying the same about a Trump presidency a year ago!)

One possibility, in line with Trump's views on trade and immigration, is taking antitrust back to its populist roots and breaking up what he views to be modern-day trusts. Trump has already aimed populist antitrust rhetoric at Amazon, saying that it has "a huge antitrust problem" because it "is controlling so much." Similar things were said about Standard Oil prior to the 1911 Supreme Court ruling.

Trump's apparent motivation for making those comments about Amazon—he believed the Washington Post (owned by Amazon CEO Jeff Bezos) was trying unfairly to undermine his campaign—suggests a second possibility. Perhaps a Trump administration uses antitrust to go after its perceived enemies in the business world. A number of high-profile companies, particularly in the tech industry, supported the Democratic nominee and oppose various Trump policy initiatives.

Or maybe Trump takes a page out of what many consider to be the playbook of the Communist Party rulers of China, and uses antitrust to further nationalistic goals. For example, antitrust enforcement actions could be targeted at foreign companies that compete with U.S. companies or are thought to have caused U.S. jobs to be lost to foreign workers.

Unpredictability seems to be one of Donald Trump's hallmarks, so it is hard to prognosticate with much confidence. Perhaps the only thing we can be sure of is that there will be a lot of Tweets involved.
Antitrust In Transition: Points To Watch

Abbott (Tad) B. Lipsky, Jr.

The world hungers to know whether the Trump administration will be bold and Reaganesque—unafraid to make substantial policy corrections that are sound but possibly unpopular (pending the delivery of results)—or something else. Ronald Reagan, labeled the “amiable dunce” by Democratic heavyweight Clark Clifford, reestablished the U.S. as a technology powerhouse and threw Communism off the world stage, shortlisting him for greatest U.S. President of the 20th century. Donald Trump’s doubters are no less derisive than Reagan’s.

In this essay, I offer thoughts on four key points that would signal President Trump’s odds of becoming a successful policy innovator on a level with Reagan. I also offer some comments in response to the article in this issue of the Source by Steven Salop and Carl Shapiro, which, their comments notwithstanding, does not in my view suggest any realistic threat that protecting capitalism will bring an end to our democracy.

1. Clarity, Quality, and Speed of First Steps

A strong start matters—in its own right, and in paving the way for continuing policy innovations. Reagan quickly proved his ability to target bad policies by expunging a few instanter, signing necessary papers en route from the inauguration stand to the inaugural luncheon in the Capitol. He also had his team ready and waiting when the doors opened: in a month William F. Baxter was running the Antitrust Division and starting to deliver specific initiatives—most memorably, the principle that “if it doesn’t make economic sense, it doesn’t happen.” Watch whether President Trump can quickly locate and place senior officials to shape antitrust to his key goals.

2. Sorting Out the International Antitrust Tangle

Global antitrust activity has been mushrooming for decades. Once confined to the U.S. and a small handful of other jurisdictions, antitrust laws are now actively enforced in over 130 jurisdictions worldwide, creating frequent overlaps, conflicts, and huge increases in compliance costs. In many jurisdictions shadowy procedures allow industrial policy and questionable economics to masquerade as antitrust enforcement. The ongoing EU effort to extract $14.5 billion from Apple is only one example of many that have arisen in a variety of Asian, European, and other jurisdictions. The global enforcement bureaucracy has grown enormous, labyrinthine, and resistant to significant reforms needed to reduce costs and banish anti-growth goals. No U.S. President has yet recognized the need or assembled the means to coordinate U.S. policy on international antitrust, though this is essential to prune the wildest strands of the worldwide overgrowth. Watch whether President Trump becomes the first.

3. Modernizing U.S. Enforcement

The strains of a U.S. enforcement system built for long-extinct conditions call out for modernization. Created in 1914, the FTC received the ill-defined mandate to prevent “unfair methods of com-
petition,” free from both Presidential oversight and focused judicial review. This combination of a vague mandate and frail checks and balances has proven troublesome. The FTC needs better accountability, more disciplined procedures and a specific structure to harmonize its actions with those of the Antitrust Division. The SMARTER Act and the 2015 “Statement of Enforcement Principles Regarding ‘Unfair Methods of Competition’” are worthwhile starting points. Watch whether President Trump picks up these initiatives and moves ahead.

4. Reducing the Burden of Merger Review
U.S. merger review under the Hart-Scott-Rodino Act is justly reputed to be the most costly form of merger review in the world. It has become a poster child for agency “mission creep” and crushing procedural burdens. Over 1,800 transactions required notification in FY 2015, but only a small fraction needed any serious review. The burdens of the HSR process—agency demands for massive document searches, for example—sometimes reach levels that invite parody. Watch whether new agency leadership and the new administration can design and implement ways to limit the number of filings, narrow the focus of investigations, and regulate the process to standardize key practices and reduce cost, delay, and other burdens.

5. A Note Regarding Capitalism and Democracy
In their contribution to this issue of the Source, Professors Salop and Shapiro craft an entertaining hodgepodge of wild scenarios: the advent of “crony capitalism,” “threats to democracy,” and other ultimate-destruction-of-the- Universe consequences for antitrust in the Trump administration. It is tempting to consider responding by “riffing”—sarcastic jibes thrown out loud by an audience at particularly embarrassing scenes in a bad movie, like the playful robots and their creator, the space-marooned janitor Joel Robinson of “Mystery Science Theater 3000.”

Professors Salop and Shapiro’s violent lurch between predictions of an antitrust review standard that would consider no behavior to be competitively harmful (on the “Triumph of the 1%” end of the spectrum) to a standard that would balance (in some unspecified way) microeconomic analysis with interests of “working class consumers” or what Justice William O. Douglas referred to as the “glories of Goldendale” (i.e., small-town values) in his *Falstaff* concurrence,1 reminded me of the old joke about the “Henry Kissinger Options Memo,” which goes as follows: It is the Nixon administration and the Cold War is at its most intense. The Soviet Union makes an outrageous territorial demand, backed by a belligerent threat. Nixon tasks Dr. Kissinger to request suggested policy responses from his staff and from the other senior military and diplomatic advisers in the White House. Using his legendary intellect and knowledge of historical precedents, Kissinger considers all the suggested possibilities carefully and solemnly offers President Nixon the following options: (1) total capitulation, likely to result in a Soviet takeover of the world; (2) resolute defiance, likely to result in global thermonuclear war and the end of life on Earth, or (3) the solution recommended by Dr. Kissinger.

It’s not hard to find option (3) in the Salop-Shapiro piece—bigger FTC/DOJ budgets, fidelity to microeconomic analysis with more skepticism toward horizontal mergers, plus enhancements to the type of merger relief that has become standard in recent enforcement practice. It is the antitrust professional’s Kissinger Memo, pleading for more use of the services of antitrust professionals. This strikes me as a good occasion to listen—in a calm and relaxed setting—to Shirley Bassey’s fabulous rendition of “History Repeating.”

---

The most persuasive antitrust analyses are closely tethered to empirically tested conjectures based on simple and compelling predictions that flow from the attribution of self-interest to all key actors in the competitive domain under examination. James Buchanan, Ronald Coase, and Gordon Tullock showed persuasively how the great explanatory utility of those elements was reaffirmed and improved by including institutional or even political elements in the analysis. As in other areas of applied microeconomic analysis, modeling and empirical verification are admittedly difficult in many aspects of antitrust enforcement. When an enforcement official states that “I think the intuition behind antitrust economics is that all mergers cause harm”—as Obama’s last Acting AAG for Antitrust did a few weeks ago—it should remind us that real antitrust analysis is actually hard work. Enforcement efforts of the future should not be based on fears of “complete capitulation” or “global thermonuclear war,” nor on any of the many other verbal sedatives frequently offered to distract us from the serious business of guiding the structure of the economy by forcing changes in competitive conduct.

Our Hopes for International Antitrust Cooperation in the Trump Administration

Janet Mcdavid and Logan Breed

Antitrust has been one of our most successful exports, and well over 100 countries now have their own antitrust laws. This growth in antitrust enforcement, combined with the increasingly global economy, makes cooperation among the world’s antitrust agencies more essential and complex than ever. The ever-increasing number of enforcers creates the risk that businesses operating in multiple jurisdictions may be subject to conflicting or differing outcomes in multi-jurisdictional merger or conduct investigations, which can create uncertainty, raise costs, and chill procompetitive conduct.

The U.S. Department of Justice and FTC have long worked to address this problem through international organizations, such as the International Competition Network and the OECD, as well as in bilateral agreements, such as the recent MOUs signed with China and India. Current Antitrust Division Acting Assistant Attorney General Renata Hesse stated in a recent speech that “increased international cooperation in antitrust investigations has been a priority”1 throughout the Obama administration. For example, Hesse noted that the DOJ has now entered into more than 80 Mutual Legal Assistance Treaties (MLATs) with foreign governments to assist one another in criminal law enforcement matters. MLATs enable the DOJ to obtain emails and other records, such as bank and phone records, that are located on foreign servers or in foreign physical locations. Hesse emphasized that strong cooperation with other antitrust enforcement regimes is “good for business” because “cooperation means more consistency across jurisdictions, speedier resolutions and less duplicative efforts.” She also noted that cooperation is “good for consumers” because “more efficient government is more effective government.”2

In this spirit, the DOJ and FTC recently proposed updates to their Antitrust Enforcement Guidelines for International Operations,3 which were first released in 1995. Among other changes, the revisions added a chapter on international cooperation to clarify the agencies’ confidentiality safeguards, which are especially important both as a protection for targets of U.S. investigations and as an example of the standard to which we want foreign agencies to adhere when they are investigating U.S. companies. The revisions also specify the agencies’ investigative tools, the legal bases for cooperation with foreign governments, the types of information that can be

2 Id.
exchanged, the process for confidentiality waivers, and remedies. Noting that “the agencies’ international antitrust enforcement policies and practices are becoming more and more important in protecting U.S. consumers and businesses,” FTC Chairwoman Edith Ramirez stated that the revisions “are designed to ensure that the guidelines are up-to-date and transparent.”

It is not clear how the Trump administration will approach international antitrust coordination and competition advocacy abroad. Trump’s campaign rhetoric and his post-election comments have frequently implied a retreat from international cooperation with traditional allies and organizations such as NATO as well as international trade agreements such as NAFTA. In an April speech, Trump claimed that “America First’ will be the major and overriding theme of my administration.” On December 26, Trump tweeted that the United Nations is “just a club for people to get together, talk, and have a good time.” We hope that, instead of adopting a confrontational or isolationist posture with foreign antitrust authorities, the Trump administration will continue America’s role as an international leader in antitrust policy development and convergence. The U.S. must continue to be a credible advocate for the view that a well-functioning, market-based economy requires effective, economics-based antitrust enforcement that preserves competition to enhance consumer welfare and efficiency. U.S. companies and consumers will certainly benefit if antitrust authorities around the world adopt and enforce antitrust policies that are based on industrial organization economics and focus on protecting consumers from conduct that threatens to stifle competition and innovation.

---


Economics, Not Politics, Should Guide Antitrust Law

A. Douglas Melamed

For the past 35 or so years, antitrust law has had the widely-shared objective of promoting economic welfare by prohibiting inefficient conduct that reduces market competition. This objective has required that antitrust law be deeply informed by economic analysis, which has been used both to help decide individual cases and to help fashion legal rules and screens (such as the rule that predatory pricing claims require proof of below-cost pricing) that take into account both economic and legal process considerations. Antitrust law has been in many ways, therefore, a rather technical field that has contributed importantly to our economic welfare.

This technical aspect of antitrust law has been accompanied by two other important features. First, antitrust law is heavily empirical. Individual cases are often decided on the basis of detailed factual analysis of both past conduct and market circumstances; and legal rules and screens evolve in response to new economic learning. Second, antitrust law has been largely apolitical. While different Presidents have appointed enforcement officials that broadly share their views about the proper role of government in overseeing the economy, the White House has for decades refrained from interfering in individual antitrust enforcement decisions.

The Trump administration promises to bring substantial change to Washington. Whether or how that will affect antitrust enforcement is not clear. Statements on antitrust and other matters by then-President-elect Trump and others involved in the transition suggest that a more populist approach to antitrust enforcement might be used to constrain large transactions regardless of their effect on competition, that antitrust enforcement might be greatly diminished as part of a general deregulation policy, that economic and factual analysis might be given less emphasis in antitrust enforcement, and that antitrust enforcement or implied or explicit threats thereof might be used as a carrot or stick to induce firms to engage in desired behavior for reasons that have little or no relation to traditional antitrust objectives. Newspaper reports of meetings between then-President-elect Trump and officials of companies with pending mergers in which jobs and other non-antitrust matters were discussed suggest that the last of these possibilities might be more than mere speculation.

Hopefully, the Trump administration will bring none of these changes to antitrust enforcement. Using antitrust as a carrot or stick to induce conduct unrelated to antitrust objectives undermines both antitrust policy, by distorting market competition, and the rule of law. Antitrust enforcement should remain apolitical and deeply informed by economic and factual analysis. This does not mean that antitrust enforcement should remain unchanged. To the contrary, new empirical studies suggest, for example, that merger enforcement might have been too lax in recent years; and new economic analysis suggests ways patents are used to harm competition. The Trump administration should embrace traditional antitrust objectives and promote change in antitrust enforcement when, but only when, it is based on sound economic and empirical analysis.
The Outlook for Private Enforcement in a Trump Administration

Ellen Meriwether

Donald Trump is no stranger to litigation. An analysis published by USA Today in June 2016 estimated that President Trump or his businesses have been involved in over 3500 cases in state and federal courts.1 Nor has his role been confined to that of a defendant. To the contrary, he is more often in the role of plaintiff, not at all wary of using litigation as a weapon to protect both his personal and business interests.2

His litigious tendencies may be anathema to his conservative colleagues, who tend to believe that litigation should be curbed, not promoted.3 But there is one area in which Trump and a Republican Congress may quickly find common ground—and that is legislation to curtail class actions, an issue on the Republican legislative agenda for years.4 Because class actions are virtually the only way for businesses and consumers to be compensated for violations of the antitrust laws,5 a common commitment by the President and his party to enact legislation curtailing class actions bodes ill for private enforcement of the antitrust laws.

Last year, the House passed H.R. 1927, the Fairness in Class Action Litigation Act. If enacted, the bill would materially alter certification standards under Rule 23 to require that the party seeking certification “affirmatively demonstrate” “based on a rigorous analysis of the evidence presented” “that each proposed class member suffered the same type and scope of injury as the named class representative or representatives.”

No one yet knows what “the same type and scope of injury” means. Supporters of the bill proposed the amendment to address the so-called no injury class certified in In re Whirlpool Front-Loading Washer Products Liability Litigation,6 a case concerning defective washing machines causing mold, where not all of the class members had yet manifested injury, i.e., had mold in their

---


2 Id.

3 Id. Trump has used the court system not only to address potentially legitimate disputes, but also to threaten and punish his detractors. In 2013, for example, Trump sued comedian Bill Maher based on Maher’s comedic mimicking of Trump’s offer to donate $5 million to charity if President Obama released his college and passport records. Maher joked the he would donate $5 million to charity if Mr. Trump could prove his father was not an orangutan. Trump tendered a copy of his (short form) birth certificate “demonstrating that he is the son of Fred Trump, not an orangutan” and brought suit for “breach of contract.” Trump v. Maher, No. BC 499537 (Cal. Super. Ct., Los Angeles Cty., Feb. 4, 2013).

4 Id.


6 722 F.3d 838 (6th Cir. 2013).
washers. But the language goes further than that, and if injury of the “same scope” means injury of the “same amount,” then Rule 23 would be rendered virtually useless as a mechanism for private enforcement of the antitrust laws.

Even short of an amendment to the language of Rule 23, the conservative shift of the judiciary during the Roberts era and before has resulted in a number of decisions at both the circuit court and Supreme Court levels that curtailed class actions and access to the class action mechanism by consumers and businesses. Chief among those cases were those that held that arbitration provisions that banned class actions were enforceable even in consumer contracts of adhesion. With the death of Justice Scalia, and the (as it turns out) mistaken belief that a Justice more friendly to consumer class actions would be appointed in his stead, there was some hope that these arbitration decisions would be revisited.

Indeed, other cases that were decided by the Court just last year appeared to put a brake on some of the more draconian efforts by business interests to eliminate class actions. Specifically, the Supreme Court rejected the invitation to preclude the use of statistical evidence, averaging, and extrapolating data as part of class certification proof, and rejected calls to require that injury to all class members be demonstrated as a prerequisite to class certification. But the current vacancy in the Supreme Court (and perhaps others to come) will now be filled by Donald Trump, who has appeared to ally with his conservative colleagues on judicial appointments. Moreover, there is little reason to doubt that the dozens of judicial vacancies, unfilled in the partisan climate of the Obama administration, will soon be filled by Republican Party loyalists, for whom class action and tort reform remain a mantra.

Those in favor of vigorous private enforcement of the antitrust and consumer protection laws find little to be heartened by the prospect of a Trump administration. Amendments to Rule 23 that would effectively eviscerate the class action device are not at all out of the question. Even short of that, the conservative trend, which had seemed to slow somewhat over this past term, may again quicken.

---


8 See, e.g., Butler v. Sears Roebuck & Co., 727 F.3d 796, 801 (7th Cir. 2013) (“It would drive a stake through the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages.”).


11 Spencer S. Hsu, Waiting for Next President, Confirmations of Federal Trial Judges Stall, WASH. POST, June 5, 2016, https://www.washingtonpost.com/local/public-safety/waiting-for-next-president-confirmations-of-federal-trial-judges-stall/2016/06/05/9e626aa4-2221-11e6-9ef7-57890b612299_story.html?utm_term=.6bd138704a3b. According to data kept by the Administrative Office of the U.S. Courts, as of June 5, 2016, 10% of district court judgeships were vacant under President Obama, nearly twice as many as at the same point in George W. Bush’s presidency.
Innovation and Competition—More to Learn and Know

Christine Meyer

Innovation is the engine of economic growth, which increases the well-being of consumers. Antitrust analysis, likewise, focuses primarily on improving consumer welfare. However, the interaction between antitrust enforcement and innovation is one area of economics where much is still unknown and many questions still unanswered. The tools of antitrust economics—an understanding of incentives faced by firms and the effects of market structure on firm decision-making—are ideal for pushing forward with our collective knowledge and understanding of this vital interaction.

An administration that is truly focused on increasing economic growth could further this goal by encouraging a generation of researchers to understand more fully the innovation and antitrust intersection. What empirical relationships exist between market structure and innovation and how does this vary by industry? How can retrospective studies of past mergers inform our understanding of the tradeoffs between static and dynamic efficiency? How prevalent are some of the “hot topics” in patents and other intellectual property (such as royalty stacking and patent holdup) and what role should antitrust play in mitigating problems? How can we more fully understand the relationships among R&D spending, competition in “innovation markets,” patent portfolios and innovation? Economic theory often can support more than one potential answer to these questions. Well-crafted empirical research can distinguish between theories and provide practical answers for policymakers.

---

With federal antitrust enforcement activity at a perceived high watermark of aggressiveness, there is understandable temptation to view the transition to a Trump Administration as portending major shifts in enforcement and competition policy. That is certainly a possibility, for at least two reasons. There are plenty of examples of antitrust action and rhetoric during the Obama administration that one might expect turning out differently under Republican-appointed agency leadership. And beyond that, President Trump’s election and his initial cabinet appointments signal significant policy transformations that could leap beyond the change wrought by traditional party transitions. Thus, although we do not yet know who President Trump will appoint to lead the Antitrust Division or the Federal Trade Commission or their respective enforcement agenda, change is surely in store.

Before leaping to any conclusions about the magnitude of those changes, however, it is useful to examine some of the longer-term trends that have brought us to the Obama administration’s forward-leaning approach to enforcement.

Arguably the last major transformation of antitrust enforcement occurred during the Reagan administration, with the ascension of (Chicago School) economic analysis in assessing potential merger and civil non-merger cases. Those economists earned the moniker of “case killers,” even while the agencies were aggressively pitching pro-competition policies as the basis of broad reform of sectoral regulation. In the decades since, the role of economics has grown. New analytical tools, like those assessing potential unilateral effects of proposed transactions, often mean the economists are the case-makers. This likely will not change under a Trump administration.

So the hard question: how much will President Trump’s changes in the Division Front Office and the Commissioners’ ranks matter? These officials can shut down investigations and redirect (or relinquish) resources. But will they? And by how much? How many merger and civil non-merger investigations will be closed or never opened? How much more amenable will the agencies be to resolving their concerns through creative remedies in lieu of litigation? And will the agencies defer more or less to the public policy judgments of other regulatory bodies?

Bush-era enforcers were often criticized for their “under-enforcement.” But they did not squelch the antitrust theories advanced by Staff when those recommendations were supported by the case law, sound economics, and the available evidence. Although raw numbers offer little insight into the validity of any given enforcement decision or the agency’s overall enforcement “aggressiveness,” there is little doubt that many of the merger and civil non-merger challenges under the Obama administration would have been pursued just as aggressively by the Bush administration. But certainly not all enforcement decisions would have been the same. Despite the differences between the last two administrations, the broad direction of enforcement would have been at most a few degrees different. I suspect the same will most likely be so under a Trump administration. But those few degrees could matter a great deal to the perceptions of businesses and their counsel (and sometimes the reality) of the available latitude to pursue conduct and transactions they see as procompetitive.
Three Consumer Protection Areas to Watch

Amy Ralph Mudge

A good friend and FTC staffer recently said, “Nobody is in favor of fraud and deception.”1 As much as anything else, those are words that everyone can unite upon. On the consumer protection side this means that changes in administrations have not typically signaled significant changes in the FTC’s day-to-day mission. Of course, there are invariably some smaller, more subtle shifts. Three potential shifts to be on the lookout for stand out.

First, toward the beginning of the Obama administration, the FTC tried out a new definition for “competent and reliable scientific evidence” that in some instances called for two “gold standard” clinical studies. Neither Commissioner Maureen Ohlhausen (currently the only Republican among the three Commissioners)2 nor the courts3 were big fans. Even before a Trump administration, the FTC has begun to pull back from that approach. Commissioner Ohlhausen has also expressed misgivings about the FTC finding that advertisers in some circumstances had made implied claims without the use of empirical evidence such as consumer surveys.4 This may foreshadow a Commission that is a bit more restrained in this regard.

Second, I have long been an advocate of the Commission revisiting and loosening up its standards for “Made in USA” claims.5 Indeed, at this point California’s requirements for such a claim are in some ways less restrictive than the FTC’s.6 Absent such a change, many of the companies that respond to tweets (or tariffs) and move manufacturing jobs back to the U.S. may find themselves able only to glibly claim something like “Assembled in USA from domestic and imported parts.” An administration that is looking to create incentives to keep manufacturing jobs in the U.S. may want to re-examine this issue as well.

Third, regardless of which party occupies the White House, the FTC will also inevitably have to deal with the challenges raised by a rapidly changing digital world. Consumer privacy and data security are only likely to become more threatened, not less, particularly in an era where your refrigerator can broadcast across the Web what you had for breakfast. And the rewriting of traditional marketing rules brought about by constantly evolving social media and the rise of social media influencers and the millions of dollars some of them earn will almost certainly draw more and more of the FTC’s attention and resources.

---

1 Quoting Lesley Fair, former long-time Vice Chair of the Consumer Protection Committee of the ABA Section of Antitrust Law, speaking at the Electronic Retailing Association Government Affairs Committee meeting, Jan. 5, 2017.


President Trump’s Merger Policy: Expect Real but Modest Change

Timothy J. Muris and Keith Klovers

Although we expect some changes under President Trump, we doubt that merger policy will change as dramatically from the Obama administration’s approach as other policies will. We offer six observations.

First, the next administration will act very differently from the Clinton administration, had it existed. This is particularly true for simple market concentration statistics, which received substantial attention in the last few years and appeared primed for an expanded role under Clinton. Modern merger analysis is solidly economics-based, without reliance on basic numbers. This approach should continue.

Second, and relatedly, the new administration may be more receptive in close cases to economically based arguments, including efficiencies. Indeed, the last change at the FTC from Democrats to Republicans provides a clear precedent: in 2002, the agency cleared, on a party-line vote, competing cruise line mergers. The majority, which included one of the authors of this essay, emphasized that the industry was less concentrated than the media reported and that competitive harm was unlikely. The dissent relied on a formulaic application of the Herfindahl-Hirschman Index to presume anticompetitive harm, a presumption it made essentially non-rebuttable.

Third, critics will include antitrust in their attacks on the new administration. Shifts in party control in both 1980 and 2000 produced sharp criticism for allegedly reduced antitrust enforcement. Given this history, the next administration will face loud protestations of abandonment of antitrust norms whenever it clears a large merger in an industry with relatively few competitors, even though the Obama administration cleared analogous transactions, including Express Scripts/Medco and OfficeDepot/OfficeMax.

Fourth, critics may attempt to “prove” decreased enforcement using simple statistics, including the number of cases or the rate of challenges as a percentage of filings. These statistics cannot demonstrate such a dramatic proposition. The number of challenges depends upon multiple factors, some of which are exogenous. The FTC under the George H.W. Bush administration

---


challenged mergers at twice the rate as under the Clinton administration, yet we doubt that knowledgeable observers would regard Clinton-era enforcement as relatively lax.³

Fifth, we see at most a limited role for populism—however defined—in mergers, and perhaps then only in media mergers, which will be evaluated both at the FCC with its public interest jurisdiction, and the DOJ. Courts will remain a check on agency decisions, and the economic foundation of antitrust law is firmly established. (Outside of mergers, we foresee populist interest in limiting business practices that use government processes to restrain competition.)

Our final observation concerns procedure. We hope and expect that the new administration will reduce Second Request burdens, and include greater flexibility in negotiating compliance, especially at the DOJ. Issuing more targeted Second Requests would also reduce the volume of materials that must be processed and reviewed, freeing up scarce resources, both in the government and the private sector, for more productive uses.

Thus, we predict change in merger policy, real but modest. We also predict controversy, both real and hyperbolic.

³ For a discussion of these issues, see Timothy J. Muris, Facts Trump Politics: The Complexities of Comparing Merger Enforcement over Time and Between Agencies, ANTITRUST, Summer 2008, at 37–38.
Will Facts Still Matter?

Janusz A. Ordover

2016 has not been kind to global pundits whose predictions on many topics in many countries have been mercilessly upended. It is, thus, with a massive dose of trepidation that I approach the invitation from the editors of The Antitrust Source to be published in this special issue that coincides with Inauguration Day. I think that it is too confining to look to the future by focusing solely on Mr. Trump’s presidential victory: as others have noted, his victory is not unique but likely is symptomatic of the broader crisis facing the global liberal economic order, and the political-economic consequences of this crises are just beginning to play themselves out.

Might these concerns be overblown, at least in the realm of antitrust policy? My answer is a guarded “hopefully.” Of course, this does not mean that ideology, politics, and elections don’t matter; they do, as Professor Steven Salop lucidly demonstrated.¹ However, inasmuch as antitrust policies and enforcement have become increasingly based on solid microeconomics foundations and intensive analysis of facts, the room for ideological, political, and electoral shocks has potentially narrowed. At the same time, in other realms of political life, the importance of facts to decision-making appears to be receding. How long can antitrust stand up against this tide? Here one interesting consideration is that “fact-based” competition policy (at least as articulated by Professor Joshua Wright—an important member of Trump’s transition team) tilts against interventionist antitrust and is more aligned with conservative views on antitrust enforcement. This gives me hope that empirical analyses will continue to drive enforcement decisions at the DOJ and the FTC.

Perhaps another reason might be that there is a broad consensus regarding the virtues of free and open markets—domestic and international—that most economists and competition agencies ascribe to. But this consensus might be fraying, and not only on the edges. The concern is that the globalist vision skews the pay-offs to the “elites” and contributes to increasing concentration in income and wealth. If so, protecting and advocating for competition (and trade) may lose its luster in favor of “making country/industry strong again.” Most economists agree that this is a folly but, perhaps, we “have had enough of experts.”

Finally, if, under the next administration, the DOJ and the FTC were to throttle back on enforcement, experienced plaintiffs’ attorneys will find ways to depend more for that role on the courts, where precedent is harder to reverse. Irrespective, I do have a premonition that the 2010 Horizontal Merger Guidelines² will get a new and hard look, if only to further diminish the relevance of the Philadelphia National Bank presumption.●

Consumer Protection Change Is Coming But May Not Be as Drastic as You Think

Dana Rosenfeld and Donnelly McDowell

While the presidential transition will inevitably result in some change in consumer protection law and policy, history suggests that the core mission and related governing principles will remain largely intact. Consumer protection enjoys broad bipartisan support, and the work of federal regulators like the Federal Trade Commission has been remarkably stable over time. The incoming administration, to be sure, will have ample opportunity to shape consumer protection policy, including by filling at least three commissioner vacancies at the FTC and by instituting structural changes at the CFPB.

Yet it’s unlikely that quintessential FTC cases involving clear-cut deception or fraud will cease or that the Dodd-Frank Act will be repealed in its entirety. So what could change?

The FTC may take a more conservative view of when consumers are misled by privacy representations. Notably, the single remaining Republican FTC Commissioner, Maureen Ohlhausen, has dissented from complaints against companies for allegedly deceptive statements in connection with wireless router and Internet camera security, and for inaccuracies in a privacy policy when the practices otherwise went above and beyond legal requirements. In the latter case, former Commissioner and current head of the FTC transition team, Joshua Wright, also dissented, asserting that the targeted representation wasn’t deceptive because there was no finding that it was material to consumers and, even if it were, prosecution was unwise and likely to deter positive industry conduct in the long run.

Similar pragmatic considerations may be applied in other contexts. For example, in the substantiation area, Commissioner Ohlhausen has cautioned against excessively rigid substantiation standards, warning that they may deny consumers useful information and discourage innovation. As such, the FTC may be less likely to push the envelope when it comes to substantiation standards and pursuing enforcement actions against reputable, large-scale national advertisers that were a hallmark of Chairwoman Edith Ramirez’s tenure.

And, of course, there’s the question of the Dodd-Frank Act and the fate of the Consumer Financial Protection Bureau. After the D.C. Circuit’s decision in PHH Corp. v. CFPB, which held the

---

CFPB’s structure unconstitutional and ordered that the director be removable by the President at will, the new administration may seek to remove current Director Richard Cordray immediately. Assuming such a move was effective, there are significant questions as to what powers the Bureau could wield without a confirmed Director. Not to mention the many possible legislative options, including the reintroduction of a proposal by Representative Jeb Hensarling under the Financial CHOICE Act (FCA) to restructure the Bureau or the transfer of some or all of the Bureau’s powers to the FTC.

Time will tell but history suggests that change in the consumer protection arena is likely to be incremental rather than abrupt, with continued enforcement of fraudulent practices that result in significant injury to consumers and the public.

Because the CFPB filed for en banc rehearing in the PHH Corp. case, the decision is presently stayed and there’s a question as to when any attempted removal of Director Cordray would become effective.
What should one expect in the area of antitrust from the Trump administration? The Republican platform did not mention antitrust. However, as a candidate, President Trump made several statements that suggest a very aggressive approach to antitrust.\footnote{As a business person, Trump has been involved in several antitrust matters. See Robert A. Skitol, \textit{Donald Trump’s Major Antitrust Encounters}, \textit{Antitrust Source} (Apr. 2016), \url{http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr16_skitol_4_11f.authcheckdam.pdf}.
}

Antitrust enforcement generally has bipartisan support. Washington antitrust lawyers tend to say that Republican and Democratic administrations differ only “at the margins.”\footnote{See, e.g., Timothy J. Muris of the FTC: The More Things Stay the Same, The More Things Change 1 (Proskauer Rose, Oct. 2001), \url{http://www.proskauer.com/files/News/e9c9d726-d2dd-4e91-922a-fd5327309490/Presentation/NewsAttachment/a53f81f2-a6da-44ef-a144-d5d7668319ef/1814168b-096b-44d4-8725-c7816f2a6732.pdf}.
} Perhaps, but those “margins” can be pretty large. Price-fixing enforcement is a priority, regardless of the party controlling the White House.\footnote{Protecting this priority in healthcare may be an early challenge for the Trump DOJ. The nominee for Secretary of Health and Human Services, Congressman Tom Price, has proposed an Obamacare-repeal bill that includes an antitrust exemption for doctors collectively negotiating with health plans. See Empowering Patients First Act, H.R. 2300, 114th Cong. § 1001 (2015), \url{http://tomprice.house.gov/sites/tomprice.house.gov/files/HR%202300%20Empowering%20Patients%20First%20Act%202015.pdf}. Under the Maricopa case, such joint negotiations are per se illegal. Arizona v. Maricopa Cnty. Med. Soc’y, 457 U.S. 332 (1982).}

However, merger enforcement and civil non-merger enforcement can vary significantly, depending on the inclinations of the leadership at the Department of Justice Antitrust Division and the Federal Trade Commission and the overall approach of the administration.

We sketch out in this article two broad—and generally conflicting—approaches that might form the basis for Trump administration antitrust policy. As a kind of shorthand, we refer to these as “reining in corporate power” and “laissez faire.” In the language of the angry electorate, these instead might be called “fixing the rigged system” and “triumph of the 1%.” There is, of course, a continuum of policy choices along this dimension, from more to less interventionist.

As a candidate and since the election, President Trump’s rhetoric has sounded like he would adopt policies reflecting the first approach. When announcing the agreement with Carrier to maintain certain jobs in the United States, Vice-President Pence said, “The free market has been sorting it out and America’s been losing;” and Mr. Trump responded by saying, “Every time, every time.”\footnote{See Nelson D. Schwartz, \textit{Trump Sealed Carrier Deal with Mix of Threat and Incentive}, \textit{N.Y. Times}, Dec. 1, 2016, \url{http://www.nytimes.com/2016/12/01/business/economy/trump-carrier-pence-jobs.html?_r=0}.
}

Despite this rhetoric, other signals have pointed in the opposite direction. The administration has been stressing less government regulation, which may be associated with less antitrust as
well. Although this does not mean that every policy decision will be the laissez-faire choice and none will be reining in, we expect that the mix will tilt towards laissez faire. The question is by how much. After all, while aggregating voters’ preferences is complicated, there is no reason to think that the working-class voters who are credited with giving Trump the edge in the election wished for a laissez-faire approach to antitrust. And Republican primary voters rejected traditional laissez-faire candidates like Mitt Romney and Jeb Bush. Instead, based on polls and media reports, working-class voters hoped for a Trump administration that would rein in corporate power, not one that would give large corporations greater discretion or enable further corporate consolidation and power.

Quite apart from the possible divergent approaches to antitrust we present here, we also mention the potential for the improper use of antitrust enforcement or threats (implicit or explicit) of enforcement to further the political or economic interests of the President and his allies. Concern about possible abuse of power is not typically a part of the debate about antitrust policy, at least not in the United States, but there are some worrisome signs that warrant its inclusion. The improper use of antitrust enforcement can occur regardless of the overarching approach to antitrust policy. It can occur in any administration, and to some extent did during the Nixon Administration.

Reining in Corporate Power: Fixing the Rigged System

We use “reining in corporate power” to signify the overarching goal of reducing the power of large corporations in the American economy. This approach is motivated in significant part by concerns expressed by voters that large corporations today exert significant control over the lives of the American working class, without much regard for their welfare or that of their communities, all the while enriching their owners and executives in the process. A slogan for this approach could be “fixing the rigged system.” This approach demands that the federal government resist the power of large corporations, not facilitate such power. The term “populism” also has been used to describe this approach. Although antitrust in the United States has its roots in the populism of the late 19th and early 20th century, populism overall connotes a much broader set of issues and concerns than we can address in this article.  

---

5 Antitrust is law enforcement, not regulation. And, deregulation might require more antitrust oversight, not less, as pointed out by the Supreme Court in Verizon Communications v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 412 (2004). Still, antitrust does involve oversight of business behavior and the Hart-Scott-Rodino Act creates a structure that shares some features of regulation, so there is a common association between antitrust and regulation.

President Trump ran a campaign to appeal to working-class Americans who believe the political and economic system is not working for them.\(^7\) For example, President Trump made the following statement at a campaign rally: “As an example of the power structure I’m fighting, AT&T is buying Time Warner and thus CNN, a deal we will not approve in my administration because it’s too much concentration of power in the hands of too few.”\(^8\) Using antitrust enforcement to rein in corporate power would thus respond to the will of the working-class Trump voters, along with many Clinton voters (especially those who supported Sanders and then voted for Clinton) by giving precedence to the interests of the working class over the interests of corporate shareholders.

One exit poll, conducted on Election Day in all 50 states, indicates that 72 percent of voters agree with the statement that “the American economy is rigged to advantage the rich and powerful.”\(^9\) Many voters are concerned with the power of large firms, which they see as having reduced their incomes and weakened their communities. These concerns are not new—Wal-Mart was under attack years back for destroying small-town retail businesses while earning high profits that were taken out of the community.\(^10\) These concerns have been growing over the past 30–40 years as foreign competition, deregulation, the decline of unions, and technological innovation have taken their toll on wage norms and the incomes of working class, their communities, and the prospects for their children.\(^11\) Whereas it used to be common for a firm’s owners to live nearby and feel a responsibility for workers’ and community welfare, that culture has been replaced by multinational corporations that are seen by critics to care only about the profits of their wealthy investors and the compensation of their non-local top executives.\(^12\)

These economic stresses have become even more visible in the wake of the Great Recession and the sluggish growth in median family income during the recovery. For example, median income and wealth both declined in real terms between 2010 and 2013.\(^13\) Over roughly the same period,

the real income of the top 1 percent grew by 31.4 percent.\textsuperscript{14} The growing awareness of drug addiction and suicide in white working class communities also is a visible sign of the despair.\textsuperscript{15} Although antitrust enforcement is but one of many possible instruments to address these concerns, it can have a salutary role.

Mergers. Reining in corporate control would involve strong merger enforcement, including additional demands for injunctions and more significant remedies. Anticompetitive mergers generally harm consumers by raising prices and reducing services and/or innovation. These effects may also enrich top executives and stockholders. Such mergers also tend to reduce employment along with output, though reduced employment is not typically considered to be an antitrust harm unless it results from buyer power in the labor market.

One hallmark of the reining-in approach to mergers would be a skepticism of corporate consolidation and the enhanced economic and political power that results from mergers, especially those involving very large firms. The reining-in approach would focus on competition to the benefit of consumers if the interests of consumers and shareholders come into conflict. It would not take political power into account in analyzing specific mergers, but general social and political concerns would be relevant to setting the overall standard, as discussed in more detail below.

Antitrust law and precedent, as it has developed for decades, is well suited to this task because of its focus on consumer welfare. If a merger is predicted to raise prices and reduce output, it typically violates the Clayton Act, even if it would benefit the stockholders of the merging firms.\textsuperscript{16} Two current examples of mergers alleged to harm the working class come to mind.

First, the DOJ issued complaints to enjoin two mergers involving national health insurance companies.\textsuperscript{17} Whatever one thinks of Obamacare, the availability of low-cost health insurance is a major issue for working-class families. If meaningful health insurance costs $900 to $1000 per month, that comprises a large share of the budget for a family earning $50,000 per year; and many such families struggle to pay for rent, food, and other necessities.\textsuperscript{18} A dominant health insurer might use MFN-plus provisions or exclusives with providers to erect barriers to smaller competi-
tors or new entrants.\textsuperscript{19} Having more competition among health insurers in offering insurance would tend to give consumers lower health insurance prices and more choices.\textsuperscript{20} Similarly, the DOJ’s successful challenge to the proposed merger between Aetna and Humana, by preventing a loss of competition in the market for Medicare Advantage, protected senior citizens, especially those with lower incomes, for whom affordable health care is a major concern. By the same token, preventing anticompetitive hospital mergers, grocery store mergers, or dollar store mergers also protects working-class consumers.

Second, the DOJ and FTC are currently reviewing several major agricultural seed/chemical company mergers: Bayer/Monsanto, Dow/DuPont, and Syngenta/ChemChina.\textsuperscript{21} Approving these mergers could be politically risky for the Trump administration if it is concerned about corporate power over farmers and the working class. At Judiciary Committee hearings in September on Consolidation and Competition in the U.S. Seed and Agrochemical Industry, Senator Grassley (RI-A) said, “I'm concerned that further concentration in the industry will reduce choice and raise the price of chemicals and seed for farmers, which ultimately will affect choice and costs for consumers.”\textsuperscript{22}

For better or worse, the consolidation in the American economy over the past 30 years has gone hand-in-hand with a more lenient approach to horizontal mergers. Indeed, from today’s perspective, the 1968 Merger Guidelines are shockingly tough. As one example, they state that the DOJ will ordinarily challenge mergers in which the acquiring firm has a market share of at least 15 percent and the acquired firm has a market share of at least 3 percent.\textsuperscript{23} The significant changes in antitrust enforcement over the past 30 years are reflected in counseling clients. In today’s antitrust world, counselors commonly explain that 6-to-5 and 5-to-4 mergers rarely are challenged and many 4-to-3 and 3-to-2 mergers are approved.\textsuperscript{24} This trend could be reversed by the Trump administration if it adopts the reining-in approach.


\textsuperscript{20} For example, the DOJ complaint in the Anthem/Cigna case states: “If permitted to proceed, Anthem’s purchase of Cigna likely would lead to higher prices and reduced benefits, and would deprive consumers and healthcare providers of the innovation and collaboration necessary to improve care outcomes.” Complaint, United States v. Anthem, Inc., \textit{supra} note 17, ¶ 9.

\textsuperscript{21} See Jacob Bunge, \textit{Agricultural Seed Company Executives Defend Mergers in Washington}, \textit{Wall St. J.}, Sept. 20, 2016, http://www.wsj.com/articles/agricultural-seed-company-executives-appear-on-capitol-hill-tuesday-1474397837. We are not involved in these mergers and offer no view on whether they are anticompetitive.


\textsuperscript{24} For example, in FTC merger reviews over the 1993–2010 period, in markets with entry barriers, only 47% of mergers were challenged when the HHI increase was less than 800 points, but 86% were challenged when the HHI increase was more than 1000 points. There was an over-90% challenge rate for transactions that led to three or fewer competitors when there were entry barriers, but a challenge rate of 17 to 23% in mergers resulting in markets of four or more competitors in the market. See Malcolm B. Coate, \textit{Benchmarking the Upward Pricing Pressure Model with Federal Trade Commission Evidence}, \textit{7 J. COMPETITION L. & ECON.} 825, 834 tbl. 2 (2011). These figures are based on Coate’s “Raw Sample.” His “Adjusted Sample” does not identify the number of firms when there are “Entry Issues” or “Proof of Concern.”
**Merger Remedies.** There are other actions that a Trump administration could take to ramp up merger enforcement. For example, it could emphasize stronger consent decrees for transactions that are permitted. The Agencies traditionally have sought to facilitate proposed mergers using the most limited interventions thought necessary to preserve competition, through divestitures or other remedies. The policy toward merger remedies recently has been tightened up, which has led to some additional mergers being litigated or abandoned. But when mergers are attacked in court, the courts may permit the merging parties to “litigate the fix,” not the original consolidation that was proposed.25

Studies have shown that merger enforcement and remedies are often insufficient, and prices may rise or service may decline.26 Multiple agency reports have discussed the need for improved merger remedies.27 The FTC recently issued a report evaluating the FTC’s merger remedies from 2006 to 2012.28 The FTC study finds that 17 percent of the remedies studied failed to maintain the pre-merger level of competition. Moreover, the success rate was lower for divestitures that did not involve an entire ongoing line of business. The FTC study also identified some areas where the process of designing and implementing merger remedies can be improved, including the scope of the assets to be divested and the adequacy of the due diligence. In addition to this study, we know that the merger remedies in some cases have failed. For example, in the recent supermarket merger of Safeway and Albertsons, the divestee (Haggen) went bankrupt not long after it acquired the divested assets.29 The FTC then permitted Haggen to resell many of those stores back to the merged firm.30 Another example is the bankruptcy of the divestee in the Hertz/Dollar Thrifty merger, though this led to the sale to a different third party, which potentially may have created a stronger competitor.31 The Agencies do not currently include a mechanism in consent decrees to monitor merger performance or to correct remedial errors—neither errors involving the initial assessment of the competitive risks of the merger nor errors about the necessary remedy.32

25 For further discussion, see David I. Gelfand & Leah O. Brannon, A Primer on Litigating the Fix, ANTITRUST, Fall 2016, at 10.


32 For further discussion, see Steven C. Salop, Modifying Merger Consent Decrees: An Economist Plot to Improve Merger Enforcement Policy, ANTITRUST, Fall 2016, at 15.
Such a mechanism would incentivize the merging companies to provide better information to the government and to divestees, ultimately leading to more viable and competitive divestees.

Antitrust policy that pays attention to corporate power would recognize that problems with merger remedies are a symptom of a more systemic problem. The merged firm has considerable influence over the choice of the divestee. The merged firm also has a natural informational advantage over the Agency regarding industry conditions in general and the strengths and weaknesses of the candidates to acquire the divested assets in particular. And the merged firm has no incentive to choose the most effective competitor. Under current practice, if a merger consent decree fails to correct the competitive concerns identified by the Agency, consumers take the hit, not the merged firm.

Why is this? The current system could be defended based on the view that exposing the merged firm to the risk that an ineffective consent decree will be modified would discourage mergers and disrupt business planning by the merged entity. Businesses, however, manage various risks all the time, and making firms pay for the costs they impose on third parties is a plus, not a minus. This remedial approach might make more sense if mergers in concentrated markets commonly generated large efficiencies that typically benefited consumers on balance, but that evidence is lacking.\(^{33}\) More fundamentally, the current system is peculiar because the result is that the risk of failed merger enforcement is placed entirely on consumers, who generally have lower average incomes and thus are likely to be more risk-averse than the shareholders of the merged firm. Instead, a Trump administration seeking to rein in corporate power could strengthen merger remedies so that the merged firm rather than consumers bears some risk of a failed or inadequate divestiture.

**Public Interest Prong.** Going further, if the Trump administration decides to be aggressive about using antitrust to rein in corporate power, it could even add a “public interest” prong to merger law and enforcement. Concerns about the traditional small-town community way of life were expressed at the time that Congress amended the Clayton Act in 1950.\(^{34}\) These concerns, though, are not taken into account in merger enforcement today. Currently, the adverse impact on workers and communities when the merged firm consolidates operations and shuts down facilities to save costs or rationalize production is not part of the antitrust analysis. Those types of impacts would appear to have been effectively ruled out under current law by the Supreme Court in *Philadelphia National Bank*, where the Court stated that an anticompetitive merger could not be saved by analysis of "some ultimate reckoning of social or economic debits and credits.”\(^{35}\)

---

33 It is difficult to do rigorous empirical analysis to test the effects of such mergers (or other alleged anticompetitive conduct). Even aside from the usual econometric issues, data is often limited to a non-random sample of markets. The samples also are non-random because antitrust concerns deter the conduct in the more problematical market structures. For a critical literature review, see Lars-Hendrick Röller, Johan Stennek & Frank Verboven, *Efficiency Gains from Mergers, in European Merger Control: Do We Need an Efficiency Defence* ch. 3 (Fabienne Itzkovitz & Roderick Melkslejoh, eds. 2006). For an interesting new study based on plant-level data, see Bruce A. Blonigen & Justin R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency* (Finance and Economics Discussion Series Divisions of Research & Statistics and Monetary Affairs, Federal Reserve Board, No. 2016-082), https://www.federalreserve.gov/econresdata/feds/2016/files/2016082pap.pdf.

34 *Brown Shoe Co. v. United States*, 370 U.S. 294, 333 (1962) (The Court considered the “probable effects upon the economic way of life sought to be preserved by Congress,” stating that “Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business.”).

However, a Trump administration strongly committed to reining in corporate power could seek legislation to bring public-interest considerations, including effects on employment and local communities, into merger analysis. The logical implication of President Trump’s campaign rhetoric is to bring these and perhaps other social and political factors into the analysis. Indeed, President Trump has already indicated his concern about the political consequences of consolidation resulting from media mergers.36

We do not believe that such legislation is necessary or wise at this time. Corporate power instead could be reined in significantly, and the ancillary harms to workers and communities reduced or avoided, using more conventional antitrust enforcement tools by: (1) raising the budgets of the FTC and DOJ; (2) affirming the appropriateness of enforcement targeted at protecting consumer welfare; and (3) adopting a more interventionist merger enforcement policy based on current enforcement principles, while recognizing that current economic conditions and social and political concerns about corporate power in America demand a greater concern with false negatives (allowing or under-deterring anticompetitive mergers to proceed) relative to false positives (blocking or over-deterring benign or procompetitive mergers). These conditions and concerns also would strengthen the role of the anticompetitive presumption for certain mergers, along with a high evidentiary burden to rebut that presumption and the use of sliding scale evidentiary standards. This would fit comfortably within the approach adopted by the Supreme Court in the Philadelphia National Bank opinion, which was decided in response to then-current concerns about corporate power. As the Court stated:

This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically . . . a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. Such a test lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect in light of Congress’ design in § 7 to prevent undue concentration.37

The Agencies could also place greater emphasis on buyer cartels that harm workers and insist on criminal penalties when such cartels are uncovered.38 The Trump administration could also use the FTC Act to more actively rein in corporate power, without the need for new legislation. The FTC Act can take into account broader considerations than the Clayton Act. Section 5 of the FTC Act can be used to attack “unfair methods of competition.”39 While the FTC’s 2015 Statement of Enforcement Principles narrowed the scope of Section

---

36 The FCC already operates under a public-interest standard, but the FCC’s jurisdiction does not necessarily cover mergers and acquisitions of firms that create content.


as enforced by the FTC. President Trump’s pick to head the FTC could seek to reverse course and use Section 5 more broadly in a principled way—subject of course to whatever limitations the courts would impose.

Were the Trump administration to go further and work with Congress to add an explicit public-interest prong to Section 7 of the Clayton Act, such a legislative change should be implemented in a limited and highly principled way, both to avoid doing more harm than good and to avoid arbitrariness or distortion of the antitrust process to further other goals. Absent strict limitations, there is a risk of introducing unreviewable discretionary elements into the antitrust law and policy. One possible principle would be to treat as “non-cognizable” any efficiency claims based on reductions in employment or plant closings, or only to those that likely would lead to significant economic dislocations for affected communities, much the way that efficiency gains based on reductions in output are currently treated as “non-cognizable.” This approach to rejecting these claimed efficiencies also would be highly consistent with the theme that corporate power harms workers by ignoring the impact on their welfare.

Going further, employment increases resulting from a merger could be treated as a public-interest benefit. If this approach were taken in the context of Section 7, it would become necessary to evaluate the incremental employment impact of the merger. It also would be necessary to balance the welfare of working-class individuals as workers with their welfare as consumers, and with the welfare of other consumers. This would not be easy to do, which is why we are skeptical of this approach.

It appears that President Trump may be moving in this direction of treating employment as a public interest benefit that should be taken into account in reviewing proposed mergers, albeit in an ad hoc way so far. For example, after meeting President Trump, the CEOs of Monsanto and Bayer pledged to add 3,000 jobs, invest $8 billion, and maintain Monsanto’s headquarters in St. Louis, if their merger is approved. Although it has no merger before the agencies, the Chairman of Sprint and SoftBank (Sprint’s majority owner), Masayoshi Son, has met with President Trump and pledged to create 50,000 jobs in the United States.

**Exclusionary Conduct.** Concerns about corporate power also arise when monopolists and firms with market power engage in exclusionary conduct that helps them maintain or enhance their market power. In this regard, as an owner of a United States Football League team, President Trump once was a plaintiff in an antitrust case against the NFL that rested on exclusionary conduct. A Trump administration seeking to rein in corporate power could aggressively

---


41 We certainly recognize that reducing variable costs by laying off workers can be cost-efficient for the merged firm and can lead to lower prices. At the same time, such layoffs also can have adverse social impacts, including increased depression, drug and alcohol addiction, and suicide in affected communities. While these are not “competitive effects” concerns, they are real social costs that might be relevant for setting merger policy under a public-interest approach. However, as noted, we do not favor distorting the modern approach to merger analysis in this way. We prefer setting tighter general merger standards in light of these concerns.


44 The USFL won on liability. U.S. Football League v. Nat’l Football League, 644 F. Supp. 1040, 1058 (S.D.N.Y. 1986). But damages were set by the jury at only $1, trebled to $3. This award was affirmed by the appellate court, which stressed the league mismanagement in building up the league and instead changing to a fall schedule in order to induce the NFL to merge with it. See U.S. Football League v. Nat’l Football League, 842 F.2d 1335, 1350, 1370 (2d Cir. 1988).
challenge exclusionary conduct by hospitals, health insurers, agricultural product suppliers, banks and other financial institutions, and other firms selling products and services used by working-class families.

**Impact on Democracy.** Furthermore, President Trump has suggested that corporate consolidation can adversely affect democracy. As a candidate, he condemned the proposed AT&T/Time Warner vertical merger and media consolidation generally. He stated, “Deals like this destroy democracy. And we’ll look at breaking that deal up and other deals like that.” He also attacked the Comcast/NBCU vertical merger, stating, “This should never ever have been approved in the first place.”

Concerns about the impact of mergers on democracy are outside the range of competitive-effects analysis, though the impact of corporate consolidation on democracy was a concern when Congress amended Section 7 in 1950. Recognizing these concerns, antitrust standards could strengthen the role of the anticompetitive presumption for certain mergers and require a higher evidentiary burden to rebut that presumption. Under this approach, the Agencies and the courts would not attempt to analyze the impact on democracy of a specific merger but would set the bar higher for the most sensitive mergers.

**Rent Seeking.** Consolidation increases the political power of corporations to influence or control governmental actions, which also can threaten democracy. Conservatives have long expressed concerns about “rent-seeking” behavior and the “capture” of regulators to protect incumbents and blockade disruptive new entrants. Concerns about rent-seeking and capture could be an area where conservatives and progressives agree about the need for a reining-in approach.

**Trade Policy.** Trade policy is a classic area of rent-seeking via protectionism. In this short antitrust article, we do not focus on trade policy or other policies to protect domestic firms from foreign competition. We note, however, that adopting such protections would have implications for antitrust enforcement policy. In particular, if the administration erects trade barriers, it will be important for merger enforcement to adjust by taking a tougher stance toward mergers between domestic firms. This is because trade barriers make foreign competition a less effective constraint on price increases by domestic firms.

**Banking Regulation.** As a candidate, President Trump indicated that he is in favor of “breaking up the big banks” as well as adopting a new Glass-Steagall Act limiting the scope of what banks can do. This corporate power issue involves more than antitrust, however. While we have not focused on consumer protection in this article, we note that there is an enormous tension between President Trump’s call to rein in the big banks and other plans already taking shape to repeal the Dodd-Frank Act and potentially to eliminate or weaken the Consumer Financial Protection Bureau.
Whatever might be the inefficiencies in Dodd-Frank, that statute was an attempt to rein in the large banks that contributed to the financial meltdown in 2008 and the worst economic catastrophe in the United States since the Great Depression. Undoubtedly, many working-class voters or members of their families were among those who became unemployed or lost their homes during this period. Indeed, the perception that the big banks and their highly paid executives were receiving favorable treatment (including bail-outs), while working families were suffering, losing their jobs and their homes, helped fuel the anger that President Trump rode into office.

Laissez Faire: Triumph of the 1%

Although working-class Trump voters were hoping that the Trump administration would rein in corporate power, some initial indications suggest that the administration instead will adopt a more laissez-faire approach to antitrust enforcement. By laissez faire, we mean to suggest a highly permissive, minimalist approach to antitrust (outside of price-fixing enforcement) of the type associated with Robert Bork. The laissez-faire approach is much more fearful of over-deterrence than under-deterrence. This is based on the belief that markets self-correct when anticompetitive conduct occurs, plus a greater acceptance of efficiency explanations for business conduct, combined with skepticism regarding the competence and objectivity of judges and juries to evaluate antitrust issues. The result is a far more permissive overall approach to antitrust enforcement. While laissez-faire proponents believe that a permissive approach to antitrust is the best route to higher efficiency and long-run consumer welfare, we do not. We also do not think that this is the approach hoped for by working-class voters who put Trump into office. As we noted earlier, a slogan for this laissez-faire approach by angry voters might be “Triumph of the 1%.”

Antitrust permissiveness runs along a continuum, depending on the strength of these beliefs. To illustrate what the more permissive end of the continuum might be, we will highlight some of the policy positions advocated by Professor Joshua Wright. Professor Wright is a conservative law professor who teaches at the Antonin Scalia Law School at George Mason University and was an FTC Commissioner from 2013–2015. Most importantly, he has advised the FTC transition team, recently has met with President Trump, and has been reported to be under consideration for AAG. Professor Wright has described his positions on antitrust law and policy in his extensive writings. While Wright’s positions highlighted here do not reflect the totality of his views, they can serve as a useful signal of the type of policies that would that be adopted if the Trump administration pursues a laissez-faire approach.

Horizontal Mergers. A laissez-faire approach toward merger enforcement could be highly permissive. The ideology behind laissez-faire presumes that mergers generally will lead to increased

---


52 David Higbee, an antitrust lawyer at Hunton and Williams (and a former Antitrust Division official during the George W. Bush administration), also has reportedly been appointed to the DOJ transition team. However, we have not found any major articles setting out his general policy views.
efficiencies—lower costs, higher quality products, and more innovation—and that entry and competition from non-merging firms will tend to protect consumers from any potential market power resulting from a merger. Furthermore, merger policy based on the laissez-faire approach treats transfers of wealth and income from consumers to stockholders as irrelevant to antitrust policy.\textsuperscript{53} According to this general view, any income distribution concerns are better addressed using income tax policies.\textsuperscript{54}

We interpret a number of Wright’s merger enforcement positions as consistent with aspects of the laissez-faire approach. He has advocated eliminating the \textit{Philadelphia National Bank} anticompetitive presumption quoted earlier, which has governed merger law since 1963.\textsuperscript{55} This goes well beyond the D.C. Circuit’s position in \textit{Baker Hughes}, where the D.C. Circuit panel reduced the defendant’s rebuttal standard from “clear showing” down to simply a “showing.”\textsuperscript{56} Because the Agencies routinely rely on this presumption when they go to court to challenge mergers, eliminating the anticompetitive presumption could make it significantly more difficult for the Agencies to prevail in court when they challenge anticompetitive mergers. This would likely lead to much more lenient merger enforcement and under-deterrence of anticompetitive mergers, not only during the Trump administration but potentially for many years to come.\textsuperscript{57}

As an FTC Commissioner, Wright advocated more permissive merger enforcement than his colleagues. He supported the majority of the merger complaints brought by the FTC but dissented in numerous cases. Overall, he dissented in about 23 percent of the merger complaints where a consent decree was signed while he was a Commissioner (8 out of 35). He was the lone dissenter in seven of these eight matters. Both the reasoning and frequency of these dissents indicate how a laissez-faire antitrust approach could affect merger policy.

Commissioner Wright generally based his dissents on the grounds that there was insufficient evidence of anticompetitive harm to support a complaint, which also is consistent with his disagreement with the \textit{Philadelphia National Bank} presumption—and the use of presumptions based on market shares more generally. One dissent involved a 3-to-2 merger where the parties proposed a divestiture shortly after the second request was issued, which apparently truncated somewhat the evidentiary record.\textsuperscript{58} In this context, Commissioner Wright found no credible basis to conclude that the merger would enhance the likelihood of coordination, notwithstanding the market structure.\textsuperscript{59} This indicates a higher relative concern with false positives than with false negatives, and associated evidentiary standards for efficiencies and harm evidence.

\textsuperscript{53} See, e.g., \textit{ROBERT BORK, THE ANTITRUST PARADOX} 111 (1978) (“I think it seems clear the income distribution effects of economic activity should be completely excluded from the determination of the antitrust legality of the activity.”).

\textsuperscript{54} Of course, taxation has been critiqued by separate arguments based on economic incentive effects, for example, as reflected in the famous Laffer curve.


\textsuperscript{57} As explained by Judge Posner, “I don’t think turning an antitrust case into a graduate economic seminar is feasible.” \textit{Philadelphia National Bank} at 50: An Interview with Judge Richard Posner, 80 \textit{ANTITRUST L.J.} 205, 207 (2015).


\textsuperscript{59} Id.
He dissented in another matter on the grounds that there was insufficient evidence of anticompetitive effects, based on his conclusion that there were efficiency benefits to consumers that outweighed the likely competitive harms. His disagreement with the other members of the Commission appears to have involved different views of the proper burden of proof to be placed on the merging firm to prove the efficiency benefits, as well as the burden on the Commission to prove competitive harms. Wright was generally less skeptical of efficiency claims, a view that is in line with laissez-faire antitrust and is more permissive than current FTC policy.

**Vertical Mergers.** The laissez-faire approach takes a very permissive view of vertical mergers. A key rationale is that vertical mergers are generally efficient. One of Commissioner Wright’s merger dissents illustrates this permissive approach. That dissent involved a matter where, perhaps as a way to speed up resolution of the transaction, the merging firms themselves had identified a potential competitive problem relating to its vertical integration and were negotiating the remedial solution with a third party even before the Commission identified the issue as a competitive concern. Nevertheless, Commissioner Wright concluded that there was insufficient evidence to believe that there was a competitive problem. Under a permissive approach, vertical mergers like AT&T/Time Warner would have a much higher likelihood of success and receive approval with fewer limitations.

**Exclusionary Conduct.** The laissez-faire approach also would be permissive with respect to other allegedly exclusionary conduct. To illustrate, Commissioner Wright’s dissent in the FTC’s McWane exclusive-dealing case opined that exclusive dealing even by a monopolist should be treated as presumptively procompetitive, and that the plaintiff would need “clear evidence” to rebut this presumption. The Eleventh Circuit rejected that position. However, it nonetheless could animate enforcement policy during a Trump administration. Similarly, while accepting the logic of the modern economic approach to analyzing foreclosure, Professor Wright and other commentators propose raising the evidentiary bar to establish that exclusionary conduct creates significant foreclosure. Setting a higher evidentiary bar for showing harm and a lower bar for showing efficiencies would come close to treating exclusionary conduct by monopolists as nearly per se legal.

In the context of Section 5 of the FTC Act, Commissioner Wright voted with Chairman Ramirez and Commissioners Brill and McSweeny in support of the FTC’s Statement of Principles Regarding

---


64 See McWane, Inc. v. FTC, 783 F.3d 814, 836 (11th Cir. 2015).

65 The more permissive foreclosure standard would demand a showing that the rival’s output has fallen below minimum efficient scale (MES) or minimum viable scale (MVS), rather than be satisfied by a showing that the rival’s costs were raised materially or its capacity reduced and these foreclosure effects permit the defendant to maintain, or enhance market power. Compare Joshua D. Wright, Moving Beyond Naïve Foreclosure Analysis, 19 Geo. Mason L. Rev. 1163 (2012), with Steven C. Salop, The Raising Rivals’ Cost Foreclosure Paradigm, Conditional Pricing Practices and the Flawed Incremental Price-Cost Test, 81 Antitrust L.J. (forthcoming 2017). Commissioner Wright proposed the use of the MES standard in McWane, 783 F.3d at 824.
Enforcement of FTC Act as a Competition Statute. Nevertheless, prior to that vote, in his own writings on Section 5, Commissioner Wright crafted an absolute defense for conduct that generated any efficiency benefits, regardless of whether those benefits were outweighed by harms to consumers and to the competitive process.66

**Antitrust and Patents.** Another key test for Trump administration antitrust policy will be how it handles knotty questions at the intersection of antitrust law and patent law. During the George W. Bush administration, the FTC, under Chairman Timothy Muris, took a balanced view of how antitrust and patent law intersect and interact. The Muris FTC issued a highly influential report in 2003 raising concerns that “overly generous patent rights” were stifling rather than promoting innovation.67 The report made a number of recommendations to reverse the expansion of patent rights resulting from decisions by the Federal Circuit Court of Appeals. The FTC report was widely cited in the debate over patent reform that ultimately led to the passage of the America Invents Acts in 2011. The FTC also brought a cutting-edge case against Unocal for its deceptive use of patents to achieve market power in the context of the development of reformulated gasoline standards set by the State of California.68 The Muris FTC also brought a case against Bristol Myers Squibb for abuse of process by improperly filing an Orange Book listing and inequitable conduct at the Patent and Trademark Office.69

Two specific areas at the intersection of antitrust law and patent law have been active in recent years and are likely to remain lively over the coming years: pay-for-delay agreements in the pharmaceutical industry and the treatment of standard-essential patents. The positions taken by the Trump administration are likely to be of considerable consequence in both of these areas.

As to pay-for-delay agreements, during the first term of the George W. Bush administration, under Chairman Muris, the FTC continued the Pitofsky FTC’s policy of challenging pay-for-delay agreements in the pharmaceutical industry. These efforts were further continued by FTC Chairwoman Deborah Majoras, Chairman Jon Leibowitz, and Chairwoman Edith Ramirez, culminating in the Supreme Court’s landmark 2013 decision in *Actavis*, which largely adopted the position that the FTC had taken for some 15 years that those agreements can be anticompetitive.70

Defenders of these agreements have pushed back against the view that large “reverse payments” are evi-

---


idence of anticompetitive agreements to delay entry. The FTC has found that these pay-for-delay agreements have been extremely costly to consumers. A laissez-faire approach to pay-for-delay deals could dramatically reduce generic competition and harm working-class consumers.

As to standard-essential patents, the DOJ and the FTC have warned about the dangers of patent holdup and the harm to competition that can occur if a patent holder fails to abide by its promise to license its standard-essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms. In 2013, the FTC brought enforcement actions in this area against Google and Bosch, both of which were ultimately resolved by consent decrees.

The DOJs business review letter issued in 2015 to the Institute of Electrical and Electronics Engineers (IEEE) illustrates what is at stake in this debate. The IEEE sought the DOJs view when the IEEE was seeking to update its policies to better prevent patent hold-up by firms that promise to license their SEPs on FRAND terms. The DOJ concluded that the proposed IEEE updates had the potential to benefit competition by facilitating licensing negotiations, mitigating hold up and royalty stacking, and promoting competition among technologies for inclusion in standards.

The DOJs business review letter was sharply criticized by some commentators, who expressed grave concern that the IEEE updates would reduce the value of SEPs. These commentators and

---

71 These critics argue that the fact that a settlement involves a large and unexplained reverse payment is not reliable evidence of anticompetitive delay. This view was rejected by the Supreme Court in Actavis. Without the Actavis Inference established by the Supreme Court, it would become much more difficult for the FTC to prevail in those cases. Professor Wright and his co-authors criticized the Supreme Court’s decision in Actavis, stating that the rule established by the Supreme Court “will deem some welfare increasing settlements anticompetitive.” Bruce H. Kobayashi, Joshua D. Wright, Douglas H. Ginsburg & Joanna Tsali, Actavis and Multiple ANDA Entrants: Beyond the Temporary Duopoly, ANTITRUST, Spring 2015, at 89, 95. Shapiro has criticized that article. See Aaron Edlin, Scott Hemphill, Herbert Hovenkamp & Carl Shapiro, The Actavis Inference: Theory and Practice, 67 RUTGERS L. REV. 585 (2015).


76 Id. at 16.

others have expressed skepticism about the significance of patent hold-up. One fact commonly cited by these skeptics is the rapid growth of smartphone sales in recent years, which is treated (erroneously in our view) as evidence inconsistent with the presence of patent hold-up in the smartphone industry. If the Trump administration takes a narrow view of the role of antitrust and patent law in preventing SEP owners from evading their FRAND commitments, potentially very large amounts of money would flow from ordinary consumers purchasing smartphones (as one leading example) to a small number of entities that hold SEPs relating to smartphones and have promised to license those patents on FRAND terms. The FTC’s recent complaint against Qualcomm, which provoked a strong dissent from Commissioner Ohlhausen, is illustrative.

**Occupational Licensing and State Restrictions on Entry.** One area where the laissez-faire approach likely would not roll back current policy would be occupational licensing and other state restrictions on entry. Conservatives led the way in recognizing how state regulations can reduce competition; progressives have generally followed that lead, while aiming to keep legitimate consumer protections in place. In fact, the Trump administration might go further than previous administrations in removing such regulations. In this regard, President Trump has called for the repeal of the McCarran-Ferguson Act, which restricts competition in insurance, including health insurance. He was quoted as saying, “The insurance companies, they’d rather have monopolies in each state than hundreds of companies going all over the place bidding.”

**Summary.** We have contrasted the reining-in and laissez-faire approaches. While we expect the latter, the direction has not yet been resolved. As we have discussed, there is a policy continuum, and the Trump administration could follow a mix of policies. That will depend on who President Trump appoints to be Chair of the FTC and Assistant Attorney General for Antitrust. For example, in addition to the approach he took in the patent and pay-for-delay area, FTC Chairman Muris stressed bipartisan cooperation and continuity between his approach and that of the previous

---

78 For example, see Joshua D. Wright & Douglas H. Ginsburg, Comment on the Japan Fair Trade Commission’s Draft Partial Amendment to the Guidelines for the Use of Intellectual Property Under the Antimonopoly Act 5 n.21 (Aug. 3, 2015), https://www.ftc.gov/system/files/documents/public_statements/693631/150803japantradecomments.pdf. By contrast, we consider it obvious that the dramatic growth in smartphone sales is due to impressive technological progress, and this evidence of growth is perfectly consistent with the hypothesis that patent hold-up has caused smartphones to be somewhat more expensive due to excessive royalties for SEPs. More generally, patent-holdup skeptics frequently ignore the costs borne by potential infringers to avoid patent hold-up, including by paying higher royalties. This is a notable oversight: in determining the cost of theft, it would be a major error to ignore the costs people incur to avoid having their property stolen and the “protection money” they pay to criminal enterprises to leave their property alone. See Gordon Tullock, The Welfare Costs of Tariffs, Monopolies, and Theft, 5 W. ECON. J. 224 (1967).


administration. Under Chairman Muris, the FTC took the initiative to reinvigorate the FTC’s hospital merger enforcement and to assess limitations in the state action doctrine.

Another example of a more moderate Republican approach can be found in some of the positions taken by Commissioner Maureen Ohlhausen. For example, Commissioner Ohlhausen was part of the four-Commissioner majority in the McWane case holding McWane liable for anticompetitive exclusive dealing. Commissioner Ohlhausen has not dissented from any merger consent decrees based on a lack of finding potential anticompetitive harm to be caused by the acquisition. On January 25, 2017, President Trump named Commissioner Ohlhausen Acting Chair of the Federal Trade Commission.

Abuse of Power Using Antitrust

Conservative commentators have expressed concerns that the Trump administration might abuse Presidential power with “political coercion” and “crony capitalism.” For example, the widely reported negotiation with Carrier appeared to threaten Carrier’s parent company with the loss of government contracts if Carrier moved certain jobs to Mexico. Saving domestic jobs is a goal consistent with reining in corporate power, but the concern is that it was implemented by way of an ad hoc threat of retaliation rather than as part of a rule-based process. That is, Trump did not call on Congress to implement a government procurement law that would deny government contracts to firms that exported jobs, nor did he announce that he would implement an Executive Order to that effect.

Abuse of power can involve carrots or sticks. Governmental antitrust enforcement could be used to frighten or punish enemies of the administration or reward its friends. Antitrust investigations can be initiated, and antitrust enforcements actions can be brought, against firms that

---


91 Crony capitalism is a fear in every administration. However, this concern is heightened by the Trump family’s extensive business interests. University of Chicago Professor Luigi Zingales, author of A CAPITALISM FOR THE PEOPLE: RECAPTURING THE LOST GENIUS OF AMERICAN PROSPERITY (2012), has written that Donald Trump is “the essence of that commingling of big business and government that goes under the name of crony capitalism.” See Luigi Zingales, Donald Trump, Crony Capitalist, N.Y. TIMES, Feb. 23, 2016, http://www.nytimes.com/2016/02/23/opinion/campaign-stops/donald-trump-crony-capitalist.html?_r=0.
challenge the administration or do not accede to its demands. Likewise, antitrust enforcement actions can be withdrawn as a way to reward friends or to line the pockets of government officials themselves. Friends of the administration also can be rewarded by bringing antitrust cases against their competitors. Depending on the specifics, these actions could well be illegal. Certainly, forgoing enforcement as a quid pro quo for payment would be. Even putting aside such criminal violations, using antitrust enforcement to frighten or punish enemies or reward friends is inconsistent with the rule of law. 92

As noted above, President Trump announced as a candidate that he would block the AT&T/Time Warner transaction. That stance could be based on conventional concerns over vertical mergers in the media industry or on reining in corporate power because of the threat that media consolidation poses to democracy, as discussed above. However, President Trump’s statement also could have been a way to threaten media players like CNN that he may view as his enemies.

As a candidate, President Trump threatened a monopolization case against Amazon. 93 In doing so, he specifically flagged the fact that Jeff Bezos, Amazon’s controlling owner and CEO, owns the Washington Post, an apparent Trump enemy. Threats—even if veiled—can harm the victim, and so can be used to chill opposition. Forbes reported that Amazon’s stock price fell 6 percent several days after President Trump’s election. 94 President Trump made other threats against media during the campaign. As early as February 2016, referring to media companies, Trump said, “Believe me, if I become president, oh, do they have problems.” 95

These are not unprecedented concerns. Political pressure by Congress and the White House on the antitrust agencies is a fear in every administration. While one hopes that such pressure is rarely applied, and fails when it is applied, instances of the significant abuse of power involving antitrust occurred during the Nixon administration.

One example that figured prominently in the Nixon impeachment hearings involved the alleged White House intervention in the DOJ’s conglomerate antitrust cases against International Telephone & Telegraph in exchange for ITT’s contribution of $400,000 to the cost of the 1972 Republican presidential convention in San Diego. 96

92 A related issue is the misuse of antitrust enforcement as a way to obtain cooperation in other areas of the administration’s agenda. Permitting an anticompetitive merger as a quid pro quo for the merged firm’s agreement (say) not to export jobs of employees in a separate division of the company would be one example.
95 Callum Borchers, 4 Threats to the Media Under President Trump, WASH. POST, Nov. 10, 2016, https://www.washingtonpost.com/news/the-fix/wp/2016/11/10/4-threats-to-the-media-under-president-trump/. He went on to say, “They’re gonna have such problems. . . . I’m going to open up our libel laws, so when they write purposely negative and horrible and false articles, we can sue them and win lots of money.” Id.
Another example was the assurances the White House allegedly gave to Howard Hughes that it would not attempt to use Section 7 of the Clayton Act to block his purchase of an additional Las Vegas hotel—over the opposition of the Antitrust AAG, Richard McLaren—in exchange for a $100,000 contribution.⁹⁷ Although there is some controversy on the point, one of the possible motives for the Watergate burglary may have been either to unearth what the Democrats knew about the Howard Hughes contributions or to dig up other information with which to persuade the Democrats to withhold such information.⁹⁸

But perhaps most telling was the Nixon administration’s delaying a threatened lawsuit against the three prominent TV networks as a way of obtaining more favorable news coverage of the administration.⁹⁹ Apparently, the DOJ was considering an antitrust case against the networks involving ownership of “prime-time” programming. As reported by the Washington Post in 1997 when Nixon White House tapes relating to this matter were released, the tape transcript indicated that, “Nixon decided to have [Attorney General] Mitchell ‘hold it for a while, because [Nixon was] trying to get something out of the networks.’”¹⁰⁰ As the President himself declared in the tape, “We don’t give a goddam about the economic gain. Our game here is solely political. . . . As far as screwing them is concerned, I’m very glad to do it.”¹⁰¹

**Summary.** We certainly hope that the Trump administration (or any other administration) avoids the use of antitrust as a tool for political leverage or retribution, or even permits any appearance or hint of such an abuse of the rule of law in antitrust. We fear that if the Trump administration does act in that manner, doing so would seriously undermine the legitimacy of U.S. antitrust enforcement. That would harm American antitrust institutions. In addition, it would weaken the ability of the United States to convince foreign jurisdictions to adopt the U.S. approach to antitrust. The result could be that other countries either resort more to intrusive forms of regulation or depart from sound competition policy in ways that harm U.S. corporations and consumers around the world.

**Conclusion**

If the antitrust leaders in the Trump administration take a cue from the substantial majority of voters who believe that the American economy is rigged in favor of the rich and the powerful, they will take the approach of reining in corporate power. However, at this point it seems more likely that the Trump administration will adopt a more laissez-faire approach.

---


⁹⁹ One of the Watergate tapes also suggested that the Nixon White House was considering engineering opposition to renewal of Washington Post radio station licenses, although this was an FCC issue, not an antitrust issue. For a description and citation to the tape, see Nancy Scola, *Why Obama Called Out the FCC in Public*, WASH. POST, Nov. 12, 2014, https://www.washingtonpost.com/news/the-switch/wp/2014/11/12/why-obama-called-out-the-fcc-in-public/?utm_term=.6d8df91b2453.


¹⁰¹ Id.
Still, it remains possible that the incoming antitrust leaders at the FTC and the DOJ will adopt
the reining-in approach in significant part. These leaders could be moderate Republicans or
Trump supporters who view antitrust from a more centrist perspective. Or they might be more laissez-faire Republicans who substantially moderate their views in keeping with current political and
economic conditions.

Finally, we note that if the Trump administration does substantially cut back on antitrust enforce-
ment, the state attorneys general may pick up some of the slack. The states often are involved in
merger analysis where local issues predominate, as with hospital and supermarket mergers. But
they have not limited their efforts to issues of purely local concern. For example, the recent “prod-
uct hopping” case against Actavis was brought by the state of New York.102 Looking further back
in time, many states were involved in the Microsoft case.103

We hope that the Trump administration will honor the preferences of the working-class voters
who put Trump into office by adopting a reining-in approach to antitrust. This would involve vig-
orously enforcing the antitrust laws that control mergers and exclusionary conduct by dominant
firms. While antitrust enforcement may not be the most important instrument for maintaining a
democratic system, it is vitally important for protecting consumer welfare and maintaining confi-
dence in the market system.

102 New York v. Actavis PLC, 787 F. 3d 638, 659 (2d Cir. 2015) (successfully enjoining pharmaceutical company’s “product hopping” effort
for an Alzheimer’s treatment drug).

(2014) (detailing states’ efforts in the litigation and settlement of federal and state monopolization suits against Microsoft, including some
states’ substantial disagreement with the remedy accepted by the Justice Department).
Merger Enforcement in a Trump Administration

Scott Sher

Is merger enforcement under the antitrust laws a swinging pendulum, vacillating between active and passive, subject to the whims of presidential administrations? If one believes that merger enforcement is capricious and political in this way, the natural conclusion would be to expect a virtual moratorium during the Trump presidency.

Proponents of this “pendulum narrative” might point to comments from then-Senator Barack Obama that “the [Bush administration] has what may be the weakest record of antitrust enforcement of any administration in the last half century”¹ and that the 53 deals were abandoned during the Obama presidency (compared to only 27 deals abandoned during the Bush presidency)² as evidence supporting this conclusion.

As convenient as the pendulum narrative is, as explained by Bill Kovacic, it “supplies an unacceptably inaccurate representation of modern U.S. antitrust experience” and “provides an unsuitable basis for understanding how public institutions exercise their discretion to enforce antitrust laws.”³ With this in mind, it is most productive to view the upcoming Trump presidency as a next stage in antitrust enforcement rather than through the pendulum narrative. While it is likely this next stage will involve some retrenchment in merger enforcement, this should not be confused with a dramatic reduction in enforcement. The nature and magnitude of the retrenchment will depend upon much more than on the change of administration.

For instance, the 1980s experienced a retrenchment of merger enforcement that coincided with the Reagan administration. But numerous other factors contributed to (and were likely the proximate cause of) this phenomenon. First, the introduction of the Hart-Scott-Rodino Act in 1976 allowed for more deals to result in negotiated settlements rather than a rush to court to unwind a deal.⁴ Second, the law evolved in the 1970s to reflect a better understanding of relevant market definition, market power, and ways to predict price effects. Third, the 1982 Merger Guidelines⁵ equipped the business community with the ability to understand the enforcement regime and thus reduced the need for enforcement actions, as the market adjusted its behavior in light of the clarity of the rules.

In contrast, the Obama administration challenged many more mergers than the Reagan administration of the 1980s and the Bush administration of the 2000s. But a more careful evaluation of the evidence suggests the uptick in enforcement was not the product of a radical realignment of antitrust policy. Rather, the DOJ and FTC were confronted with a number of similar deals across a wide swath of industries—telecom (AT&T/T-Mobile); cable (Comcast-TWC); food distribution (Sysco/US Foods); retail grocers (Albertson/Safeway); health insurance (Anthem/Cigna and Aetna/Humana); etc.—where the agencies were reviewing deals in already highly concentrated markets. Moreover, the DOJ and FTC recent experience with failed divestitures focused the agencies on considering only truly palliative remedies and to litigate where they believed that the parties were trying to short-change consumers in the post-merger market. In this light, the apparently more aggressive enforcement record of the Obama administration is not a radical departure from prior merger enforcement regimes but rather another step in the progression of merger enforcement, shaped by the mix of deals facing the agencies.

Ultimately the trepidation or enthusiasm for some radical change to merger enforcement under President Trump will be wasted effort. Like with so many ill-fated antitrust theories, it is best to put to rest the image of the swinging pendulum. While pithy, it is almost surely wrong.

---

6 See supra note 2.

7 See Oversight of the Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary, 114th Cong. (2016) (statement of Bill Baer, Assistant Att’y Gen., Dep’t of Justice). There were two notable deals in the last several years that likely increased the agencies’ concerns regarding failed divestitures, Hertz/Dollar Thrifty and Albertson/Safeway, where the divestiture buyers were not able to compete in the market post-merger because they were underfinanced and/or the assets divested were not viable once separated from the merged parties. Notably, Bill Baer was the Bureau Director at the FTC in the 1990s during the agency’s divestiture study, which retrospectively analyzed failed and successful divestitures. There is little doubt that his experiences at the FTC shaped Baer’s philosophy regarding remedies while at the DOJ.
Antitrust Outside the Sherman Act

Tim Wu

More attention should be paid to the pursuit of a robust competition policy outside of the main federal antitrust statutes. Without any prejudice to those general purpose laws, industry-specific solutions can form an important part of the overall picture.

Consider two examples.

In the pharmaceutical markets there have been widespread and recent concerns about firms taking advantage of regulatory or other barriers to entry to support outlandish price-hikes on off-patent drugs that neither competitive forces nor the antitrust law are well-positioned to combat. Perhaps a better answer is to look at the powers of the Department of Health and Human Services. The HHS has the (currently unused) power to selectively employ statutory imports to combat opportunistic drug pricing under 21 U.S.C. § 384. The FDA has already been dealing with drug shortages by authorizing imports from trusted countries; it can use the same procedures to selectively fight price hikes.

In the beer markets, after rounds of domestic and global consolidation two brewers (InterBev and Miller-Coors) control about 75 percent of the domestic market. And while a vigorous domestic craft movement has been gaining market share since the 1990s, the Brazilian-Belgian InterBev, the so-called Standard Oil of the global beer industry, has demonstrated a recent proclivity for using economic power, rather than quality or price, to fight its better-tasting competitors.

Not well known is the fact that the Treasury Department has the statutory authority to police competition in the beer and liquor industries under the Alcohol Administration Act, 27 U.S.C. § 201 et seq. Administered by the Alcohol and Tobacco Tax and Trade Bureau (TTB), the statute confers the power to police exclusionary conduct, “commercial bribery,” and other forms of anticompetitive conduct. Its legislative history suggests broad powers: “Congress deemed the general antitrust laws insufficient,” the agency once said, “to address the unique unfair trade practice problems in the alcoholic beverage industry.”

Treasury and the TTB, with industry expertise and inspectors in the field may be in a better position to police anticompetitive conduct on an ongoing basis than the Justice Department or FTC. The agency acted recently, for example, to curtail anticompetitive shelving practices. But equipping the agency with greater antitrust expertise and a more explicit competition mandate would make a difference.

These are just two examples. Given the importance of a competitive economy, bringing an antitrust lens to bear outside of the main statutes seems an important priority.

---

Free Speech Versus Fair Markets:
Will Credit-Card Surcharge Cases Supercharge the First Amendment?

Matthew Moloshok

When a state prohibits overcharges, or institutes other conduct-related commercial regulations, has it violated the First Amendment? That is the issue, in substance, now before the U.S. Supreme Court in *Expressions Hair Design v. Schneiderman.* This case involves state laws that prohibit imposing credit card surcharges, but allow merchants to charge lower prices for customers who pay cash. The petitioners, a variety of merchants, claim these laws violate their freedom of speech because they “require the merchant to communicate that price difference as a cash ‘discount’ and not as a credit-card ‘surcharge.’ ”

The New York statute at issue makes no reference to speech, advertising, or anything else typically viewed as expression. In relevant part, the statute provides: “No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means.” The U.S. Court of Appeals for the Second Circuit therefore held that the statute only regulated conduct (i.e., charging credit card customers more) and so did not present a First Amendment issue. Yet other courts construing similar state statutes have divided on the question.

If the Supreme Court agrees that the statute regulates only conduct, then *Expressions Hair Design* will be of limited interest. But a ruling that the statute impermissibly regulates speech would have wide ramifications. Finding that transacted prices constitute protected “speech” would force government to meet heightened standards of review. That could draw into question large swaths of consumer protection regulation. It may even require reconceiving some aspects

---

1 808 F.3d 118 (2d Cir. 2015), cert. granted, 137 S. Ct. 30 (U.S. Sept. 29, 2016) (No. 15-1391). The U.S. Supreme Court heard the case on Jan. 10, 2017.


3 N.Y. GEN. BUS. LAW § 518 (McKinney 2012) (emphasis added). Violation is a misdemeanor, punishable by fine up to $500, imprisonment up to one year, or both. Nine other states have similar statutes; they are gathered in Petition for a Writ of Certiorari, supra note 2, at 10 n.1.

4 *Expressions Hair Design v. Schneiderman,* 808 F.3d 118 (2d Cir. 2015), amending and superseding 803 F.3d 94 (2d Cir. 2015), rev’g 975 F. Supp. 2d 430 (S.D.N.Y. 2013).

5 Dana’s R.R. Supply v. Attorney Gen., Florida, 807 F.3d 1235 (11th Cir. 2015) (invalidating the Florida surcharge statute on First Amendment grounds), *reh’g en banc denied,* 809 F.3d 1282 (11th Cir. 2016); *Rowell v. Pettijohn,* 816 F.3d 73 (5th Cir. 2016) (rejecting a First Amendment challenge to the Texas surcharge statute). Petitions for certiorari were filed in both *Rowell* (No. 15-1455, May 31, 2016) and *Dana’s R.R. Supply* (No. 15-1482, June 6, 2016) but the Supreme Court has not acted on either to date. California’s surcharge statute has also been invalidated on First Amendment grounds by *Italian Colors Restaurant v. Harris,* 99 F. Supp. 3d 1199 (E.D. Cal. 2015), which is now on appeal to the Ninth Circuit (App. No. 15-15873, filed Apr. 24, 2015).
of antitrust law. That some lower courts and at least four Justices of the Supreme Court are prepared to consider the question at all, therefore, is a significant development.

The Swipe-Fee Saga
For 30 years or more, the major credit card networks have prohibited merchants from surcharging for use of a credit card or offering discounts to induce consumers to pay cash. Merchants claim that their inability to pass on swipe fees hurts consumers as well as their own bottom lines. Both merchants and government agencies have challenged the no-surcharge rules as products of monopolization or conspiracies in restraint of trade. A 2013 settlement of a multidistrict antitrust class action would have allowed merchants to surcharge most credit card transactions, but class certification was vacated on appeal and the settlement fell with it.

Legislatures got involved in the swipe fee battle too. Card companies for a time had convinced Congress to ban surcharges, but Congress let the federal statute expire in 1984. Card companies then successfully lobbied states to enact no-surcharge laws. As of now, ten state laws prohibit surcharging credit card use. Merchants have challenged those laws too, principally on First Amendment grounds.

The First Amendment Saga
Basing a challenge on the First Amendment would have been unimaginable in the not-so-distant past. Although the First Amendment by terms prohibits the adoption of any law “abridging the freedom of speech,” until 1976 it had not been thought to apply even to commercial advertising. No longer: truthful commercial speech is subject to protection under the First Amendment. Thus,

---


8 This legislative saga at the federal and state levels is traced in Expressions Hair Design, 808 F.3d at 123–25, and in Italian Colors Restaurant, 99 F. Supp. 3d at 1203–04.

9 U.S. CONST. amend. I.

10 “[T]he Constitution imposes no . . . restraint on government as respects purely commercial advertising.” Valentine v. Chrestensen, 316 U.S. 52, 54 (1942). But see Daniel E. Troy, Advertising: Not “Low Value” Speech, 16 YALE J. ON REG. 85, 121–23 (1999) (arguing Valentine ignored a historical record showing that the Founders understood commercial advertising would be treated like other speech, and that courts, implicitly based on this understanding, left commercial speech largely unregulated until the Progressive era).

11 E.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (states must allow truthful advertising of drug prices); 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996) (even though states may comprehensively regulate or even completely ban liquor sales, states may not paternalistically prevent all advertising of liquor prices); In re R.M.I., 455 U.S. 191, 202, 203 (1982) (government may prohibit commercial speech only if it is “inherently likely to deceive or where the record indicates that a particular form or method of [commercial speech] has in fact been deceptive,” and so “States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive.”). See also Sorrell v. IMS Health Inc., 564 U.S. 552 (2011) (drug makers have right to purchase medical provider information that parties are willing to sell).
regulations of such speech must be more than simply rational; they must satisfy heightened
scrutiny under the so-called Central Hudson standards.\(^{12}\)

Even so, the Court has never extended the First Amendment to commercial conduct, even if
that conduct involved expressive aspects.\(^{13}\) To take antitrust law as an example, the Court, in
Giboney v. Empire Storage & Ice Co.,\(^{14}\) ruled that a group boycott could be punished, even
though it was intended to protest suppliers dealing with non-union distributors. The Court con-
cluded that freedom of speech does not “immunize . . . speech or writing used as an integral part
of conduct in violation of a valid criminal statute,” such as antitrust law.\(^{15}\) Later, in FTC v. Superior
Court Trial Lawyers Association,\(^{16}\) the Supreme Court ruled that the First Amendment did not pro-
tect a boycott by legal aid attorneys, who demanded higher compensation as being essential to
attract adequate legal representation of the poor. While the boycott certainly had expressive ele-
ments, “[n]o matter how altruistic the motives of respondents may have been, it is undisputed that
[the legal aid attorneys’] immediate objective was to increase the price that they would be paid
for their services,” and as such the boycott remained an antitrust violation, unprotected by the First
Amendment.\(^{17}\) Information exchanges between and among competitors may also result in antitrust
liability where the intent or foreseeable effect is to raise or stabilize prices.\(^{18}\)

The same speech/conduct distinction applies to fraud. While lying, even if knowing and inten-
tional, is constitutionally protected, fraud is not because it involves a conduct/transactional ele-
ment by which the perpetrator seeks “to effect” the fraud “or secure moneys or other valuable con-
siderations.”\(^{19}\)

But can (and should) courts so readily distinguish conduct from speech? Some scholars have
argued that the First Amendment does not allow drawing such rigid categorical distinctions. Drawing from the example of antitrust law, Professor Eugene Volokh points out: “wherever such a
line [between speech and conduct] should be drawn, it can’t be drawn just by saying that certain
speech constitutes the conduct of attempted monopolization, just as lobbying for anticompetitive

\(^{12}\) In Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y., 447 U.S. 557, 564 (1980), the Court ruled:

If the communication is neither misleading nor related to unlawful activity . . . the restriction must directly advance the [substantial] state inter-
est involved; the regulation may not be sustained if it provides only ineffective or remote support for the government’s purpose. Second, if the
governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

The exact contours of the Central Hudson standard are uncertain. See Andrew S. Gollin, Comment, Improving the Odds of the Central
Supreme Court has allowed government to prove only a rational basis, or sometimes “reasonable fit” while at other times has required least
restrictive means).

\(^{13}\) “If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into ‘speech’
simply by talking about it.” Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 66 (2006); see also Frederick Schauer,

\(^{14}\) 336 U.S. 490 (1949).

\(^{15}\) Id. at 498; see also Rumsfeld, 547 U.S. at 62 (“[I]t has never been deemed an abridgment of freedom of speech or press to make a course
of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written,
or printed.” (quoting Giboney, 336 U.S. at 502)).


\(^{17}\) Id. at 427.

(1978); 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 97–102 (7th ed. 2012).

\(^{19}\) United States v. Alvarez, 132 S. Ct. 2537, 2547 (2012) (plurality opinion). Whether the “fraud” test immunizes other consumer protection
legislation and regulations that prohibit “misleading” communications is less clear, as discussed infra note 50 and accompanying text.
Each court that has grappled with the question of whether the no-surcharge laws are invalid under the First Amendment came to its conclusions by applying categorical logic: to the Second and Fifth Circuits, the laws address only conduct; to the Eleventh Circuit the laws address only speech. How, then, should one understand the granting of certiorari in Expressions Hair Design? At least four Justices have something on their minds, but the nature of their concern is unclear. Perhaps they want to expand the First Amendment so that it will no longer draw a categorically firm line between speech and pricing and other commercial conduct. This interpretation would require government to give heightened justification for regulation of any conduct involving speech elements under the Central Hudson standards. Perhaps the Justices want to pull in the reins by affirming the Second Circuit’s holding that the First Amendment does not stand as a bar to the regulation of pricing and other transactional conduct. Either way, the no-surcharge cases provide a vehicle that starkly presents the choice.

Expressions Hair Design, Pettijohn, and Dana’s R.R. Supply

Each court that has grappled with the question of whether the no-surcharge laws are invalid under the First Amendment came to its conclusions by applying categorical logic: to the Second and Fifth Circuits, the laws address only conduct; to the Eleventh Circuit the laws address only speech. That they rely on quite different paradigms to reach their conclusions seems apparent in the incredulity each court expresses as to contrary points of view.  


21 See also Hillary Greene, Antitrust Censorship of Economic Protest, 59 Duke L.J. 1037, 1101–03 (2010) (recommending extending First Amendment coverage to non-“feigned” expressive boycotts, through abandonment of the antitrust per se rule and application of a modified rule of reason to such boycotts).

22 In a dissenting opinion, Justice Holmes wrote:

> When there are competing sellers of a class of goods, knowledge of the total stock on hand, of the probable total demand, and of the prices paid, of course will tend to equalize the prices asked. But I should have supposed that the Sherman Act did not set itself against knowledge . . . .

> I must add that the decree as it stands [prohibiting information exchanges among competitors] seems to me surprising in a country of free speech that affects to regard education and knowledge as desirable. . . . I cannot believe that the fact, if it be assumed, that the acts have been done with a sinister purpose justifies excluding mills in the backwoods from information, in order to enable centralized purchasers to take advantage of their ignorance of the facts.


24 This is not unusual when on the cusp of a “paradigm shift.” Cf. Thomas S. Kuhn, The Structure of Scientific Revolutions 94 (3d ed. 1996) (at the point of scientific revolution, the competing schools use completely different methods of analysis and choosing “between competing paradigms proves to be a choice between incompatible modes of community life.”).
The Second Circuit’s ruling in *Expressions Hair Design* reversed the trial court’s conclusion that the New York no-surcharge law unconstitutionally regulated speech. Describing the contention that the statute involved speech “bewildering,” the Second Circuit found that the statute was easily comprehended and did not regulate speech at all but only what consumers actually paid: “A seller imposing a surcharge (an additional amount above its sticker price) on credit-card customers could . . . ‘characterize’ that additional charge as whatever it wants, but that would not change the fact that it would be violating [New York’s statute].”

In *Rowell v. Pettijohn*, the Fifth Circuit reached the same conclusion as the Second Circuit, ruling that the Texas surcharge law only regulated conduct and left ample room for expression because it imposed no limitation on the merchants’ opportunities to “inform[] customers about the costs of credit, encourag[e] them to use cash, or express[] views on pricing policy more generally.”

In *Dana’s R.R. Supply*, however, the Eleventh Circuit held that Florida’s no-surcharge law regulated speech rather than conduct. The Eleventh Circuit agreed that the appropriate test was the categorical one, as the statute’s “fate . . . hinges on a single determination: whether the law regulates speech—triggering First Amendment scrutiny—or whether it regulates conduct—subject only to rational-basis review as a mine-run economic regulation.” But it held that the Florida statute landed on the “speech” side of the line. The Florida statute, like New York’s, prohibits a surcharge for use of a credit card; unlike the New York’s, it defines a surcharge as the requirement to pay an additional amount for the privilege of using the card and explicitly allows merchants to offer a discount for cash so long as they offered it to all customers. Nonetheless, the Eleventh Circuit concluded it was a speech regulation rather than a conduct prohibition:

---

25 The district court in *Expressions Hair Design* dramatically announced its conclusion in the first paragraph of its opinion:

Alice in Wonderland has nothing on section 518 of the New York General Business Law. Under the most plausible interpretation of that section, if a vendor is willing to sell a product for $100 cash but charges $102 when the purchaser pays with a credit card, the vendor risks prosecution if it tells the purchaser that the vendor is adding a 2% surcharge because the credit card companies charge the vendor a 2% “swipe fee.” But if, instead, the vendor tells the purchaser that its regular price for the product is $102, but that it is willing to give the purchaser a $2 discount if the purchaser pays cash, compliance with section 518 is achieved. . . . [T]his virtually incomprehensible distinction between what a vendor can and cannot tell its customers offends the First Amendment and renders section 518 unconstitutional.


26 *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 132 (2d Cir. 2015), *amending and superseding* 803 F.3d 94 (2d Cir. 2015), rev’d 975 F. Supp. 2d 430 (S.D.N.Y. 2013). The Second Circuit limited its ruling to situations in which the seller had announced a single price, i.e., the cash price, and then charged more. Id. at 130. The merchants noted that sellers might announce their prices in a variety of ways, including posting separate cash and credit card prices. Id. at 126. Pursuant to *R.R. Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), the Second Circuit abstained from addressing those scenarios, in order to allow New York’s state courts to interpret the statute. Id. at 139–40.

27 *Rowell v. Pettijohn*, 816 F.3d 73, 82 (5th Cir. 2016) (quoting Brief of Appellee Commissioner of the Office of Consumer Credit of the State of Texas at 14). In reaching its conclusions, the Fifth Circuit had the benefit of the prior court of appeals rulings in *Expressions Hair Design*, *Dana’s R.R. Supply*, and the district court’s ruling in *Italian Colors*, discussed infra at notes 31–33 and accompanying text.

28 807 F.3d 1235 (11th Cir. 2015).

29 Id. at 1241.

30 The Florida statute states:

A seller or lessor in a sales or lease transaction may not impose a surcharge on the buyer or lessee for electing to use a credit card . . . . A surcharge is any additional amount imposed at the time of a sale or lease transaction by the seller or lessor that increases the charge to the buyer or lessee for the privilege of using a credit card to make payment.

Fla. Stat. § 501.0117(1) (2016). It further states that “[t]his section does not apply to the offering of a discount for the purpose of inducing payment by cash, check, or other means not involving the use of a credit card, if the discount is offered to all prospective customers.” Id.
To violate the statute, a defendant must communicate the price difference to a customer and that communication must denote the relevant price difference as a credit-card surcharge. Calling § 501.0117 a “no-surcharge law,” then, is something of a misnomer. The statute targets expression alone. More accurately, it should be a “surcharges-are-fine-just-don’t-call-them-that-law.”

The district court in Italian Colors v. Harris invalidated California’s no-surcharge statute on free speech grounds as well. Like Texas’s statute, California’s allowed merchants to offer discounts for cash if “the price difference was disclosed and limited to the additional credit card cost to the merchant.” But if merchants were free to set their own prices and make their own departures from those prices then “what is regulated is how those prices are conveyed to customers, not the prices themselves,” and “the manner in which price information is conveyed to buyers is quintessentially expressive, and therefore protected by the First Amendment.” The district court went on to rule the California statute facially failed several branches of the Central Hudson test—it singled out a particular message (labeling the differences as “surcharges” bad and labeling them as “discounts” good) and was insufficiently narrowly tailored to pass muster as a disclosure statute.

At bottom, the Eleventh Circuit and like-minded courts believe the “discount”/“surcharge” distinction is simply a matter of description, a semantic distinction, without substantial economic effect. Meanwhile, barring surcharges limits useful consumer information because the sting of the surcharge itself provides a behavior-motivating way to communicate to consumers that using credit is costly.

The Solicitor General Tries to Bridge the Gap

At the Supreme Court, the Solicitor General took an intermediate position, asserting that the New York statute regulated speech but nonetheless could pass First Amendment scrutiny as a fraud-prevention or disclosure regimen. The Second Circuit ruled the New York statute was constitutional because it only banned imposing previously undisclosed surcharges; the prevention of fraudulent imposition of undisclosed costs could certainly withstand Central Hudson scrutiny. Recall, however, that the Second Circuit had abstained from ruling on whether the statute permitted merchants to disclose both a “cash” and “credit” price. The Solicitor General argued that in that situation the statute would pass constitutional muster as a mandatory disclosure regime so long as the “sellers display credit-card prices alongside cash prices.” The United States urged the

31 Dana’s R.R. Supply, 807 F.3d at 1245.
32 Italian Colors, 99 F. Supp. 3d at 1204 (citing Thrifty Oil Co. v. Superior Court, 111 Cal. Rptr. 2d 253 (Cal. Ct. App. 2001)).
33 Id. at 1207 (quoting Judge Rakoff’s decision in Expressions Hair Design, 975 F. Supp. 2d at 445 (S.D.N.Y. 2013), which the Second Circuit reversed).
34 Id. at 1209–10. Interestingly, the court acknowledged that the no-surcharge rules could be permissible were they simply to require that any surcharge be adequately disclosed in advance, id. at 1210, seeming to ignore its own prior recognition that California courts had already construed the statute in exactly that manner, id. at 1204.
35 In the Supreme Court, two groups of behavioral economists submitted amicus briefs, one supporting the merchants, Brief of Scholars of Behavioral Economics as Amici Curiae in Support of Petitioners filed Nov. 21, 2016, and one supporting the State of New York, Brief of Amici Curiae International Center For Law & Economics and Scholars of Law and Economics in Support of Respondents filed Dec. 21, 2016.
36 Brief for the United States as Amicus Curiae Supporting Neither Party at 20, 21–33, Expressions Hair Design, No. 15-1391 (U.S. Nov. 21, 2016).
Supreme Court to remand for further development of the record as to how the statute is enforced and possible certification of questions to the New York Court of Appeals.37

The Solicitor General’s position may simply be proposing a solution that exists independent of the no-surcharges statute: under the Federal Trade Commission Act and various state consumer protection statutes, merchants cannot engage in deceptive practices, while regulations adopted under the Truth in Lending Act already require the disclosure of surcharges in credit transactions.38

Meanwhile, engraving a mandatory disclosure regime poses its own questions as to what constitutes adequate disclosure, at what point in the sale process and in what form?39

Ultimately, the Solicitor General’s position assumes that government has a relatively wide berth to mandate disclosures so long as the disclosures are “reasonably related” to preventing consumer confusion.40 Justice Thomas, at least, has criticized this view,41 while other developments in First Amendment jurisprudence after 2010 may put greater limits on what speech may be banned or regulated as “deceptive.”42

**The Widespread Need for “Framing” in Consumer Protection Regulation**

It seems plain, of course, that no-surcharges prohibitions really have nothing to do with communication and everything to do with privileging credit card users—perhaps an unwise policy choice, but not an imposition on anyone’s speech. The logical remedy is to convince legislators to make better choices or use other means of persuasion to convince consumers to pay with cash.

To accept petitioners’ position and overturn the Second Circuit requires some contortions. The Court would have to agree that the imposition of a surcharge—a transaction conducted above the announced price—is somehow predominantly communicative, and that by barring such upcharges the government has engaged in “framing” the way merchants can present their prices. Acceptance of an argument that governments cannot “frame” prices to assure that transacted

---

37 During the argument some of the Justices expressed similar concerns about the state of the record. See Transcript of Oral Argument at 12 and 20, *Expressions Hair Design*, No. 15-1391 (U.S. Jan. 10, 2017) (according to Justice Alito, the court does not yet “really know what the statute means and we don’t have a definitive interpretation,” and he feels “uncomfortable about ruling on the constitutionality of this statute without knowing how the . . . New York Court of Appeals would interpret the statute.”); id. at 22–23 (Justice Breyer noting the parties were asking the court to rule on its face, when not clear how it is being enforced); id. at 24 (Justice Kagan stating that as written, statute applies only to unannounced surcharges; to explore other issues would need to further develop the record).

38 Regulation Z, 12 C.F.R. § 1026.9(d)(1) (2016) (“Any person, other than the card issuer, who imposes a finance charge at the time of honoring a consumer’s credit card, shall disclose the amount of that finance charge prior to its imposition.”). The ubiquitous “cash price” and “credit price” signs posted at gas stations and pumps is largely a reaction of petroleum suppliers to the Truth in Lending Act and earlier versions of Regulation Z. See John M. Barron, Michael E. Staten & John Umbeck, *Discounts for Cash in Retail Gasoline Marketing* 11–13 (Credit Research Ctr., Krannert Graduate Sch. of Mgmt., Purdue Univ., Working Paper 57, 1991), https://www.researchgate.net/publication/5208956_Discounts_for_Cash_in_Retail_Gasoline_Marketing.

39 The Solicitor General, at oral argument, suggested that disclosures would need to be made in dollars and cents—disclose that the sandwich costs $10 cash, $10.20 credit—rather than as a percentage of the cash price, to avoid consumer confusion. (This kind of dollar and cents disclosure follows the Regulation Z model.) Some of the Justices questioned whether having to disclose information to the penny was too paternalistic—although it was pointed out that it would be difficult for ordinary consumers to calculate the surcharge on the spot if the price and surcharge were not expressed in round numbers—e.g., if a meal cost $32.46 plus a 2 percent surcharge, or if the merchant used the “percentage that is the fifth digit of pi” actually charged by the credit card issuer. Transcript of Oral Argument at 36–37, *Expressions Hair Design*, No. 15-1391 (U.S. Jan. 10, 2017).


41 Milavetz, Gallop & Milavetz, P.A., 559 U.S. at 255 (Thomas, J., concurring).

42 See infra notes 49–51 and accompanying text.
prices conform to consumer expectations—i.e., that they will not be charged more than the announced price—would have broad ramifications.

**Impacts on Consumer Protection.** Nearly all consumer protection regulation turns upon “framing” of “truthful” price, quantities, and similar information so that consumers and regulators can determine if the transaction conforms to seller promises and consumer expectations. To choose a few examples that directly implicate how prices or other terms are described:

- Twenty states regulate displays of “unit prices” for products found on grocery and drug store shelves; this requires choices by the government as to which weights, measures, and comparators to use.
- The Truth in Lending Act and Regulation Z thereunder regulate how to compute interest rates for retail installment sales and direct that the rate be expressed as an “annual percentage rate.” This requires defining the inputs into rates and how they may be described.
- The FTC imposes requirements regarding the types of information that must be disclosed regarding franchise fees and how the information must be presented, again choosing inputs and how they are described.
- Forty of the 50 states by statute prohibit a merchant claiming that an item is “on sale” or being discounted if the advertised price represents the price at which the item normally is sold during a governmentally determined period, thereby “framing” what can be called a discount.

In each of these instances, government engages in “framing” by establishing definitions and rules about the transactions and their descriptions that involve “contested policy choices” that would have been precluded by the First Amendment in, for instance, the political arena. Indeed, as construed by the Second Circuit, the New York statute is less intrusive than these kinds of regulations because it does not limit the prices that a merchant can announce and does not prevent merchants from trying to persuade the customers to pay cash instead.

It is true that once government directs the inputs and comparators (say, by requiring that price differences be compared from the announced price to the transacted price), it has essentially determined what kinds of statements are true or false about the transaction. This is essential, however, to effectuate the policy for which the inputs and comparators were created. A 2012 plurality opinion from the Supreme Court, *United States v. Alvarez*, ruled that the First Amendment...
excludes only fraud, which requires both falsity and intent to mislead. Arguably under Alvarez, the First Amendment would protect commercial speech that is literally true even if misunderstood by large numbers of reasonable consumers. If so, it may no longer be true, as once confidently asserted, that “[m]isleading advertising may be prohibited entirely” under the First Amendment. Hence, if states want to assure that transacted prices for credit card purchases will take place at the announced price and not at some higher unannounced price, it is appropriate to call the upcharge a surcharge and refer to any reduction from the announced price as a discount.

**Impacts on Antitrust Law.** Were charged prices to fall into the category of speech rather than conduct, then antitrust law would face significant First Amendment challenges too. As already seen, information exchanges and group boycotts have been identified as having significant expressive content that could rise to the level of “speech”—even though the antitrust concern is with the transacted prices and damage to competition that result from the information exchange or boycott. Vertical restraints arguably could rise to the level of “speech” as well; they arguably embrace the distributor’s First Amendment’s right of association or constitute an embodiment (if not like a sculpture or dramaturgy) of how services should be delivered and quality assured.

Would application of the First Amendment in the antitrust world really change the direction or fundamentals of antitrust law? This is a challenging question. Sometimes they pull in the same direction, as in Edwards v. District of Columbia, in which the D.C. Circuit invalidated the District of Columbia’s licensing scheme for tour guides. The court based its ruling on the First Amendment right of tour guides to express themselves and present their points of view and of their customers to learn from them. Imposing unnecessary licensing costs and burdens, of course, can be highly anticompetitive.

Yet antitrust and the First Amendment will not pull in the same direction in every case. Protecting markets against manipulation is a substantial governmental interest, but antitrust law might fail other aspects of Central Hudson review. As one example, prohibition of “unreasonable” restraints is a broad and vague concept; in the context of an information exchange and especially conduct evaluated under the rule of reason, actors may not know that their conduct will cause the required market foreclosure until after the fact, and that could lead them to refrain from drawing near the line. Chilling commercial conduct is unfortunate for the economy but is not a constitutional violation; chilling free speech is, and therefore arguably could prohibit antitrust rules against price fixing through information exchanges or market foreclosures through vertical restraints.

**Conclusion**

While speech is necessary to propose prices or other transaction terms, at some point the parties cross a line out of speech and into conduct. Deploying the First Amendment to invalidate conduct-based statutes wields a weapon that could be turned against important consumer protection regulation, and even some antitrust doctrines. The court, regulators, legislators, and the public should understand the ramifications of doing so before taking that precipitous step.

---

50 132 S. Ct. 2537, 2545 (2012) (Scalia, J.) (plurality opinion) (even as to fraud, “falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood.”).

51 Central Hudson, 447 U.S. at 566 (“For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading.”). See also POM Wonderful, LLC v. FTC, 777 F.3d 478, 500 (D.C. Cir. 2015) (“insofar as the FTC imposed liability on petitioners for the nineteen ads found to be deceptive by the administrative law judge, the Commission sanctioned petitioners for misleading speech unprotected by the First Amendment.”), cert. denied, 136 S. Ct. 1839 (2016).

52 755 F.3d 996 (D.C. Cir. 2014).

53 Id. at 1008–08.
Editor’s Note: Editor Subramaniam Ramanarayanan and Bryan Ray review a paper at the forefront of efforts to rigorously quantify the effects of branded drug manufacturers’ use of copay coupons for prescription drugs.

Send suggestions for papers to review, or comments, to page@law.ufl.edu or jwoodbury@crai.com.

—William H. Page and John R. Woodbury

Recent Papers


A common means used by health insurers to control their costs are financial incentives (such as co-payments or coinsurance) that sensitize consumers to the cost of care and thus encourage them to use lower-cost alternatives. In this regard, health insurers often use tiered drug benefit plans, with insureds’ financial obligations varying by tier. For example, a recent report by the Kaiser Family Foundation indicated that health plan drug formularies typically have “different tiers for generic, preferred and non-preferred drugs.”1 With this tiering, enrollees in health plans typically have lower copays (or coinsurance rates) for generic drugs on the plans’ formularies than for branded drugs on the same formularies.2

Faced with the increased prevalence of tiered drug benefit plans, manufacturers of branded drugs have resorted to greater use of copay coupons in recent years.3 A copay coupon is a subsidy provided to consumers by a manufacturer of a branded drug product to reduce the out-of-pocket costs that insured consumers may incur to fill prescriptions for that product.

The use of copay coupons has been the subject of recent study in academic and policy circles, focusing on possible effects with respect to increasing healthcare costs and improving patient adherence to medications.4 The use of copay coupons has also been subject to legal challenges, with lawsuits being brought by insurers against branded drug manufacturers alleging that

2 Over time, health plans have tended to increase the number of tiers that they use, and copay amounts, by tier, have also tended to increase. Id. at 172, Exhibits 9.1 and 9.4.
the use of copay coupons constitutes commercial bribery and a violation of RICO. A recent working paper by Leemore Dafny, Christopher Ody, and Matt Schmitt, *When Discounts Raise Costs: The Effect of Copay Coupons on Generic Utilization* (Dafny et al.), contributes to this discourse by being at the forefront of efforts to rigorously quantify effects of copay coupons.

Using data on dispensed prescriptions from IMS Health, insurance claims, and copay coupon offerings for a sample of drug products for which the first bioequivalent generic versions were launched between June 2007 and December 2010, Dafny et al. attempt to assess the effects of copay coupons on “generic efficiency” (i.e., the authors’ term for the share of the prescriptions for a drug product, including branded and generic versions, that are filled using a generic version), drug pricing, patient adherence to medication regimens, and total spending on pharmaceuticals. Based on their analysis, they find that copay coupons reduce generic efficiency rates, are associated with faster price growth for branded drugs, and have no statistically meaningful impact on total quantities of drugs consumed (which they use as a proxy to test for the effect of copay coupons on medication adherence). Taking these results together, and using other assumptions and estimates, they find that copay coupons increased retail spending by as much as $2.74 billion in the five-year period following generic entry for the drugs in their sample. Moreover, to the extent that these copay coupons affect the ability of insurers to steer patients towards lower-cost alternatives, this research also speaks to the potential effects of “side payments” in response to cost-sharing mechanisms in other areas of health care.

In the discussion that follows, we describe some of the methods and analyses used in this study and offer some observations on the implications of their findings for the nature of competition in health care.

**Study Methodology**

Figure 3 in the paper by Dafny et al. (reproduced below) shows the relationship between the offering of copay coupons and generic efficiency that the authors are trying to investigate. Presented in this form, on average, drugs (in their sample) for which a copay coupon is offered have lower levels and slower growth rates of generic efficiency than drugs (also in their sample) for which no coupon is offered. These average differences are statistically significant.

Of course, this difference could be driven by factors other than the presence of a copay coupon. Confounding factors that may affect generic efficiency need to be accounted for to better support the inference that copay coupons are the cause of the difference. Regression analysis is a method commonly used by economists for this purpose. To the extent that these confounding factors can be observed (and measured), they can be included as control variables in a regression specification. Doing so may allow the effects of the copay coupon on the various outcomes of interest to be isolated. In situations in which some of these factors might be unobserved, the researcher might

---


6 Leemore Dafny is a professor at Harvard Business School; Christopher Ody is a research assistant professor at Northwestern University’s Kellogg School of Management; and Matt Schmitt is an assistant professor at UCLA’s Anderson School of Management.

7 Dafny et al., supra, at 8–9 and tbl. 1. The authors also impose other selection criteria that further restrict the sample of drugs products they use for their analyses. Id. at 9.

8 id. at 4, 20, and 23.

9 id. at 13.
have to adopt alternative empirical strategies to establish causality. Dafny et al. employ both approaches and include a thoughtful discussion of the differences between the two.

The first regression specification that the authors estimate is a “confined exponential” equation. This is a non-linear diffusion model that attempts to capture the trajectory of generic efficiency over time as it increases and approaches its maximum value of 1. Specifically, the rate at which generic efficiency increases is modeled as a function of the presence of a copay coupon, as well as other factors, such as the number of generic firms and the refill percentage (i.e., the proportion of total dispensed prescriptions accounted for by refills). Because the relative value of the copay coupon with respect to the total copayment might be more relevant to a patient than just the absolute value of the coupon, the authors also estimate regression specifications that attempt to account for “effect of coupon intensity” (i.e., the extent to which the coupon covers the copayment). In sum, across various specifications for their model, the authors find that “generic efficiency for drugs with coupons is estimated to be around 10 percentage points lower than for drugs without coupons.”

The limitation of this analysis, as the authors acknowledge, is that it might suffer from so-called endogeneity bias. Intuitively, in this case, this means that the offering of a coupon may depend on certain unobserved factors that may also be correlated with generic efficiency. Because the estimates from the model are obtained by comparing drugs with copay coupons to drugs without copay coupons (a cross-sectional comparison), if drugs that have a copay coupon are somehow systematically different from drugs that do not have a copay coupon in ways that affect generic

10 Id. Fig. 3.
11 Id. at 13–14.
12 Id. at 11 and 14.
13 Id. at 14.
14 Id. at 15. In technical terms, endogeneity occurs when the dependent variable of a regression is correlated with the error term of the regression. There are several possible causes of endogeneity. In this case, the cause would be variables that should be included in the regression specification but are omitted.
efficiency, the estimated difference in generic efficiency between drugs with and without coupons may be due to this difference, and not due to the coupons.

An ideal “experiment” to test the effect of the copay coupons would randomly assign coupons across drugs to remove any systematic relationship between the coupons and other unobservable factors that affect generic efficiency. Such randomization is typically not possible to implement in practice. In this case, the authors make use of a “difference-in-differences” design whereby they exploit the differences in the regulatory environments in the neighboring states of Massachusetts and New Hampshire to try to isolate the causal effect of copay coupons on generic efficiency. The use of copay coupons for pharmaceuticals is not allowed in Massachusetts, while it is permitted in New Hampshire.\(^\text{15}\)

The “difference-in-differences” approach imposes the assumption that the average change in generic efficiency in the “treatment” state (New Hampshire, where copay coupons are allowed) would have equaled that change in the “control” state (Massachusetts, where co-pay coupons are not allowed), in the absence of the treatment (i.e., allowing copay coupons). That is, if New Hampshire would have also banned coupons, the change in generic efficiency rates over time would mirror what we see in Massachusetts. If this were to hold, then any observed difference between the generic efficiency rates in the two states can be ascribed to the presence of copay coupons in New Hampshire. This so-called parallel trends assumption is illustrated in Figure 2 below.

\[\text{Figure 2: Estimating Causal Effects with a Difference-in-Differences Model}\]

\(^{15}\) Id. at 15.

\(^{16}\) Adapted from Joshua D. Angrist & Jörn-Steffen Pischke, Mostly Harmless Econometrics: An Empiricist’s Companion 172 (2009).
Using this approach, the authors estimate that generic efficiency is 3.4 percentage points lower in New Hampshire (when compared to Massachusetts) for drugs with copay coupons, while it is effectively the same across both states for drugs without coupons.\textsuperscript{17}

In addition to their effect on the utilization of generics (vis-à-vis branded drugs), copay coupons could also affect the pricing of drugs. For example, if it offers a copay coupon for a drug, the manufacturer may find it optimal to raise the price of the drug (even if that price increase causes higher copays) which may, all else equal, result in lower utilization of the drug.\textsuperscript{18} Using IMS Health data, Dafny et al. find that the presence of copay coupons is associated with faster growth in branded drug prices (12.2 percent annual growth for drugs with coupons versus 7.1 percent for drugs without coupons, with the difference being statistically significant).\textsuperscript{19} They also find a small effect on generic price growth—specifically, that coupons are associated with slower price declines for generic drugs—an effect that may reflect, they suggest, the relaxation of the competitive constraint imposed by the pricing of the branded drug.\textsuperscript{20} As the authors point out, these are not to be interpreted as causal effects given that the research design simply compares price trends for drugs with and without copay coupons and does not fully control for other factors that may affect prices.\textsuperscript{21}

Based on their analysis, Dafny et al. conclude that copay coupons increase total spending on pharmaceuticals. Specifically, for the average drug in their sample, they estimate that the offering of a copay coupon led to an increase in retail drug spending by between 1.2 percent and 4.6 percent over the five-year period following generic entry.\textsuperscript{22}

The effects of these coupons will surely be subject to further research, policy discussions, and actions taken by insurers and pharmaceutical manufacturers. That said, this paper presents a thoughtful and rigorous study, and we recommend it not just to readers interested in the particulars of drug pricing and the effect of copay coupons, but also for those interested in understanding the mechanics of a carefully implemented empirical economic analysis exploiting the presence of a “natural experiment.” The authors do a nice job of walking the reader through the logic behind their empirical methodology and also take care to point out the limitations of their analyses and the caution that one needs to exercise in interpreting some of their estimates.

\textsuperscript{17} Even with this research design, the possibility remains that the “coupon” effect is, in actuality, capturing other factors that vary across the states and are correlated with the offering of coupons. For example, the copayments for drugs may differ across the states in such a way that they are correlated with whether or not a drug has a coupon, or promotional efforts for branded drugs may differ across the states depending on whether a coupon is offered for the drug. The authors attempt to control for these possibilities with a so-called triple difference model that uses the fact that the Centers for Medicare and Medicaid ban the use of copay coupons for all Medicare-sponsored drug plans. Here, the authors contend that, to the extent that the coupon effect is actually due to other factors, those other factors will affect prescriptions dispensed to individuals over 65 (covered by Medicare plans, but not allowed to use coupons) as well as all other individuals in New Hampshire more or less equally. Using the “triple-difference” model, the authors find larger negative effects of coupons on generic efficiency based on this approach. But the small samples of individuals over 65 in their data make their estimates less precise than those for the difference-in-differences model described above. Dafny et al., supra, at 16–18.

\textsuperscript{18} In this regard, the authors suggest that offering a copay coupon may be able to mute the effect of sales quantity that higher copays (potentially imposed in response to a price increase) may cause. Id. at 18.

\textsuperscript{19} Id. at 20. It is not clear from the paper if this estimated price difference accounts for the effect of the effective price decrease afforded by the copay coupons themselves.

\textsuperscript{20} Id. at 20.

\textsuperscript{21} Id. Because the contracts between drug manufacturers and insurers that are important determinants of drug pricing do not vary across states, the authors are unable to implement the difference-in-differences research design described above to examine causality. Id. at 18–19.

\textsuperscript{22} Id. at 27.
Concluding Thoughts
Taken at face value, the estimates from this study suggest that copay coupons, by reducing generic efficiency rates and by leading to higher price growth for branded drugs, might lead to higher costs for insurers. Insurers, in turn, might resort to a variety of responses to battle this increase in their costs: passing on a portion of it to consumers in the form of higher premiums, implementing methods that restrict the use of copay coupons, or dropping certain branded drugs from their formularies altogether. In other words, based on this study, while consumers may benefit from the presence of copay coupons in the short term (through reduced out-of-pocket costs), the long-term cost-benefit ratio is unclear.

The study also speaks to a larger trend in health care, where cost-sharing incentives have been increasingly employed by insurers to steer patients towards less expensive providers. With narrow network and tiered products becoming more common, patients are faced with increased out-of-pocket payments when they visit more expensive providers or providers that are out-of-network. Actions taken by some providers ostensibly to engage in “fee forgiving” (by allegedly waiving or reducing the increased out-of-pocket costs for patients for whom they are out-of-network) have led some insurers to bring lawsuits against such providers.23 This study takes an important step in advancing the debate on the use of such “side-payments” to consumers and in helping to understand the mechanisms through which they might affect incentives for all participants in the health care system.

—Subramaniam Ramanarayanan and Bryan Ray are economists at NERA Economic Consulting

---

23 See, e.g., Michelle Casady, Hospital Must Pay Aetna $41M for Out-of-Network Scheme, Law360 (Jan. 3, 2017); Jessica Corso, Cigna Says It’s Owed Millions in Ind. Fee-Forgiveness Scheme, Law360 (July 7, 2015).