AAI AMERICAN ANTITRUST INSTITUTE

THE STATE OF ANTITRUST ENFORCEMENT AND COMPETITION POLICY IN THE U.S.

APRIL 14, 2020

TABLE OF CONTENTS

SECTION 1: INTRODUCTION

Not since the first federal antitrust law was enacted over 120 years ago has there been the level of public concern over economic power that we see today.[1] Until recently, public attention to antitrust in the U.S. was transient, driven by the occasional merger or cartel case in high profile markets. Concern over declining competition, growing inequality, and slowing rates of market entry is being driven by a number of factors. Consolidation in numerous markets such as wireless telecommunications, airlines, healthcare, and others has produced unprecedented levels of market concentration, raising concerns over stronger incentives to exercise market power and adverse effects on competition, consumers, and workers. Mega-mergers, once relatively rare, are now the order of the day. The average value of deals, in real terms, was almost 17% higher at the peak of the most recent merger wave in 2015 than at the peak of the previous wave in 2007.[2] Other antitrust concerns are also stacking up. International cartels continue to proliferate, extracting billions of dollars from consumers, and the growth of dominant firms threatens to stymie smaller, innovative rivals.

The Obama administration expressed concern about declining competition in 2016, reinforced by a burgeoning body of economic research.[3] The role of long-term under-enforcement of the U.S. antitrust laws features prominently in this debate. For four decades, antitrust enforcers have pulled their punches based on assumptions that most mergers and business practices are pro-competitive. But economic evidence shows that these assumptions lack empirical grounding or are demonstrably false, and they have effectively cloaked anticompetitive practices and harmful mergers.[4] Indications that antitrust enforcement lags behind are apparent even in simple statistics. For example, federal merger enforcement, as measured by the number of transactions challenged by the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC), generally tracked the ups and downs of merger activity from the early 1990s to early 2000s.[5] Thereafter, trends in merger and enforcement activity become increasingly disparate.

Where are we now? Antitrust enforcement is at a crossroads. The U.S. economy struggles with the cumulative effects of decades of under-enforcement *and* a step-down in current enforcement levels under the Trump administration. Despite its anti-corporate concentration rhetoric on the campaign trail, key metrics of cartel and merger enforcement have declined since the Trump administration took over.[6] And in 2017 and 2018, the DOJ did not open one monopolization investigation, the longest span

[1] The American Antitrust Institute (AAI) is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. Our thanks to AAI Advisors who contributed to this report.

[2] Institute for Mergers, Acquisitions and Alliances, *M&A in the United States, available at* https://imaa-institute.org/m-and-a-us-united-states/, last visited Mar. 8, 2020.

[3] Exec. Order No. 13725, 81 Fed. Reg. 23,417 (Apr. 15, 2016). *See, e.g.*, Council of Economic Advisers, *Benefits of Competition and Indicators of Market Power*, The White House (Apr. 2016), at 4, *available at* https://www.whitehouse.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf;
Bruce A. Blonigen and Justin R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency*, 24 (Fed. Reserve Bd., Working Paper No. 2016-082 (2016); José Azar et al., *Labor Market Concentration*, NBER, Working Paper No. 24147 (Dec. 2017), *available at* http://www.nber.org/papers/w24147.

[4] *See, e.g.*, Jonathan B. Baker, *Taking the Error Out of 'Error Cost' Analysis: What's Wrong with Antitrust's Right*, 80 Antitrust L.J. (2015), *available at* https://ssrn.com/abstract=2333736.

[5] *Supra* note 2 and Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 1993 through 2018, *available at* https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports. Merger enforcement and merger activity are highly positively correlated between 1993 and 2002 and weakly positively correlated between 2003 and 2018.

[6] Carl Shapiro, *Antitrust in a time of populism*, 61 Int'l. J. of Ind. Org. 714-748 (2018).

of inattention to dominant firms in the last 50 years.[7] The compound effect of these problems is to imperil the very power of the antitrust laws. For example, the role of merger control is to prevent harmful mergers, but lax enforcement of hundreds of transactions over time has resulted in "creeping" concentration in many markets, resulting in tight oligopolies and dominant firms. Merger enforcement is now effectively constrained to preventing only the most patently anticompetitive mergers and acquisitions, and competition problems must instead be addressed through enforcement against collusive and exclusionary conduct. But these areas of law face their own limitations, including the difficulty of policing tacit agreements, which the courts do not recognize as illegal, and high standards for showing monopolization. The result is that the enforcement balance among the three areas of antitrust law—mergers, agreements, and monopolies—has been fundamentally and perhaps irrevocably disturbed.

> *"The cumulative effects of under-enforcement of the antitrust laws present a significant political-economic dilemma in the U.S."*

Our analysis indicates that the Trump antitrust agencies have not recalibrated antitrust enforcement to address systemic concerns over declining competition. And they have no apparent plan for doing so. Moreover, sector regulators under the Trump administration have taken steps to remove important regulations that address market failures and promote a level playing field in key industries such as agriculture, telecommunications, and energy. The quandary that antitrust enforcement now faces has therefore fostered alternative proposals, including economic regulation and proposals that mandate firm breakups. Such solutions should be unnecessary if antitrust law were better enforced because in most cases, competition is better able than the government to ensure efficient and fair markets.

The first part of this report evaluates federal enforcement activity under the Trump antitrust agencies. This is measured by both quantitative statistics and qualitative assessments, which also account for policy changes and agency advocacy, as well as initiatives by federal sector regulators with statutory competition mandates. Our analysis indicates that the Trump administration receives a low grade by failing to protect competition at a time when markets are highly concentrated and evidence of competitive abuse surfaces with increasing regularity. The second part of the report assesses various alternatives to federal enforcement, and the promise they hold to make up for federal inaction. Enforcement by both state Attorneys General and private plaintiffs has secured significant recoveries. State activity is on the rise, including initiatives by state Attorneys General to open investigations and block illegal mergers. Both forms of activity can take up some slack from federal inaction, shape case law, and generate useful public debate. We give private and state enforcers a higher grade for stepping into the void left by federal inaction to seek compensation and deterrence for antitrust violations that harm consumers and workers.

[7] *See* Workload Statistics, FY2009-2018, U.S. Dep't. Just. Antitrust Div., *available at* https://www.justice.gov/atr/file/788426/download; Historical Workload Statistics, FY1970-1979, FY1980-1989, FY1990-1999, and FY2000-2009, U.S. Dep't. Just. Antitrust Div., *available at* https://www.justice.gov/atr/division-operations.

A free and open, market-based economy is fundamental to U.S. economic growth, consumer and entrepreneurial freedom, and democratic values. When markets produce anticompetitive and inefficient outcomes, as many in the U.S. economy do now, the role of antitrust enforcers as "referees" becomes all the more important. But the path forward is a fraught one. The cumulative effects of under-enforcement of the antitrust laws present a significant political-economic dilemma. Stepped-up private and state antitrust enforcement cannot fully substitute for strong federal enforcement. The invocation of additional policy tools, including regulation and legislation, to address declining competition highlights the fundamentally "public policy" nature of the problem. Whether an antitrust-specific response should focus on strengthening and clarifying the laws, or if more significant legislative overhauls will be necessary remains to be seen. Regardless, a variety of complementary competition policy tools will be necessary to support and bootstrap antitrust moving forward.

SECTION 2: SUMMARY OF MAJOR CONCLUSIONS

- **DECLINING COMPETITION PRESENTS A POLITICAL-ECONOMIC DILEMMA IN THE U.S.:** The cumulative effects of decades of lax antitrust enforcement, coupled with a step-down in enforcement under the Trump administration, poses fundamental challenges for markets and the democratic values that undergird them. Long-term inaction has compromised the effectiveness of the U.S. antitrust laws, presenting a significant political-economic dilemma around the role of antitrust in solving the broader public policy problem of declining competition.

- **ANTITRUST ENFORCEMENT HAS DECLINED UNDER THE TRUMP ADMINISTRATION:** Key metrics indicate a decline in cartel enforcement under the Trump administration, as well as a falloff in second requests and merger challenges. And despite a few high-profile cases, there is no meaningful invigoration of monopolization enforcement. Recent agency actions to block some mergers involving highly concentrated markets reflect "emergency" merger control of the most egregiously anticompetitive transactions.

- **POLICY PRIORITIES AT THE ANTITRUST AGENCIES ARE MARKEDLY DIFFERENT:** The Trump DOJ has introduced major changes in government policy surrounding cartel and merger enforcement, the intersection of competition and intellectual property, and competition advocacy. Many of these policies could work against the interests of competition and consumers. The FTC has taken a more pro-active approach, with continued efforts to challenge the expansion of intellectual property to achieve anticompetitive objectives in pharmaceutical markets.

- **SHIFTS IN AGENCY ADVOCACY REFLECT MORE FEDERAL INTERVENTION BY DOJ IN PRIVATE ANTITRUST CASES:** The important role of antitrust agency advocacy has shifted markedly under the Trump agencies. The FTC's competition advocacy, embodied in comments before federal and state agencies and amicus briefs, has fallen off dramatically. In contrast, the DOJ's competition advocacy has increased but often stakes out positions that work against the interests of competition and consumers.

- **PRIVATE ENFORCERS CAN TAKE UP SOME OF THE SLACK IN FEDERAL UNDER-ENFORCEMENT AND SPUR POLICY CHANGE, BUT THEY FACE SIGNIFICANT CHALLENGES:** Key private antitrust cases have had positive impacts by obtaining compensation for victims, deterring future violations, and spurring public debate and state legislative reform. There are also opportunities for private challenges of consummated mergers that have harmed consumers and workers. But challenges remain, with tightening judicial standards for showing collusion and other impediments that make it more difficult to bring, litigate, and win cases.

- **STATE ATTORNEYS GENERAL ARE BECOMING MORE ACTIVE BUT LIMITATIONS PERSIST THAT WILL DEFINE HOW MUCH THE STATES CAN DO IN RESPONSE TO FEDERAL INACTION:** State Attorneys General are stepping up efforts in response to weak federal enforcement. These include independent lawsuits to block illegal mergers and confront price fixing, a proactive stance on strengthening federal merger settlements, and investigations into the competitive practices of large digital technology companies. Resource limitations and a change in the tenor of coordination between the DOJ and the states, however, pose challenges.

- **LEGISLATIVE ANTITRUST REFORM IS NEEDED BUT PROPOSALS THUS FAR LACK A COMPREHENSIVE AND COORDINATED APPROACH:** Legislative efforts to reform the antitrust laws have accelerated in the 116th Congress and are at levels not seen since the early 1990s. These include comprehensive reform proposals and narrower initiatives targeting specific antitrust issues and particularly vulnerable sectors. Legislative reform is needed to strengthen and clarify the antitrust laws, but these efforts require a coordinated response to ensure that they promote enforcement, not inadvertently weaken it or cause confusion in the courts.

- **REVERSING DECLINING COMPETITION IS A PROBLEM THAT WILL REQUIRE A PUBLIC POLICY SOLUTION:** Change in the way the U.S. promotes competition and protects the market system is badly needed. Strengthening antitrust to promote more vigorous enforcement of the antitrust laws is part of a broader solution that should be complemented through the use of other tools, including social and economic regulation, standard-setting and interoperability, labor policy, and intellectual property law.

SECTION 3: REPORT ON THE TRUMP ADMINISTRATION

Federal enforcement of the antitrust laws under the Trump administration is in decline. These laws are Section 7 of the Clayton Act (mergers), Section 1 of the Sherman Antitrust Act (agreements), and Section 2 of the Sherman Act (monopolies).[8] The administration's failure to appoint leadership at executive level agencies and independent commissions in a timely way was the first indication of a worrisome lack of commitment to competition enforcement and policy. As of early 2020, the Trump administration had filled fewer than 70% of positions in the government that require Senate confirmation.[9] The Assistant Attorney General (AAG) for the Antitrust Division of the DOJ and the Chairman of the FTC and remaining commissioners were sworn in after lengthy delays that were in keeping with the administration's failure to fill leadership positions throughout government.[10] The average annual rate at which the Trump antitrust agencies opened antitrust cases declined significantly relative to the Obama agencies and all other administrations extending back to Bush II.[11] Declining quantitative metrics of enforcement are reinforced by changes in existing policy, as well as new policy initiatives that have troubling implications.

> *"The Trump administration's failure to appoint leadership at federal agencies in a timely way was the first indication of a worrisome lack of commitment to competition enforcement and policy."*

3.A: MERGER ENFORCEMENT

Section 7 of the Clayton Act prohibits mergers and acquisitions the effect of which "may be substantially to lessen competition or to tend to create a monopoly."[12] This includes when mergers eliminate existing competition or increase the potential for foreclosing rivals from access to inputs or distribution. Mergers can also entrench market positions by eliminating future competitive threats or diluting the overall capacity of the market to support innovation. The effects of decades of lax merger enforcement are becoming increasingly clear. Many markets feature tight oligopolies or dominant players with stronger incentives to exercise market power, the effects of which are felt by consumers

[8] 15 U.S.C. § 18; 15 U.S.C. § 1; 15 U.S.C. § 2.

[9] *Tracking how many key positions Trump has filled so far*, washingtonpost.com, *available at* https://www.washingtonpost.com/graphics/politics/trump-administration-appointee-tracker/database/ last visited Mar. 2, 2020.

[10] The Assistant Attorney General (AAG) for the Antitrust Division was not confirmed until late September of 2017, eight months after the Trump inauguration. The Chairman of the FTC and remaining four commissioners were sworn in late April 2018, 15 months after the administration took over.

[11] Cases and Proceedings, Federal Trade Commission, *available at* https://www.ftc.gov/enforcement/cases-proceedings/advanced-search, last visited Feb. 29, 2020; Antitrust Case Filings, U.S. Dep't. Just. Antitrust Div., *available at* https://www.justice.gov/atr/antitrust-case-filings, last visited Mar. 8, 2020. FTC data include federal and administrative enforcement actions.

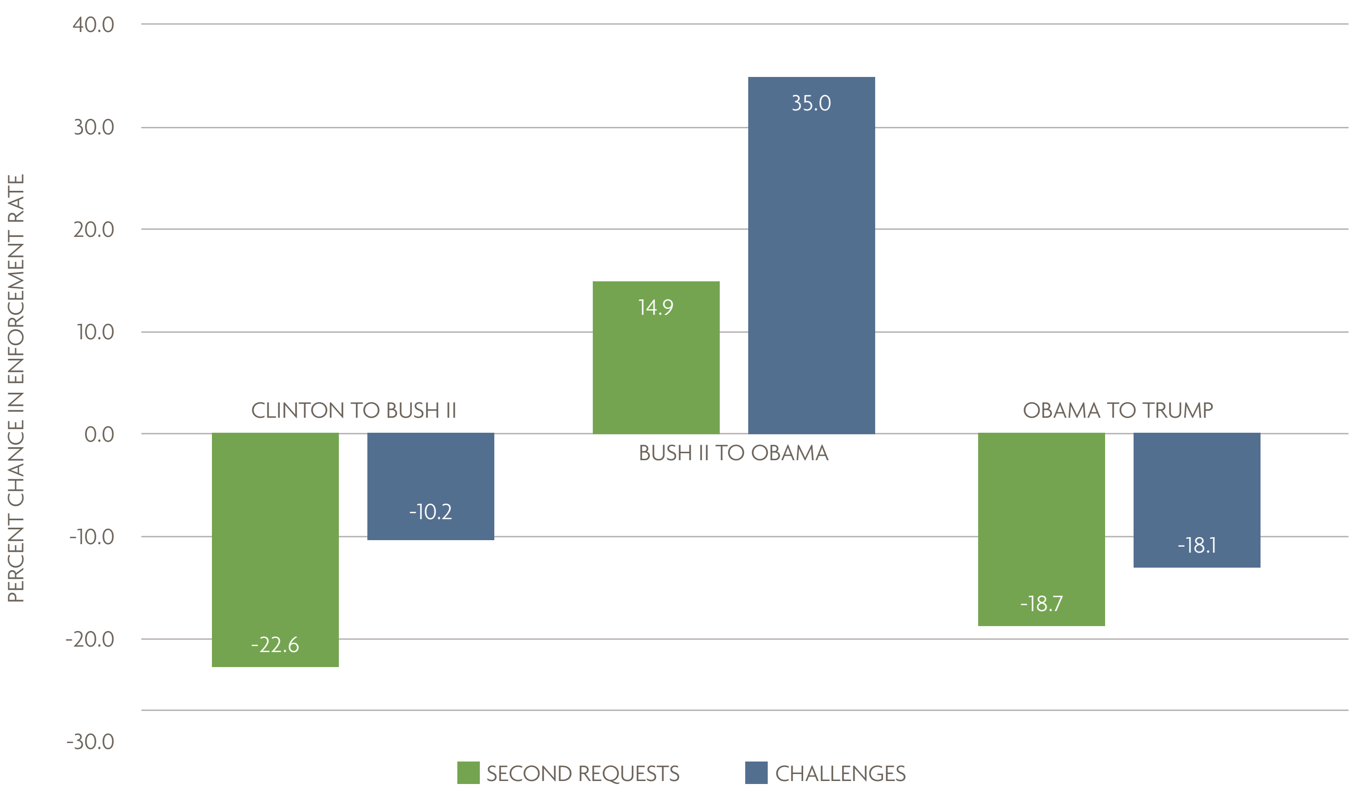
[12] 15 U.S.C. § 18.

in higher prices, lower quality, and less innovation, and by workers in the form of less bargaining power and lower wage rates.

DECLINING RATES OF SECOND REQUESTS AND CHALLENGES

Our review of the Trump agencies' record of merger enforcement reveals low levels of merger enforcement. The figure below shows administration-over-administration changes in the rates of second requests and challenges by the DOJ and FTC for transactions that are reportable under the Hart Scott Rodino Act (HSR).[13] The average annual rate of second requests and merger challenges rose 15% and 35%, respectively, between the Bush II and Obama administrations.[14] However, both rates fell by almost 20% between the Obama and Trump administrations. As is clear from the figure, declines in enforcement are more typical during transitions from Republican to Democratic administrations. However, the rates of second requests and challenges over the entire period spanning the Clinton, Bush II, and Obama administrations were positive, highlighting the marked drop off in enforcement under the Trump agencies.

MERGER ENFORCEMENT RATES ACROSS ADMINISTRATIONS (1993-2018)



[13] 15 U.S.C. § 18a.
[14] HSR Reports to Congress, *supra* note 5. Statistics are measured as a rate, *i.e.*, the percentage of total cases cleared to either agency under the Hart-Scott-Rodino Act reporting requirements.

Changes in the rates of merger enforcement at each agency reveal additional, important details. For example, the rate at which the DOJ issued second requests fell by almost 30% but the same rate for the FTC declined only a small amount between the Obama and Trump administrations.[15] Conversely, the DOJ's rate of merger challenges fell by just over 5% while the FTC's declined by about 20% between the Obama and Trump administrations. The FTC thus appears to be issuing about the same number of second requests under Trump as it did under Obama but challenging far fewer deals. This reflects a marked decline in enforcement vigor. The DOJ appears to be issuing fewer second requests but challenging deals at somewhat below Obama-era levels. This signals less agency effort to screen mergers that could raise competitive concerns. Moreover, a closer look at the merger challenges that the DOJ did bring reveals concerns over the substance of those enforcement actions and their implications for the vigor of enforcement.

> *"Merger enforcement statistics under the Trump DOJ and FTC reflect a marked decline, both in terms of screening mergers through the second request process and challenging harmful deals."*

TROUBLING CASE PRECEDENTS AND POLICY DEVELOPMENTS

It is important to focus on what case selection, case outcomes, procedural changes, and policy initiatives tell us about the vigor and course of antitrust enforcement. The Trump agencies have overseen a number of high-profile cases that have had decidedly negative implications. Enforcers in the later years of the Obama administration made clear that the government is capable of significantly stronger enforcement. For example, both the DOJ and FTC made significant progress in blocking highly concentrative mergers, either through full stop injunctions or forcing their abandonment. This includes deals such as Baker Hughes-Halliburton, AT&T-T-Mobile, Anthem-Cigna, Sysco-US Foods, and Staples-Office Depot that reduced the number of rivals from four to three, three to two, and even two to one.

The Trump antitrust agencies' enforcement actions involving horizontal mergers bear no resemblance to the stronger enforcement of the previous administration. A leading example is the proposed merger of national facilities-based wireless carriers Sprint and T-Mobile. Similar to its predecessor AT&T-T-Mobile (2011), the deal was a highly concentrative four-to-three merger and the parties' efficiencies claims (e.g., cost savings and consumer benefits) were dubious, at best. Rather than moving to block Sprint-T-Mobile, the Trump DOJ approved it in 2019 by taking an unprecedented, conduct-heavy remedy designed to create a new rival out of Dish TV Network, a firm with no experience in the national retail mobile wireless market.[16] The remedy, which is particularly prone to failure, involves significant complexity, optional components, and requirements to deal

[15] *Id.*
[16] Proposed Final Judgement, *U.S. v. Deutsche Telekom, et al*, No. 1:19-cv-02232 (D.D.C. Jul. 26, 2019), *available at* https://www.justice.gov/atr/case-document/file/1187771/download.

with rivals.[17] The Sprint-T-Mobile decision should be read in light of economic evidence showing that highly concentrative mergers result in adverse effects on price and other dimensions of competition.[18] Growing evidence of failed remedies in past merger cases also bears materially on the remedy taken by the DOJ in Sprint-T-Mobile.[19]

> *"The government's loss in AT&T-Time Warner has undermined incentives to challenge future vertical mergers, the fallout of which has been for the agencies to largely ignore vertical issues."*

The DOJ's unsuccessful challenge to the vertical merger of AT&T and Time Warner was the Trump administration's first major vertical merger enforcement action and marked the beginning of a series of poor outcomes and troubling precedents. Vertical mergers that combine dominant firms in complementary markets such as inputs and distribution can create significant competitive risks.[20] The AT&T-Time Warner deal combined cable TV/broadband internet service (ISP) and content programming providers, enhancing the merged company's bargaining power and increasing incentives to use its control over "must have" programming to raise prices charged to competing distributors. Despite a strong case, an apparent error in litigation strategy led the DOJ to credit the dubious efficiency claim that the AT&T-Time Warner merger would eliminate the markup on the purchase of programming. This error, reinforced by the court's failure to appreciate the merger's likely adverse effects, was fundamental in shaping the outcome of the case despite evidence that a similar merger, Comcast-NBC Universal, had resulted in similar problems.

The government's loss in the trial court, affirmed on appeal, has arguably undermined the agencies' incentives to challenge future vertical mergers. The most obvious fallout from the loss in AT&T-Time Warner has been for the agencies to largely ignore vertical issues raised in a number of mergers. For example, the CVS Caremark-Aetna merger, like AT&T-Time Warner, raised concerns over input foreclosure. In an unprecedented Tunney Act proceeding, *amici* raised concerns over the merged company's increased bargaining power vis-à-vis its rivals, resulting in increased incentives to use its control over critical pharmacy benefit management and retail pharmacy services to raise prices charged to rival insurers. The Antitrust Division ignored these issues in permitting the combination, focusing exclusively instead on horizontal overlaps in Medicare Part D prescription drug plans.[21]

---

[17] John Kwoka, Jr., *Masquerading as Merger Control: The U.S. Department of Justice Settlement With Sprint and T-Mobile*, Am. Antitrust Inst. (Aug. 21, 2018), *available at* https://www.antitrustinstitute.org/work-product/john-kwoka-unpacks-settlement-in-the-merger-of-sprint-and-t-mobile-demonstrates-why-the-remedy-is-ineffective-and-a-worrisome-new-development-in-merger-control/.

[18] *See, e.g.*, John E. Kwoka Jr., *Does Merger Control Work? A Retrospective on Enforcement Policy, Remedies, and Outcomes* 78 Antitrust L.J. 619, 636 (2013); John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns,?* 81 Antitrust L.J. 837, 860–61 (2017).

[19] *See, e.g.*, Brent Kendall, *Haggen Struggles After Trying to Digest Albertsons Stores*, Wall St. J. (Oct. 9, 2015); Press Release, FSNA, Franchise Services of North America Inc. Announces Bankruptcy Filing by Simply Wheelz LLC (Nov. 4, 2013), *available at* http://www.fsna-inc.com/newspdfs/115201391920.PDF; and Guardado, Jose R, Emmons, David W. & Kane, Carol K, *The Price Effects of a Large Merger of Health Insurers: A Case Study of UnitedHealth-Sierra*, 1 Health Mgmt Pol'y 16 (2013).

[20] Such mergers will also almost always eliminate a substantial market for independent input suppliers.

[21] *See* Response of Plaintiff United States to Public Comments on the Proposed Final Judgment, *U.S. v. CVS Health Corporation and Aetna Inc.,* No. 1:18-cv-02340-RJL (D.D.C. Feb. 13, 2019), *available at* https://www.justice.gov/atr/case-document/file/1131901/download.

The Trump DOJ also ignored vertical issues in the merger of agricultural biotechnology giants Bayer and Monsanto. The combination resulted in a large, vertically integrated "system" of genetic traits, transgenic seeds, agro-chemicals, and digital farming. There, the concern was over higher barriers to entry to smaller unintegrated firms and strengthened incentives for Bayer-Monsanto to engineer exclusive, proprietary systems that lock out rivals and lock in farmers.[22] Likewise, the FTC ignored vertical effects in the merger of dominant clinical dialysis provider Fresenius and in-home dialysis rival NxStage. The merger potentially heightened incentives to increase prices or reduce service for the supply of hemodialysis products or to withhold critical information from rival clinics.[23] The DOJ's recent enforcement action in the 2010 merger of Live Nation-Ticketmaster further weakens merger enforcement. In February, the DOJ filed a motion to amend the conduct remedies in the ten-year-old consent decree, prompted by evidence of persistent violations, including threats and retaliation against competing concert venue operators.[24] In doing so, the DOJ passed up the opportunity to obtain a needed structural remedy through a consummated Section 7 merger challenge or a Section 2 monopolization case.[25]

The disarray in merger enforcement prompted by a number of cases taken by the Trump agencies strongly supports the need for updated guidance on how the agencies will review vertical mergers. In 2020, the agencies produced draft vertical merger guidelines. But the effort fell woefully short. The draft guidelines contain, at best, abbreviated guidance and ideological bias that will likely create confusion and uncertainty.[26] The agencies have fast-tracked the initiative, with little time allotted for public comment and hearings, as compared to the 2010 Horizontal Merger Guidelines, which involved a thorough and collaborative public process.

The DOJ and FTC have also done little to advance stronger enforcement against acquisitions that remove potential rivals that could grow to challenge entrenched incumbents. This includes the spate of acquisitions of small digital farming startups by the agricultural biotechnology giants, such as DuPont's acquisition of Granular.[27] It also includes the digital technology markets where the largest players have acquired hundreds of potential rivals in markets ranging from cloud computing, to artificial intelligence, social media, and digital advertising. The rate of agency challenges for such deals is well below the average across all sectors.[28] Since 2017, the five largest digital technology firms have made about 130 acquisitions but the agencies have not challenged any that are reportable under HSR.[29] These transactions comprise almost 20% of total transactions consummated by the companies over about the last three decades. More insight into the agencies' strategy on enforcement involving future and consummated transactions is

[22] *See, e.g.*, Letter from Am. Antitrust Inst., Food & WaterWatch, and National Farmers Union to Acting Assistant Attorney General Andrew Finch, re: Proposed Merger of Monsanto and Bayer, Am. Antitrust Inst. (Jul. 26, 2017), *available at* https://www.antitrustinstitute.org/wp-content/uploads/2018/08/White-Paper_Monsanto-Bayer_7.26.17_0.pdf.

[23] Complaint, in the Matter of Fresenius Medical Care Ag & Co. Kgaa and Nxstage Medical, Inc., No. 1710227 (F.T.C. Feb. 19, 2019), *available at* https://www.ftc.gov/system/files/documents/cases/1710227_fresenius-nxstage_complaint_2-19-19_0.pdf.

[24] Motion To Modify Final Judgment and Enter Amended Final Judgment, *U.S. v. Ticketmaster Entertainment, Inc. and Live Nation Entertainment Inc.*, Case No. 1:10-cv-00139-RMC (D.D.C. Jan. 8, 2020).

[25] Letter from Am. Antitrust Inst. to Assistant Attorney General, Makan Delrahim, Re: Amended Final Judgment: *U.S v. Ticketmaster Entertainment, Inc., and Live Nation Entertainment, Inc.*, Am. Antitrust Inst. (Feb. 4, 2020), *available at* https://www.antitrustinstitute.org/wp-content/uploads/2020/02/AAI_Ltr-to-DOJ_LN-TM_F.pdf.

[26] *See* Comments of Am. Antitrust Inst. re: Draft Vertical Merger Guidelines, Am. Antitrust Inst. (Feb. 25, 2020), *available at* https://www.antitrustinstitute.org/wp-content/uploads/2020/02/AAI-Comments_Draft-VM-Guidelines2.25.2020.pdf.

[27] Letter from the Am. Antitrust Inst., Food & Water Watch, and National Farmers Union, Re: Monsanto-Bayer Merger: Competitive Concerns Surrounding Traits-Seeds-Chemicals Platforms, Digital Farming, and Farm Data, Am. Antitrust Inst. (Oct. 3, 2017), *available at* https://www.antitrustinstitute.org/wp-content/uploads/2018/08/AAI-FWW-NFU_MON-BAY-addendum.pdf.

[28] Diana L. Moss. *The Record of Weak U.S. Merger Enforcement in Big Tech*, Am. Antitrust Inst. (Jul. 8, 2019), *available at* https://www.antitrustinstitute.org/wp-content/uploads/2019/07/Merger-Enforcement_Big-Tech_7.8.19.pdf.

[29] CrunchBase Pro search engine, queried for Amazon, Apple, Facebook, Google, and Microsoft, *available at* https://about.crunchbase.com/market-research/, last visited Mar. 8, 2020.

Aside from poor case precedents, a number of policy developments are likely to adversely affect Section 7 enforcement, including the Trump agencies' use of conduct remedies in merger cases.

needed, but the DOJ and FTC investigations into some digital technology players have thus far given the public little indication of if, or when, the agencies plan to bring cases.

Finally, in a case that attracted little attention, the DOJ proposed using arbitration, for the first time, to resolve issues of market definition. The merger challenge involved the combination of Novelis and Aleris, producers of aluminum auto sheet.[30] Market definition is a key issue in merger investigations and case law remains an important source of information and guidance on how enforcers and the courts approach it. Regardless of the outcome, arbitration in the merger setting raises significant concerns. For example, as a private process, arbitration will not create legal precedent. Market definition is a controversial area of analysis and arbitration will remove important information from the case law.[31]

Aside from poor case precedents, a number of policy developments are likely to adversely affect Section 7 enforcement. For example, the agencies continue to favor the use of conduct remedies in merger cases, despite economic evidence that they are ineffective in restoring competition lost by a merger. Among other problems, conduct remedies do not change firms' incentives to exploit their market power and require compliance monitoring, a task for which enforcers and courts are ill-suited.[32] This is contrary to agency advocacy expressing a preference for structural remedies. In late 2017, for example, the DOJ signaled a change in remedies policy with the withdrawal of the 2011 Policy Guide to merger remedies, which put more emphasis on conduct remedies than the previous 2004 guide.[33] Yet the agencies continue to use conduct remedies in Sprint T-Mobile and other deals. For example, the FTC required firewalls in the vertical mergers of Broadcom-Brocade Communications and Staples-Essendant, respectively.[34] Firewalls are designed to prevent the sharing of competitively sensitive customer information that

[30] Justice Department Sues to Block Novelis's Acquisition of Aleris, U.S. Dep't. Just. Antitrust Div. (Sept. 4, 2019), *available at* https://www.justice.gov/opa/pr/justice-department-sues-block-noveliss-acquisition-aleris-1. The challenge involved Novelis Inc.'s proposed acquisition of Aleris Corporation, a 4-3 merger of North American producers of aluminum auto body sheet.

[31] *See* Stephen Calkins, *Binding Arbitration of Merger Challenges: First Do No Harm*, Am. Antitrust Inst. (Sept. 18, 2019), *available at* https://www.antitrustinstitute.org/work-product/binding-arbitration-of-merger-challenges-first-do-no-harm-stephen-calkins-comments-on-the-dojs-recent-announcement-in-novelis-aleris/. The DOJ prevailed in arbitration. *See Justice Department Wins Historic Arbitration of a Merger Dispute*, U.S. Dep't. Just. Antitrust Div. (Mar. 9, 2020), *available at* https://www.justice.gov/opa/pr/justice-department-wins-historic-arbitration-merger-dispute.

[32] *See* John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 57 Antitrust Bull. 979, 994, 1010 (2012). *See* also Diana L. Moss, *Merger Policy and Rising Concentration: An Active Agenda for Antitrust Enforcement*, 33 Antitrust (Fall 2018). In a 2017 speech, the Antitrust Division AAG highlighted the work of Kwoka and Moss. *See* Makan Delrahim, Assistant Attorney General, U.S. Dep't. Just. Antitrust Div., Keynote Address at American Bar Association's Antitrust Fall Forum (Nov. 16, 2017), *available at* https://www .justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar.

[33] U.S. Dep't. Just. Antitrust Div. Roundtable Discussion Series On Competition & Deregulation (2018), *available at* https://www.justice.gov/atr/page/file/1120641/download; and Makan Delrahim, Assistant Attorney General, U.S. Dep't. Just. Antitrust Div., *It Takes Two: Modernizing the Merger Review Process*, Remarks as Prepared for the 2018 Global Antitrust Enforcement Symposium (Sept. 15, 2018), *available at* https://www.justice.gov/opa/speech/file/1096326/download.

[34] *See* Decision and Order, In the Matter of Brocade Communications Systems, Inc. and Broadcom Limited, File No. 1710027 (F.T.C. Aug. 17, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/171_0027_c4622_broadcom_brocade_decision_and_order_public_version.pdf. Two FTC commissioners dissented. *See also* Decision, In the Matter of Sycamore Partners II, L.P., Staples, Inc., and Essendant Inc., No. 1810180 (F.T.C. Jan. 25, 2019), *available at* https://www.ftc.gov/system/files/documents/cases/1810180_staples_essendant_do_and_apps_a-g-redacted_public_version.pdf.

would facilitate the merged companies' ability to foreclose rivals. They are a particularly unenforceable type of conduct remedy.

3.B: ANTICOMPETITIVE AGREEMENTS

Enforcement of Section 1 of the Sherman Act has long been the staple of both public and private antitrust enforcers. U.S. antitrust law makes illegal "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."[35] The conditions for reaching and maintaining anticompetitive agreements are fostered in markets where successive consolidation creates tight oligopolies of firms with stronger incentives to collude, rather than compete on the merits. The DOJ pursues Section 1 violations as either civil or criminal actions while the FTC can bring only civil cases under Section 5 of the Federal Trade Commission Act.[36] Anticompetitive agreements involve activities such as bid rigging, price fixing, wage-fixing, no-poach agreements, market allocation schemes, group boycotts, and some vertical agreements.

> *"Numbers of corporations fined, size of fines, and incarceration times for engaging in illegal anticompetitive agreements have fallen under the Trump DOJ."*

INDICATORS OF DECLINING ENFORCEMENT

Anticompetitive agreements are unique in that they are policed as both civil and criminal violations. Much like merger enforcement, government action is revealed in a number of key statistics. At the broadest level, after peaking in 2015, the number of new global cartels publicly known to be under investigation by the U.S. government in 2017-2019 fell below the average of the 1990s.[37] Cartel detections by other competition authorities also peaked in 2015 but declined each year less rapidly than in the U.S., indicating that U.S. enforcement on the global stage may be flagging. Turning to all Section 1 enforcement statistics, our analysis shows that investigations opened in the first two years of the Trump administration (2017-2018) averaged 41 per year.[38] This is the same as the annual average during the eight years of the Obama administration. However, it is over 80% lower than the annual average number of cases opened over the previous three administrations (1993-2016).[39] The story, however, goes deeper. Numerous other Section 1 enforcement metrics follow from the number of investigations opened, and serve as an important source of deterrence against future illegal conduct.

DOJ congressional testimony in 2018 indicates that 30 individuals were convicted and sentenced to incarceration in fiscal year 2017 for price fixing, the "*highest* number of

[35] 15 U.S.C. § 1.

[36] 15 U.S.C. § 41. The FTC can challenge agreements that would violate Section 1 of the Sherman Act using its authority under Section 5 of the FTC Act, which prohibits "unfair methods of competition." The FTC also can use its Section 5 authority to challenge activities such as "invitations to collude."

[37] John M. Connor, *Comment on Cartel Enforcement in the Trump Administration*, CPI Antitrust Chronicle (Jun. 2019), at 5. As of early 2019, the only large international cartel investigations known to be on the cusp of active convictions were *Generic Pharmaceuticals, Sovereign Bonds*, and *Pre-Release ADRs*.

[38] Workload Statistics, *supra* note 7.

[39] Historical Workload Statistics, *supra* note 7.

individuals sentenced to prison terms since 2012."[40] However, most of those 30 appear to be connected with conduct in only one case—the public real estate foreclosure auctions. We also note that focusing on enforcement metrics in a single year is misleading. For example, the average annual number of individuals convicted of Section 1 crimes and sentenced to incarceration by the Trump DOJ declined relative to the Obama administration. Our analysis also indicates that incarceration time imposed under the Trump DOJ is low by historical standards. Overall, average annual incarceration time fell by about 55% relative to the Obama administration and previous administrations.[41] For example, the average sentence imposed under the Trump administration is about nine months, whereas under the Bush II and Obama administrations, average prison sentences were about 19 and 21 months, respectively.[42]

The vast majority of criminal Section 1 fines levied by the U.S. government are corporate fines. Our analysis shows two indicators of declining enforcement. One is the number of corporations fined by the U.S. government for Section 1 crimes. As compared to the Obama administration, the average number of corporations fined by the Trump agencies in 2017 and 2018 fell by about 45%.[43] A second indicator is the amount of the fines. Congressional testimony by the Trump DOJ highlights that criminal cartel fines for 2016 and 2017 totaled about $3.2 billion.[44] Corporate fines for 2017 alone (about $2.8 billion) accounted for the bulk of this amount. But research shows that they do not provide an accurate picture of the Trump administration's record.[45] For example, fines levied on the four large banks that pled guilty in the *FOREX Currency Exchange* collusion case did so in 2015 when they were prosecuted under the Obama administration. It is not clear why the DOJ statistics assign the roughly $2.5 billion in fines associated with that violation to 2017. But when adjusted accordingly, the average annual average level of corporate fines declined by 80% under the Trump, relative to the Obama, administration.[46]

POLICIES THAT WEAKEN ENFORCEMENT OR FAIL TO DELIVER ON PROMISES

A number of new policy developments under the Trump administration will affect Section 1 enforcement. For example, in mid-2019, the Antitrust Division announced a major policy shift in its willingness to credit corporate compliance programs and consider the use of deferred prosecution agreements (DPAs) in criminal charging decisions.[47] The longstanding policy had been to almost never credit compliance programs as a means to avoid criminal charges because criminal violations themselves signal an ineffective compliance program. The new Antitrust Division policy requires prosecutors to consider pre-existing compliance programs in every corporate charging recommendation. It also requires prosecutors to consider whether a DPA, rather than a guilty plea, would be a more appropriate disposition of a case. Because DPAs, unlike guilty pleas, do not result in final judgments, they do not constitute *prima facie* evidence of a violation in a subsequent private class action and thus have the potential to make such actions more risky and difficult.

[40] Statement of Makan Delrahim Before the Subcommittee on Antitrust, Competition Policy, and Consumer Rights, Committee on the Judiciary, United States Senate (Oct. 3, 2018), at 3, *available at* https://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/2018/12/13/delrahim_statement_10-03-18_on_atr_laws.pdf ("Delrahim Statement").

[41] *Id.*

[42] Workload Statistics, *supra* note 7 and Historic Workload Statistics, *supra* note 7 .

[43] *Id.*

[44] Delrahim Statement, *supra* note 40, at 3.

[45] Connor, *supra* note 37.

[46] *Supra* note 7.

[47] Antitrust Division Announces New Policy to Incentivize Corporate Compliance, U.S. Dep't. Just. Antitrust Div. (Jul. 11, 2019), *available at* https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance.

Another troubling policy development involves the Trump DOJ's approach to wage-fixing or no-poaching agreements. In 2016, the Obama antitrust agencies recognized the need for effective antitrust enforcement to protect workers with their joint Guidance for Human Resource Professionals.[48] The agencies pledged at that time to proceed criminally against naked wage-fixing or no-poaching agreements. Taking up that initiative, the Trump DOJ's AAG stated in early 2018 that the agency "has a handful of criminal cases in the works."[49] Around the same time, the Division announced its first lawsuit against a French and a U.S. manufacturer of railway equipment.[50] However, the penalties ultimately imposed were modest and the DOJ brought civil rather than criminal charges because the agreement was formed prior to the 2016 announcement. At the same time, as discussed in more detail below, the DOJ has intervened in private no-poaching cases to argue in favor of defense-friendly standards for evaluating them.

> *"To date, the government's commitment to criminally prosecuting naked wage-fixing and no-poaching agreements appears to involve rhetoric but no action."*

During remarks at a public workshop on labor market competition in late 2019, the AAG "reaffirm[ed] that criminal prosecution of naked no-poach and wage-fixing agreements remains a high priority for the Antitrust Division."[51] But more than three years after the joint guidance, nothing has materialized. And last July, after the FTC uncovered a textbook naked horizontal wage-fixing agreement among domestic firms, the DOJ took an unexplained "pass."[52] To date, the government's commitment to criminally prosecuting naked wage-fixing and no-poaching agreements therefore appears to involve rhetoric but no action.

3.C: EXCLUSIONARY CONDUCT

Section 2 of the Sherman Act makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . . ."[53] Federal Section 2 enforcement has been extremely limited for many years. According to DOJ statistics, the Antitrust Division undertook 50 investigations between 2000-2018 where monopolization was the "the primary type of conduct under

[48] Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation, U.S. Dep't. Just. Antitrust Div. (Oct. 20, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals.

[49] Lauren Norris Donahue, Brian J. Smith & Gina A. Jenero, *Assistant Attorney General Announces that DOJ Antitrust Division is Building Criminal Cases Against Companies for Anti-Poaching Agreements*, K&L GATES (Jan. 31, 2018), *available at* http://www.klgates.com/assistant-attorney-general-announces-that-doj-antitrust-division-is-building-criminal-cases-against-companies-for-anti-poaching-agreements-01-31-2018/.

[50] Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees, U.S. Dep't. Just. Antitrust Div. (Apr. 3, 2018), *available at* https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete.

[51] Assistant Attorney General Makan Delrahim Delivers Remarks at the Public Workshop on Competition in Labor Markets, U.S. Dep't. Just. (Sept. 23, 2019), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-public-workshop-competition.

[52] *See* In the Matter of Your Therapy Source, LLC, Neeraj Jindal, and Sheri Yarbray, No. 1710134 (F.T.C. Jul. 31, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/171_0134_c4689_yourtherapysource_do_10-25-2019.pdf.

[53] 15 U.S.C. § 2.

investigation at the outset of the investigation."[54] But since the *Microsoft* case some 20 years ago and the handful of other cases litigated at that same time, the DOJ has actually brought only one comparatively insignificant Section 2 case.[55] This was an Obama-era challenge to exclusive dealing by a dominant hospital in a small market in Texas.[56] The DOJ's approach to Section 2 enforcement has therefore been to look, but not to sue.

The FTC has been more active in policing single-firm conduct, but it has been almost entirely focused in certain narrow areas. With the rare exception of cases like *McWane v. FTC*, involving exclusive contracts in iron pipe fittings, a settlement with Intel Corporation that ended exclusionary practices in computer chips, and the Commission's 2019 case against Qualcomm, involving modem chips used in smartphones, the FTC's monopolization cases have almost all been in healthcare and pharmaceuticals.[57] While time will tell how seriously the recent federal investigations into the conduct of the large digital technology firms should be taken, the DOJ in particular has indicated through its inaction that it has no real interest in Section 2 enforcement, providing reason to doubt that the Trump agencies' investigations will result in meaningful enforcement.[58]

> *"Time will tell how seriously the recent federal investigations into the large digital technology firms should be taken but the DOJ in particular has indicated no real interest in Section 2 enforcement."*

3.D: COMPETITION AND INTELLECTUAL PROPERTY

The intersection of competition law and intellectual property (IP) law is increasingly important but continues to be fraught with tension over the protection of IP (primarily patents, copyrights, and trademarks) at the expense of competition, and vice versa. While historically aligned on basic governing principles and policies, the agencies under the Trump administration have diverged. For example, the FTC continues its fight, which began in the mid-1990s, to use antitrust law to constrain anticompetitive conduct by firms that own standard essential patents (SEPs) and to police abuses of IP in the pharmaceutical area. The *Qualcomm* case involving SEPs that read on critical technologies used in wireless communications is a notable example.[59] In contrast, the Trump DOJ appears to now consistently err on the side of over-protecting IP rights at the expense of competition.

[54] Historic Workload Statistics, *supra* note 7.

[55] *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). DOJ filed two other significant Section 2 cases at about the same time: *United States v. Dentsply Intern., Inc.*, 399 F.3d 181 (3d Cir. 2005) and *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003).

[56] *United States v. United Regional Healthcare Sys.*, No. 7:11-cv-00030 (S.D. Tex. 2011).

[57] 783 F.3d 814 (11th Cir. 2015). *See also In re Pool Corp.*, No. 101-0115, 2012 WL 159752 (F.T.C. Jan. 10, 2012) and *In re Intel Corp.*, 150 F.T.C. 420 (F.T.C. 2010). *FTC v. Qualcomm*, 411 F. Supp. 3d 658 (N.D. Cal. 2019).

[58] *See* Brent Kendall, *Justice Department to Open Broad, New Antitrust Review of Big Tech Companies*, Wall St. J. (Jul. 23, 2019); and Tony Romm, *Amazon Could Face Heightened Antitrust Scrutiny Under a New Agreement Between U.S. Regulators*, Wash. Post (Jun. 1, 2019).

[59] Complaint for Equitable Relief, *Federal Trade Commission v. Qualcomm, Inc.*, No. 5:17-cv-00220 (N.D. Cal. Jan. 17, 2017), *available at* https://www.ftc.gov/enforcement/cases-proceedings/141-0199/qualcomm-inc.

REVERSAL OF POLICY ON PATENT HOLD-UP

Prior to the Trump Administration, the DOJ had joined in more than fifteen years of cooperative advocacy and policy development with the FTC about the competitive problem of patent "hold-up."[60] Patent hold-up derives from a common feature of many technology products, namely that they are a combination of many inputs that must work together through some sort of interface. Frequently, industry trade associations known as standard-setting organizations (SSOs) develop technical interface standards collaboratively, and when a patented product is included in the standard, the patent becomes a SEP. Hold-up issues arise when a firm that owns a SEP waits until all of the firms in the industry are producing products that implement the standard, sues them for infringement, and then insists on royalty rates that extract a large share of the value of the entire system of products that use the SEP.

For over 50 years, SSOs have required that firms participating in the standard-setting process disclose their SEPs and agree in advance to a process for setting SEP royalty rates that are fair, reasonable and non-discriminatory (FRAND).[61] But SSOs lack the authority to enforce these requirements, and in some cases firms do not disclose their SEPs in advance and impose ex post licensing terms that seem unreasonable. This limitation highlights the important role for antitrust in a critical area at the nexus of competition and IP law—a role that, until recently, the federal agencies had critically supported.

Under the Trump administration, the DOJ has unilaterally reversed course on patent hold-up issues. For example, in 2018, the Antitrust Division withdrew from its 2013 Joint Policy Statement with the Patent & Trademark Office on Remedies for Standard Essential Patents (SEPs). The Policy Statement had endorsed sensible limits on court-ordered injunctive relief and the International Trade Commission's issuance of exclusion orders, which ban imports of products into the U.S. if the products infringe a U.S. patent. It cautioned against such injunctions and orders when the alleged infringer's products are compliant with industry standards and the patent holder has voluntarily committed to an SSO to license the patent on FRAND terms.

In December 2019, the Antitrust Division issued a new Policy Statement downplaying the concerns and ignoring the public policy justifications against injunctions and exclusion orders on products alleged to infringe SEPs.[62] The new Policy Statement offers no tailored rules or meaningful guidance, and it signals increased scrutiny of SSOs rather than SEP owners. The new Policy Statement warns that such heightened scrutiny could result in an investigation or enforcement action when SSO's take certain steps to clarify their patent policies and procedures to mitigate the risks of hold-up and disputes over licensing terms, whereas the previous statement had *encouraged* SSOs to make appropriate clarifications to that end.

[60] *See* Richard M. Brunell & Diana L. Moss, Letter to Assistant Attorney General Makan Delrahim from Am. Antitrust Inst. (Mar. 15, 2019), *available at* https://www.antitrustinstitute.org/wp-content/uploads/2019/03/AAI_Ltr-to-DOJ_IP_3.19.2019.pdf.

[61] Jorge L. Contreras, *A Brief History of FRAND: Analyzing Current Debates in Standard Setting and Antitrust through a Historical Lens*, 80 Antitrust L.J. 39 (2015).

[62] U.S. Department of Justice, U.S. Patent and Trademark Office & National Institute of Standards and Technology, Policy Statement on Remedies for Standard-Essential Patents Subject to Voluntary FRAND Commitments (Dec. 19, 2019), *available at* https://www.justice.gov/atr/page/file/1228016/download. *See also* Michael A. Carrier, *New Statement on Standard-Essential Patents Relies on Omissions, Strawmen, Generalities*, Bloomberg Law (Jan. 20, 2020).

EFFORTS TO PROMOTE COMPETITION IN PHARMACEUTICALS

FTC challenges of settlements of infringement lawsuits in the pharmaceutical industry are a leading example of the battle against firms that seek to expand exclusive intellectual property rights to achieve anticompetitive objectives. The complex provisions of the Hatch Waxman Act create incentives for anticompetitive behavior by both the brand-name and generic firms. Under Hatch-Waxman, a generic firm can attempt to enter a pharmaceutical market by asserting that a branded firm's drug patent is either invalid or not infringed. If the brand firm files an infringement suit, the Food and Drug Administration (FDA) is prohibited from granting a license for the generic version for an additional 30 months. At the end of this period, the FDA can, and usually does, authorize the sale of the generic, at which time the generic firm can "enter at risk," meaning that after entering it is subject to a damage award if the generic is found to have infringed a valid patent. The generic firm that is first to file an application for a generic version of the brand-name drug is given a 180-day "exclusivity period" in which no other generic firm may enter, except that the brand-name firm is permitted to offer a generic version of its own brand-name drug.

> *"Challenges of settlements of pharmaceutical infringement lawsuits highlight the FTC's battle against firms seeking to expand their intellectual property rights to achieve anticompetitive objectives."*

Brands and generics sometimes act on anticompetitive incentives created under Hatch-Waxman provisions by settling patent infringement lawsuits with anticompetitive "reverse payments." Such payments occur when the allegedly damaged brand (the plaintiff) settles by paying the allegedly infringing generic (the defendant), rather than vice versa. The first reverse-payment settlements that the FTC challenged were straightforward "pay for delay" agreements whereby the brand-name firm paid cash to a generic firm to stay off the market until some future date after the FDA authorized entry but before the expiration of the patent. Subsequent agreements have involved in-kind payments. In lieu of paying cash to induce delay, for example, the brand-name firm can agree not to produce an "authorized generic" version of its brand-name drug until the expiration of the generic firm's exclusivity period, thereby giving the generic firm all generic sales for six months after entry.

The FTC began challenging reverse-payment agreements in the early 2000s and suffered several early defeats.[63] But in 2013, the Commission persuaded the Supreme Court of the anticompetitive nature of reverse-payment settlements in *FTC v. Actavis*.[64] In that case, the majority concluded that anticompetitive harm can reasonably be inferred from the presence of a "large, unjustified reverse payment" in an infringement settlement agreement. Since *Actavis*, the FTC has continued to aggressively pursue anticompetitive

[63] The first case that the FTC lost was *Schering-Plough* (2003). *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005). For a comprehensive list of the FTC's antitrust litigation, *See Federal Trade Commission, Bureau of Competition, Health Care Division Overview of FTC Actions in Pharmaceutical Products and Distribution*, Federal Trade Commission (Jun. 2019), *available at* https://www.ftc.gov/system/files/attachments/competition-policy-guidance/overview_pharma_june_2019.pdf.

[64] 570 U.S. 136.

reverse payment agreements, to the enormous benefit of consumers.[65] During the Trump Administration, the Commission has filed two new complaints challenging reverse-payment agreements to delay the risk of generic competition for the drugs Lidoderm, used to treat complications from shingles, and Opana ER, an opioid pain medication, while continuing to litigate several other similar cases.[66] In the aftermath of the FTC's successes, the incidence of such agreements appears to be declining. The FTC's most recent study of post-Actavis settlements shows that more than 85% do not involve payment or other compensation from the brand to the generic.[67]

Subsequent cases brought by the FTC and private plaintiffs also have challenged other forms of anticompetitive behavior aimed at delaying generic entry beyond the date of FDA authorization. In early 2017, the FTC challenged a brand manufacturer's efforts to delay generic entry through alleged abuse of governmental processes by filing serial, repetitive and unsupported filings with the FDA.[68] In another case, the FTC accused brand manufacturer Abbvie of engaging in anticompetitive conduct by pursuing sham litigation in the form of baseless infringement suits against Teva and another generic firm.[69] The FTC alleged that the suits were filed solely for the purpose of invoking the provisions of the Hatch-Waxman Act that delay entry.

Abbvie also is alleged to have made a payment to Teva that took the form of a "sweetheart" deal.[70] In settling the infringement litigation, Teva agreed to delay entry of its generic for three years in return for AbbVie supplying Teva with a generic version of another drug, TriCor. This deal allowed Teva to enter with its generic version of TriCor before other generics could enter, thereby earning substantial profits from the absence of generic competition. Similarly, in the aforementioned Opana ER case, the challenged agreement included a promise by the brand manufacturer, Endo, to pay the generic manufacturer, Impax, for joint development and marketing of a different drug. The issue did not play a central role in the case because the other elements of the agreement clearly made the settlement large under the *Actavis* standard, regardless of whether the payment was a fair price for a partnership agreement in the new drug. The increasingly elaborate schemes that brands and generics devise to profit from delayed generic entry thus continue to warrant close scrutiny, but the FTC's efforts to combat practices involving patent infringement in the pharmaceutical area are a welcome development.

3.E: FEDERAL AGENCY ADVOCACY

As revealed in the previous sections, assessing any administration's stance on antitrust enforcement requires a look at both quantitative metrics and qualitative analysis. But there are other factors, such as agency advocacy before federal agencies, the states, and the courts and more general information-gathering, that provide additional insight into

[65] *See* Michael Kades, *Competitive Edge: Underestimating the Cost of Underenforcing U.S. Antitrust Laws* (Dec. 13, 2019), Washington Center for Equitable Growth, *available at* https://equitablegrowth.org/competitive-edge-underestimating-the-cost-of-underenforcing-u-s-antitrust-laws/.

[66] *See* Federal Trade Commission, *supra* note 64, at 3-5., *available at* https://www.ftc.gov/system/files/attachments/competition-policy-guidance/overview_pharma_june_2019.pdf (discussing *FTC v. Allergan and In the Matter of Impax Laboratories*).

[67] Federal Trade Commission, Bureau of Competition, *Agreements Filed with the Federal Trade Commission Under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003: Overview of Agreements Filed in FY 2016* (May 2019), *available at* https://www.ftc.gov/reports/agreements-filed-federal-trade-commission-under-medicare-prescription-drug-improvement-fy2016.

[68] *Supra* note 64 (discussing *FTC v. ShireViropharma*).

[69] Complaint, *Federal Trade Commission v. Abbvie et al*., Case No. 2:14-cv-05151-HB (E.D. Pa. Sept. 26, 2014), *available at* https://www.ftc.gov/enforcement/cases-proceedings/121-0028/abbvie-inc-et-al. Although this case was filed in 2014, the district court decisions in this case were made in 2017 and 2018, and the case is still on appeal.

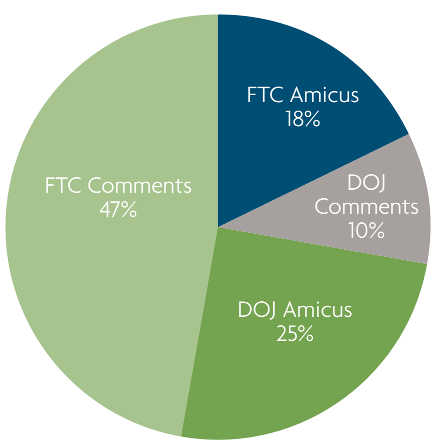
[70] *Id*.

the vigor with which the administration pursues enforcement and the emphasis it puts on promoting competition policy. Both agencies have conducted notable information gathering efforts involving outside experts and members of the business and consumer communities. This includes several DOJ workshops and 14 hearings as part of the FTC's Competition and Consumer Protection in the 21st Century initiative.[71] However, it is not clear where those will lead. The agencies have thus far issued only some summary documents, with little reporting or indication about how they plan to use public input to strengthen and improve enforcement, enhance transparency, or provide policy guidance.[72] In other areas, we have seen a surge in the quantity of advocacy from the DOJ, while the FTC has been overall less vocal.

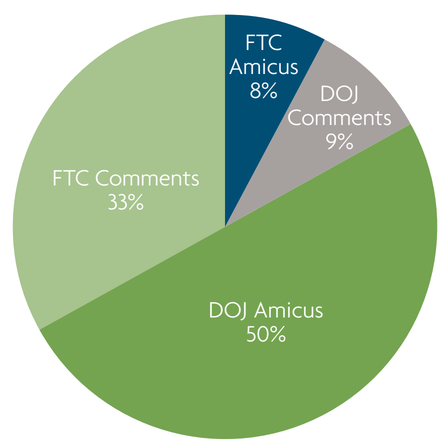
SURGE IN DOJ ADVOCACY AND DECLINE IN FTC ADVOCACY

Agency advocacy falls into two major categories. One includes comments in matters, rulemakings and inquiries initiated by federal executive agencies and independent commissions, and in response to state legislative proposals and regulatory proceedings. A second includes the agencies' role as *amicus curiae* and in filing statements of interest in both public and private antitrust cases. Our analysis indicates that total advocacy by the FTC, as measured by the average annual number of filings, declined by almost 35% between the Obama and Trump administrations. In contrast, the DOJ's advocacy increased by about 80%.[73] As compared to the Obama administration, the allocation of advocacy within the Trump agencies has changed markedly, as shown in the figures below.

ALLOCATION OF AGENCY ADVOCACY UNDER THE OBAMA ADMINISTRATION (2009-2016)



ALLOCATION OF AGENCY ADVOCACY UNDER THE TRUMP ADMINISTRATION (2017-2019)



[71] The DOJ has held workshops on: competition in labor markets, the Antitrust Criminal Penalty Enhancement & Reform Act (ACPERA), competition and deregulation, criminal antitrust compliance, real estate, television, and advertising and venture capital and antitrust. *See* Workshops, U.S. Dep't. Just. Antitrust Div., *available at* https://www.justice.gov/atr/events, last visited Mar. 8, 2020; and Hearings on Competition and Consumer Protection in the 21st Century, Federal Trade Commission, *available at* https://www.ftc.gov/policy/hearings-competition-consumer-protection.

[72] One DOJ report on ACPERA simply summarizes the discussion at the workshop. *See* ACPERA Roundtable Executive Summary, U.S. Dep't. Just. Antitrust Div., *available at* https://www.justice.gov/atr/page/file/1184396/download.

[73] *See* Appellate Briefs, U.S. Dep't. Just. Antitrust Div., *available at* https://www.justice.gov/atr/appellate-briefs; Comments and Testimony, U.S. Dep't. Just. Antitrust Div., *available at* https://www.justice.gov/atr/comments-and-testimony; Appellate Briefs, Federal Trade Commission, *available at* https://www.ftc.gov/policy/advocacy/amicus-briefs; and Advocacy Filings, Federal Trade Commission, *available at* https://www.ftc.gov/policy/advocacy/advocacy-filings, last visited Mar. 8, 2020.

Comments filed by the antitrust agencies before other federal agencies and the states often pertain to competition in the markets over which antitrust agencies and sector regulators both have oversight, or where state legislative proposals are likely to affect competition. Both of these can affect the workings of markets, including entry and competitive incentives. The agencies typically identify key issues at the interface of antitrust and regulation, highlighting the importance of consistency in promoting principles of competition. Average annual advocacy filings in the form of comments filed before federal agencies and states fell by about 20% from the Obama to Trump administrations. The FTC's advocacy fell markedly, by about 25%, while the DOJ's fell by less than 5%.[74] Notably, the FTC's advocacy before the states declined far more than before federal agencies. In contrast, the DOJ all but stopped filing comments in federal regulatory proceedings under the Trump administration, at the same time it increased advocacy before the states by over two-fold. The DOJ's ramp-up in advocacy before the states is unprecedented, and raises questions about the DOJ's position on state-level regulations or actions vis-à-vis federal policy.

The Trump antitrust agencies' advocacy before the federal courts tells a different story. On the whole, the agencies' activity in this area increased by just over 40% overall from the Obama to Trump administrations.[75] But the individual agencies show very different patterns. The FTC's amicus advocacy fell by about 55% since the Trump administration took over—a notable development that raises questions as to the reasons for the fall-off in the Commission's engagement. In contrast, however, the average annual number of amicus briefs and statements of interest filed by the DOJ increased by over 100%. This uptick in DOJ activity is notable. The filings convey policy positions on an expanding group of issues discussed throughout this report, some of which introduce fundamental changes in government policy that do not necessarily work in the interests of competition, consumers, and workers.

INTERVENTIONS IN PRIVATE CASES

Our analysis of agency advocacy reveals that the Trump DOJ has framed a new policy of intervening in private antitrust cases through the unprecedented use of amicus briefs and statements of interest. Several examples stand out. One was an uninvited appearance in the Ninth Circuit with an amicus brief in *Stromberg v. Qualcomm*. The Antitrust Division reversed, without explanation, a decades-old policy position that the federal *Illinois Brick* indirect purchaser rule does not irreconcilably conflict with state Illinois-Brick repealer rules that allow indirect purchaser suits under state antitrust law.[76] In a bipartisan stance first adopted by the Reagan Administration during the *Arc America* case, the DOJ had always maintained that *Illinois Brick* repealer states are in alignment with the federal regime insofar as both share the same deterrence and compensation goals. In its *Qualcomm* brief, the Antitrust Division defended an alleged monopolist seeking to avoid a nationwide class action by arguing the opposite position: that state laws recognizing indirect purchaser standing in antitrust cases pose an irreconcilable policy conflict with federal direct-purchaser rules. If accepted, the Antitrust Division's new argument would make it harder to adequately deter antitrust violations causing nationwide harm and unnecessarily deprive many consumers of compensation for antitrust injuries.

[74] *Id.*
[75] *Id.*
[76] *See* Brief of the United States et al. as Amici Curiae in Support of Appellant, *Stromberg v. Qualcomm Incorporated*, No. 19-15159 (9th Cir. Jun. 10, 2019).

The DOJ has also used advocacy to actively thwart cases challenging no-poaching agreements in the franchise sector that govern some of the most vulnerable workers in the U.S. In early 2019, it made an uninvited appearance in a trial court in the Eastern District of Washington to urge that vertical no-poaching agreements covering entry level workers at fast-food franchises be presumptively ancillary and reviewed under the rule of reason, without regard to their actual competitive effects. The DOJ urged rejection of the quick look standard even when such agreements divide markets horizontally and have no plausible efficiency justifications, and when facts showed unequivocally that the agreements were not reasonably necessary for the success of the franchise arrangements.[77]

"Analysis of agency advocacy reveals that the Trump DOJ has framed a new policy of intervening in private antitrust cases through the unprecedented use of amicus briefs and statements of interest."

Yet another example is the DOJ's amicus brief in the FTC's *Qualcomm* case. Initiated in the Obama administration, the case was built on the agency's longstanding efforts to combat standard-setting and patent abuse and followed up on its important but unsuccessful effort in the 2008 *Rambus* case.[78] But *Qualcomm* has been the subject of bitter Republican criticism, including a dissent from the decision to sue. This was followed by an unprecedented opinion piece by a sitting FTC commissioner after the agency won at trial, urging that her own agency should lose on appeal.[79] The DOJ's amicus brief—in opposition to the FTC—continued an unprecedented effort to interfere with and upend the case.[80] The DOJ's brief largely reprises the arguments and spirit of the controversial Section 2 Report of the Bush II Antitrust Division, which has since been withdrawn and which the FTC never joined.[81]

Finally, the Solicitor General's Office has joined the Antitrust Division in downplaying "hold-up" concerns in the copyright context. In the landmark *Oracle v. Google* case currently before the Supreme Court, the government's amicus briefs have urged the Court to hold that the "applications programming interfaces" used in software language, which act much like standards from the perspective of software developers who write programs in the language, are entitled to copyright protection and not subject to the fair-use

[77] Insofar as they had already been removed from the franchise contracts at the time of the litigation. *See* Corrected Statement of Interest of the United States of America, *Stigar v. Dough, Inc.*, No. 2:18-CV-00244-SAB (E.D. Wash. Mar. 8, 2019); *see also* Letter from Am. Antitrust Inst. to the Antitrust Division of the Department of Justice re Franchise No-Poaching Agreements, Am. Antitrust Inst. (May 2019), *available at* https://www.antitrustinstitute.org/wp-content/uploads/2019/05/AAI-No-Poach-Letter-w-Abstract.pdf.

[78] *FTC v. Rambus*, 522 F.3d 456 (D.C. Cir. 2008). *See, e.g.*, *Federal Trade Commission, Patent Assertion Entity Activity: An FTC Study* (2016), *available at* https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf. A similar case was *In re* Union Oil Co. of California, Dock. No. 9305, 2005 WL 2003365 (F.T.C. Aug. 2, 2005).

[79] Dissenting Statement of Commissioner Maureen K. Ohlhausen, *In re* Qualcomm, Inc., No. 141-0199 (F.T.C. Jan.17, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/170117qualcomm_mko_dissenting_statement_ 17-1-17a.pdf. *See also, e.g.*, Claude Marx, Mike Swift & Joshua Sisco, *Ohlhausen Wants to Explore FTC Withdrawing Qualcomm Suit*, Mlex (Jan. 23, 2017), *available at* https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/north-america/ohlhausen-wants-to-explore-ftc-withdrawing-qualcomm-suit; and Christine Wilson, *A Court's Dangerous Antitrust Overreach*, Wall St. J., May 28, 2019.

[80] *See FTC v. Qualcomm*, No. 19-16122 (9th Cir. Jul. 16, 2019) (United States' Statement of Interest Concerning Qualcomm's Motion for Partial Stay of Injunction Pending Appeal); and Scott Graham, *FTC Fires Back at DOJ Over Qualcomm Competition*, LAW.COM (Jul. 19, 2019), *available at* https://www.law.com/therecorder/2019/07/19/ftc-fires-back-at-doj-over-qualcomm-competition/.

[81] Justice Department Withdraws Report on Antitrust Monopoly Law, U.S. Dep't. Just. Antitrust Div. (May 11, 2009), *available at* https://www.justice.gov/opa/pr/justice-department-withdraws-report-antitrust-monopoly-law.

defense.[82] If adopted, the government's positions would effectively eliminate competition and interoperability considerations in such cases, allowing copyright owners to engage in a form of hold-up by appropriating the investments made by developers in learning to write programs in a software language.

3.F: DEREGULATION

When markets depart from the model of perfect competition, government has historically used one of two mechanisms with which to address the losses in efficiency that result from the exercise of market power. Regulation is designed to work *ex ante* to create pro-competitive incentives through price and entry mechanisms that correct market failures and level the playing field for competition. With the exception of merger control, antitrust enforcement works *ex post* to directly control firms' strategic anticompetitive behavior. But Congress has ensured, through antitrust savings clauses, that antitrust and regulation play complementary roles in a number of sectors, including electricity and telecommunications.

> *"The Trump administration has taken a particularly aggressive approach to deregulation, without any assessment of the potential anticompetitive impacts of a broad deregulatory agenda."*

As markets have changed over time, deregulation garnered broad support through bipartisan efforts intended to remove regulatory barriers that were thought to impede competition more than their benefits could justify. This was based, however, on the assumption that lost government oversight would become unnecessary due to active antitrust enforcement. Conservative administrations have often deregulated without concern for whether antitrust enforcement or competition policy would effectively fill the gap.[83] The Trump administration has taken a particularly aggressive approach in this regard, without any assessment of the potential anticompetitive impacts of a broad deregulatory agenda. Coupled with a step-down in antitrust enforcement, deregulation is likely to have significantly adverse effects on consumers, workers, and innovation.[84]

UNLEVELING THE PLAYING FIELD IN AGRICULTURE, COMMUNICATIONS, AND ENERGY

Our review of the Trump administration's deregulatory initiatives reveals the risks of tilting the playing field toward powerful incumbent firms and away from consumers, workers, and small businesses. These actions include the repeal of laws and rulemakings that were on the books when the Trump administration took office; those in the

[82] Brief for the United States as Amicus Curiae Supporting Respondent, *Google LLC v. Oracle America, Inc.*, No. 18-956 (U.S. filed Feb. 19, 2020).

[83] *See generally* Alfred E. Kahn, *Deregulatory Schizophrenia*, 75 Calif. L. Rev. 1059 (1987); Deregulation that Frees the Economy, White House (Feb. 21, 2018), *available at* https://www.whitehouse.gov/articles/deregulation-that-frees-the-economy/.

[84] *Tracking Deregulation in the Trump Era*, Brookings (Mar. 8, 2020).

pipeline that have been delayed or made only partially effective; and new deregulatory initiatives. They cover a number of industries and issues, including agriculture, media and telecommunications, healthcare, banking and finance, energy, and labor. Many deregulatory initiatives trigger concerns in sectors that already display significant concentration, entrenched oligopolies, and powerful sellers and buyers.

For example, the U.S. Department of Agriculture (USDA) cancelled the proposed Fair Farmer Practices (FFP) rules in late 2017.[85] The FFP rules were the outgrowth of a 2008 Congressional mandate that the USDA use its rule-making authority to clarify the application of the Packers and Stockyards Act (PSA).[86] The rules were an important policy response to claims of unfair and discriminatory conduct resulting from transformational, consolidation-driven changes in commercial livestock and poultry production. This includes the shift to the "tenant farmer" model of raising chickens owned by integrators and meatpackers' practice of awarding supply contracts to selected producers at the same time their own purchases set the base price for contract sales.[87]

"A failure to promulgate needed non-discrimination rules leaves independent farmers and ranchers vulnerable to exploitation while insulating powerful processing corporations from liability."

The PSA prohibits any "unfair" or "discriminatory" conduct affecting farmers, but numerous requirements limit the protections afforded by the statute.[88] For example, judicial interpretation of the PSA has evolved to several overly restrictive requirements: (1) any unfair or discriminatory act must also "harm competition," not just harm a competitor; (2) resulting losses must be experienced by consumers and not just by farmers; and (3) conduct for which a plausible business justification might exist, even if a less restrictive alternative was also available, is exempt from "unfairness."[89] The FFP rules would have clarified that certain conduct by meatpackers and poultry dealers may violate the PSA without necessarily being anti-competitive and rejected the requirement that any unfair or discriminatory action must also affect competition.[90] Cancelation of the FFP rules involved, notably, withdrawal of the rule that reversed judicial interpretation requiring competitive harm as a prerequisite to any unfairness claim.[91]

Revocation of the FFP rules leaves independent farmers and ranchers vulnerable to exploitation while insulating powerful processing corporations from liability.[92] In response

---

[85] *Id.*

[86] Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651, § 11006 (2008).

[87] *See* Christopher Leonard, The Meat Racket: The Secret Takeover of America's Food Business (2014).

[88] 7 U.S.C. §§ 201–217a. *See also* Peter. C. Carstensen, *How to Assess the Impact of Antitrust on the American Economy: Examining History or Theorizing*, 74 Iowa L. Rev. 1175, 1198–1210 (1989).

[89] 7 U.S.C. § 228b. *See, e.g.*, *London v. Fieldale Farms Corp.*, 410 F.3rd 1295, 1302–1305 (11th Cir. 2010); *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir.2009) (en banc); *Pickett v. Tyson Fresh Meats*, 420 F. 3d 1272 (11th Cir. 2005); and *Terry V. Tyson Farms*, 604 F.3d 272, 277-279 (6th Cir. 2010).

[90] 81 Fed. Reg. 92566, 92594 (Dec. 20, 2016) creating 7 C.F.R. §201.3(a) ("A finding that the challenged conduct or action adversely affects or is likely to adversely affect competition is not necessary in all cases.").

[91] 82 Fed. Reg. 48,594-01 (Oct. 17, 2018).

[92] *See* Press Release, Roger Johnson, Pres. National Farmers Union, NFJ Deeply Disappointed by USDA Decision to Terminate Farmer Fair Practices Rules (Oct. 17, 2017), *available at* https://indianafarmersunion.org/2017/10/17/nfu-deeply-disappointed-by-usda-decision-to-terminate-farmer-fair-practices-rules/. ("With this decision, USDA has given the green light to the few multinational meatpackers that dominate the market to discriminate against family farmers.")

to objections to withdrawing the rules, the Trump administration issued different, proposed regulations in early 2020 that specify criteria for determining whether an undue or unreasonable preference or advantage has occurred in violation of the PSA.[93] But the proposal, combined with the withdrawal of the FFP rules, makes the PSA even less likely to have any useful effect in protecting livestock growers. This is exacerbated by USDA's elimination of the Grain Inspections, Packers, and Stockyards Administration and assignment of its functions to the Agricultural Marketing Service, which is largely the agent of the major buyers of commodities.

The media and communications sectors have also undergone significant change as the result of horizontal and vertical integration involving broadband ISPs and multi-video programming distribution and content programmers. Beginning almost immediately, and despite evidence that large mergers such as Comcast-NBCU and others have hampered competition, the Trump Federal Communications Commission (FCC) implemented major deregulatory initiatives. In early 2018, for example, the FCC repealed multiple media ownership rules.[94] This includes the National Television Multiple Ownership Rule, which removes the "UHF Discount" and allows major television companies to count only half the coverage area reach of their ultra-high frequency (UHF) stations towards the 39% national ownership cap. Also repealed is the Media Cross-Ownership ban, which prohibited a single company from owning a newspaper and television and radio stations in the same town.[95] Removal of the UHF Discount will likely prompt further consolidation in television and repeal of the cross-ownership rules has already led to a rash of merger proposals, resulting in less local network content and more partisan reporting.[96]

The FCC also repealed the Net Neutrality rules in mid-2018. Repeal permits ISPs to engage in a multitude of discriminatory practices.[97] For example, ISPs can pressure consumers into paying more for services by issuing paid prioritization internet bundles, throttling internet speeds, or even blocking certain content.[98] This creates barriers to entry for smaller companies unable to pay for high-speed access to consumers and allows ISPs to favor their own content over rival services.[99] Antitrust and consumer protection laws, which will be pressured to take up the slack from the loss of net neutrality, do not address key goals such as preserving free speech, diversity of viewpoints, and preventing censorship. Moreover, antitrust challenges against ISP practices can be initiated only *after* they harm competition and would be difficult to prosecute because of a dearth of timely, actionable proof such as the effects of prioritizing network traffic of one competing provider over another.[100]

The energy and environmental sectors have also been an intense focus of the Trump administration's deregulatory agenda.[101] New rules, and the partial or full repeal of existing

[93] 85 Fed. Reg. 1771 (Mar. 13, 2020).

[94] Tracking Deregulation, *supra* note 84.

[95] *See* Cecilia Kang, *F.C.C. Opens Door to More Consolidation in TV Business*, N.Y. Times (Nov. 16, 2017).

[96] Edmund L. Andrews, *Media Consolidation Means Less Local News, More Right Wing Slant*, Stanford Business (Jul. 30, 2019).

[97] *See* Kimberly Kindy, *How Congress dismantled federal Internet privacy rules*, N.Y. Times (May 30, 2017); *see also* Keith Collins, *Net Neutrality Has Officially Been Repealed. Here's How That Could Affect You.*, N.Y. Times (Jun. 11, 2018).

[98] A federal appeals court recently upheld the revocation of net neutrality, but also clarified that the FCC could not prevent state and local governments from writing their own rules. *See* David McCabe, *Court Upholds Net Neutrality Repeal, With Some Caveats*, N.Y. Times (Oct. 1, 2019).

[99] AAI Says Repeal of Network Neutrality Eliminates Important Antitrust-Regulation Partnership, Deprives Competition and Consumers of Needed Safeguards, Am. Antitrust Inst. (Dec. 22, 2017), *available at* https://www.antitrustinstitute.org/work-product/aai-says-repeal-of-network-neutrality-eliminates-important-antitrust-regulation-partnership-deprives-competition-and-consumers-of-needed-safeguards/

[100] *See* Jon Brodkin, *Comcast deleted net neutrality pledge the same day FCC announced repeal*, Arstechnica (Nov. 29, 2017), *available at* https://arstechnica.com/tech-policy/2017/11/comcast-deleted-net-neutrality-pledge-the-same-day-fcc-announced- repeal/?amp=1.

[101] *See, e.g.*, Nadja Popovich et al., *85 Environmental Rules Being Rolled Back Under Trump*, N.Y. Times (Sept. 12, 2019).

laws and regulations, make significant inroads in rolling back emission standards for carbon and other pollutants. Among several major initiatives, the Trump administration proposed Emission Limits for New Coal Power Plants, which relax greenhouse gas emission standards on new coal-fired power plants.[102] Likewise, the administration repealed the Clean Power Plan, which required coal-burning power plants to reduce carbon emissions. The Methane Rule, proposed in 2015, has been made only partially effective and weakens regulations pertaining to emissions from oil and gas wells. The removal of regulation to correct market failures will ensure that the full social costs of production are not reflected in market prices. This will unlevel the playing field for cleaner technologies, unduly favor large incumbents and change the competitive dynamics associated with market entry. These effects will have lasting implications for investment in infrastructure in a critical sector.[103]

> *"Beginning almost immediately, and despite evidence that large mergers have hampered competition, the Trump Administration's Federal Communications Commission implemented major deregulatory initiatives."*

MANDATORY ARBITRATION CLAUSES

The Congressional Review Act has been a favorite deregulatory mechanism for the Trump administration. In the financial sector, it was used to nullify the Consumer Financial Protection Bureau's (CFPB's) rule preventing certain financial companies from including mandatory arbitration clauses in consumer contracts. Mandatory arbitration clauses typically include class action waivers that serve as de facto exculpatory clauses in a large and important category of antitrust cases. Consumer, small business, and worker antitrust cases very often involve high-volume, low-dollar frauds and price or wage fixing in which perpetrators deliberately cheat large numbers of victims out of individually small sums of money. Consequently, individual victims' claims often are small in absolute value or small in relation to the significant expenses of developing and prosecuting an antitrust case. And because such claims pose a negative value proposition for an individual claimant, they are financially irrational pursuits absent class procedures that allow for aggregation of claims and pooling of resources.

Nullifying the CFPB's rule preventing mandatory arbitration cases undermines effective enforcement of the antitrust laws and contributes to pre-existing power imbalances between these companies and their customers. Mandatory arbitration clauses allow financial companies to avoid full liability by hiding behind arbitration's private process.[104] The result is that companies are under-deterred while their customers, who often do not fully understand the rights they are signing away, are denied an affordable path to seek restitution.

[102] Tracking Deregulation, *supra* note 84.

[103] *See, e.g.*, Chris Mooney, *New EPA document reveals sharply lower estimate of the cost of climate change*, Wash. Post (Oct. 11, 2017).

[104] *See* Scott Neuman & Chris Arnold, *Senate Kills Rule on Class-Action Suits Against Financial Companies*, NPR (Oct. 25, 2017).

SECTION 4: ASSESSING POTENTIAL RESPONSES TO FEDERAL INACTION

Section 3 highlights quantitative and qualitative evidence of weaker enforcement under the Trump administration, across all three areas of antitrust law. At the same time, our assessment recognizes some examples of positive enforcement, including the FTC's pursuit of some anticompetitive uses of IP. We also note that the agencies have mounted recent challenges to mergers such as Sabre-Farelogix (travel booking services), Peabody Energy-Arch Coal (thermal coal), and Edgewell (Schick)-Harrys (wet shaving).[105] These deals were blocked because they were clearly likely to enhance market power and lead to adverse effects, either because they occurred in highly concentrated markets, removed disruptive "mavericks" from the market, or vertically combined firms operating in concentrated markets. This illustrates the increasing limitation on the effectiveness of merger control, discussed at the outset of this report, and that is the outgrowth of decades of under-enforcement. Namely, as resources are consumed with challenges to patently anticompetitive combinations in highly concentrated industries, the prophylactic goal of preventing the emergence of highly concentrated industries in the first place is undermined. Concern over under-enforcement has generated reaction in the enforcement and legislative arenas, as detailed in this section, including the possibility that private enforcers and the states may take a more active role to fill the gap created by federal inaction. It also reviews the state of legislative proposals intended to reform the antitrust laws, which are now at a level not seen since the 1990s.

4.A: PRIVATE MERGER CHALLENGES AND MONOPOLIZATION CASES

Private antitrust enforcement is an essential complement to its public counterpart and foundational in promoting competition, defending markets, and protecting consumers and workers.[106] Congress fully intended this essential complementarity. Private merger enforcement has been formally authorized since the inception of Section 7 of the Clayton Act. In *California v. American Stores Co.*, for example, the Supreme Court noted, "Private enforcement of the [Clayton] Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition."[107] While private enforcers and the state Attorneys General cannot pick up all the slack from lax public enforcement, particularly merger enforcement, they do provide invaluable resources. And despite the perceived cost, complexity, and difficulty of the Section 7 legal standard that makes private merger challenges rare, they have been brought by customers, suppliers, and competitors of merging firms.[108]

[105] Justice Department Sues to Block Sabre's Acquisition of Farelogix, Acquisition Would Eliminate Disruptive Competitor, Leading to Higher Prices as Well As Reduced Quality and Innovation in Airline Booking Services, U.S. Dep't. Just. Antitrust Div. (Aug. 20, 2019), *available at* https://www.justice.gov/opa/pr/justice-department-sues-block-sabres-acquisition-farelogix; FTC Files Suit to Block Joint Venture between Coal Mining Companies Peabody Energy Corporation and Arch Coal, Federal Trade Commission (Feb. 26, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/02/ftc-files-suit-block-joint-venture-between-coal-mining-companies; and FTC Files Suit to Block Edgewell Personal Care Company's Acquisition of Harry's, Inc., Federal Trade Commission (Feb. 3, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/02/ftc-files-suit-block-edgewell-personal-care-companys-acquisition.

[106] *See* Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 Ga. L. Rev. 1 (2013).

[107] *Cal. v. Am. Stores Co.*, 495 U.S. 271, 284 (1990).

[108] *Am. Stores Co.*, 495 U.S. at 275-76; *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 753 F.2d 1354, 1354 (6th Cir. 1985). For discussion, *see, e.g.*, Sean Royall & Adam Di Vincenzo, *When Mergers Become a Private Matter: An Updated Primer*, Antitrust, Spring 2012, at 41; Am. Bar Ass'n, Section of Antitrust Law, Private Litigation Under Section 7 of the Clayton Act: Law and Policy (1989); Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 Mich. L. Rev. 1 (1995); and Paul J. Stancil, *Atomism and the Private Merger Challenge*, 78 Temp. L. Rev. 949 (2005).

> *Concern over under-enforcement has generated reaction, including the possibility that private enforcers and the states may take a more active role to take up slack due to federal inaction.*

THE POTENTIAL FOR PRIVATE CONSUMMATED MERGER CHALLENGES

Both public and private enforcers can challenge consummated and unconsummated mergers and the courts explicitly recognize that federal and private merger enforcement are complementary.[109] However, the timing and design of private claims can substantially impact their effectiveness, and their success. Federal actions are brought almost exclusively during the HSR process prior to consummation and therefore depend on speculation of possible future injury.[110] Private merger claims brought before consummation, which are often effectively follow-on claims to federal review under HSR, almost always fail.[111] The major hurdle is the difficulty of showing likely injury prospectively, insofar as there is no actual evidence of harm or record of bad conduct.

For the foregoing reason, private Section 7 claims are more effective when they are brought after consummation to challenge actual harm retrospectively.[112] This is true even if the mergers have been approved by federal enforcers, and even if the federal enforcers obtained some relief.[113] Plaintiffs in private cases that are brought retrospectively can offer concrete, objective proof of harm actually suffered, supported with econometric evidence. These more favorable legal conditions, coupled with a higher likelihood of recovery, means that private merger challenges of consummated deals might bring greater resources to enforcement than the federal agencies currently command alone. It also implies that when the agencies do not enforce the merger law, there is a potentially significant role for private plaintiffs.

The type of plaintiff named in private merger challenges is important because the courts have tightened rules of antitrust injury and standing. All private antitrust plaintiffs must prove harm "by reason of" conduct "forbidden in the antitrust laws."[114] Courts have made it difficult for competitor plaintiffs to identify harms to themselves that also injure competition, and plaintiffs even further removed from the competitive process have very little success.[115] Customer plaintiffs, by contrast, stand on much firmer ground. Some

---

[109] *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 575 (7th Cir. 1999). (*citing Am. Stores Co.*, 495 U.S. at 284-85).

[110] The federal agencies can enforce § 7 at any time but only secure equitable relief, and the courts have resisted structural remedies after consummation.

[111] *See, e.g., DeHoog v. Anheuser-Busch Inbev SA/NV*, 899 F.3d 758 (9th Cir. 2018); *Taleff v. Southwest Airlines Co.*, 554 Fed. Appx. 598 (9th Cir. 2014); *Malaney v. UAL Corp.*, 434 Fed. Appx. 620 (9th Cir. 2011); *Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc.*, 2010 WL 1541257 (N.D.Cal. 2010).

[112] *See Midwestern Machinery Co. v. Northwest Airlines, Inc.*, 392 F. 3d 265, 269 (8th Cir. 2004); *Z Technologies Corp. v. Lubrizol Corp.*, 753 F.3d 594, 604 (6th Cir. 2014).

[113] 15 U.S.C. §§ 15, 26. *See Am. Stores Co.*, 495 U.S. at 271; *Messner v. Northshore University Healthsystem*, 669 F.3d 802, 808 (7th 2012); *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 575 (7th Cir. 1999); *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co., Inc.*, 753 F.2d 1354 (6th Cir. 1985); and *Laidlaw Acq. Corp. v. Mayflower Grp., Inc.*, 636 F. Supp. 1513, 1521 (S.D. Ind. 1986).

[114] Clayton Act § 4, 15 U.S.C. § 15.

[115] 15 U.S.C. § 15. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986); *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477 (1977). Employees and unions, for example, sometimes oppose mergers of their employers that they believe will reduce employment or create monopsony wage power. *See, e.g.*, William McConnell, *Sysco-US Foods Merger Under Fire From Teamsters*, The Street, Aug. 29, 2014, *available at* https://www.thestreet.com/story/12861420/1/sysco-us-foods-merger-under-fire-from-teamsters.html.

courts have stated a formal presumption that direct purchasers are proper plaintiffs, in antitrust generally and merger cases specifically.[116] Accordingly, those private merger challenges that succeed are usually direct-purchaser customer claims brought some time after merger consummation.

> *Recent successes signal the possibility of a larger role for private consummated merger challenges and given the record of lax federal enforcement, there should be no lack of possible candidate cases.*

Recent successes signal the possibility of a larger role for private challenges and improvements in their effectiveness. For example, the *Messner v. Northshore University Healthsystem and Blessing v. SiriusXM Radio, Inc.* challenges were both very successful, and they were both direct-purchaser challenges to consummated mergers.[117] *Messner*, in particular, reached important conclusions supporting consumer class certification in merger challenges. Similarly, a customer challenge reached the merits stage in the *Steves & Sons, Inc. v. Jeld Wen, Inc.* case. Plaintiffs recovered both substantial damages and a divestiture order unwinding a merger that had been consummated six years earlier that was not challenged by the DOJ.[118] A jury found in favor of Steves & Sons, Inc. and in 2019, Steves returned to federal district court and successfully obtained additional post-judgment damages for Jeld-Wen's continued practice of overcharging Steves for door skins.[119] Private enforcement of antitrust violations arising out of an acquisition that went unchallenged by the DOJ therefore resulted in significant relief.

It remains to be seen how aggressively private enforcers will pursue merger cases. Given the record of lax federal merger enforcement, there should be plenty of possible candidate cases that, if successful, would provide restitution for consumers or other victims for higher post-merger prices, lower quality, or less innovation. A bigger role for private merger enforcement would be supported by the availability of more merger retrospectives that identify the adverse effects of consummated deals. This would strengthen the inherent comparative advantage held by private enforcers. Namely, the federal HSR process may be suited to stopping obviously dangerous deals up front while private action can address those that were allowed but that turned out to be anticompetitive.

[116] *See, e.g., Glen Holly Entertainment, Inc. v. Tektronix, Inc.*, 352 F.3d 367, 352 (9th Cir. 2003); *SAS v. Puerto Rico Tel. Co.*, 48 F.3d 39, 44–45 (1st Cir. 1995). *See, e.g., Glen Holly Entertainment*, 352 F.3d at 372.

[117] 669 F.3d 802 (7th 2012) and 775 F. Supp. 2d 650 (S.D.N.Y. 2011).

[118] DOJ did not challenge JELD-WEN's acquisition of Craftmaster Manufacturing, Inc. *See* 345 F. Supp. 3d 614 (E.D. Va. 2018).

[119] *Steves & Sons, Inc. v. JELD-WEN, Inc.*, No. 3:16-CV-545, 2019 WL 6138200 (E.D. Va. Nov. 19, 2019), at 4–6 and 12. The DOJ filed an amicus brief supporting the plaintiff Steves and Sons, Inc. in the Fourth Circuit, where the case is currently on appeal. It noted, "The Division's decision not to challenge a particular transaction is not confirmation that the transaction is competitively neutral or procompetitive." *See* Brief for the United States of America As Amicus Curiae In Support of Appellee Steves and Sons, Inc., *Steves and Sons, Inc. v. JELD-WEN, Inc.*, No. 19-1397 (4th Cir. Aug. 23, 2019), ECF No. 41-1, at 15.

ENCOURAGING SIGNS OF PRIVATE SECTION 2 ENFORCEMENT

Settlement data for private cases indicates that about 12% of claims involve Section 2 violations, often in conjunction with Section 1 violations such as price fixing.[120] There are some encouraging signs of private Section 2 enforcement, however. In 2019, for example, both Apple and a large class of consumers brought claims against Qualcomm that were closely related to the FTC's case described earlier.[121] A consumer class action monopolization challenge also survived review on standing grounds before the Supreme Court in *Apple v. Pepper*. There, consumers challenged the exclusive sale of iPhone apps through the Apple App Store. The DOJ previously sided with Apple in arguing that plaintiffs were not direct purchasers and therefore could not pursue their claims.[122] In mid-2019, the Supreme Court rejected the DOJ's position, holding that consumers who bought apps were direct purchasers and could pursue the monopolization lawsuit.[123] At the time of this writing, the iPhone App Store antitrust litigation is ongoing.[124]

Also important was *Steward Health v. Blue Cross & Blue Shield of Rhode Island*. Successfully concluded in 2018, the case involved an attempt by an integrated Massachusetts hospital system-health insurer to enter the hospital market in Rhode Island by acquiring a failing hospital.[125] Steward Health claimed it was excluded by Rhode Island's major health insurer Blue Cross & Blue Shield through a refusal-to-deal, an area of law generally said to be tightening up and disfavored by antitrust conservatives. Yet the presiding judge gave substantial weight to plaintiff's evidence, wrote favorably of more aggressive monopolization law, and was openly critical of refusal-to-deal law for its undue deference to defendants.[126] Finally, in early 2019, an appellate court restored a multi-million jury award in a monopolization lawsuit by cigarillo company Trendsettah against Swisher International, Inc. The decision overturned the trial court's order for a new trial and grant of summary judgment in favor of Swisher.[127]

4.B: PRIVATE ENFORCEMENT AGAINST PRICE FIXING AGREEMENTS

Unlike federal enforcers suing to protect the public, private enforcers can obtain significant damages, particularly through the class action device. From 2013 to 2018 the cumulative total recovered for victims in antitrust class actions was over $19 billion.[128] Sources estimate that in 2018 the vast majority, or almost 85%, of total antitrust damages awarded by the courts in antitrust cases were attributable to settlements in antitrust class actions. As noted above, the majority of those settlements were in Section 1 cases.[129] Private enforcers focus on Section 1 enforcement because it is substantially easier to bring retrospective, after-the-fact conspiracy challenges than to enforce either Section 2 or

[120] Lex Machina, Antitrust Litigation Report 27 (Apr. 2019), *available at* https://lexmachina.com/antitrust-litigation-report/.

[121] *See* Don Clark & Daisuke Wakabayashi, *Apple and Qualcomm Settle All Disputes Worldwide*, N.Y. Times, Apr. 16, 2019.

[122] Brief for the United States As Amicus Curiae Supporting Petitioner, at 24–28, *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (No. 17-204), 2018 WL 3969563.

[123] *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019).

[124] Matthew Perlman, *DOJ Antitrust Deputy Blasts Supreme Court's Apple Ruling*, Law 360, Sept. 26, 2019, *available at* https://www.law360.com/articles/1203203/doj-antitrust-deputy-blasts-supreme-court-s-apple-ruling.

[125] 311 F. Supp. 3d 468 (D.R.I. 2018).

[126] *Id*. at 480-85.

[127] *Trendsettah USA, Inc. v. Swisher Int'l, Inc.*, 761 F. App'x 714 (9th Cir. 2019), *cert. denied*, No. 19-349, 2019 WL 5301207 (U.S. Oct. 21, 2019).

[128] Huntington National Bank & Univ. of San Francisco School of Law, *2018 Antitrust Report: Class Action Filings in Federal Court* (May 2019), *available at* http://ssrn.com/abstract=3386424. *See also "The Vital Role of Private Antitrust Enforcement in the U.S.: Commentary on the 2018 Antitrust Annual Report: Class Action Filings in Federal Court*, American Antitrust Institute (May 14, 2019), available at https://www.antitrustinstitute.org/wp-content/uploads/2019/05/AAI_USF-Commentary_2018-Antitrust-Class-Action-Report_Final_5.14.19.pdf.

[129] Lex Machina, *supra* note 120.

Section 7. Only Section 1 causes of action enjoy "per se" or "quick look" legal standards. And even when the "rule of reason" applies, Section 1 requires less demonstration of market power than monopolization or merger cases. Even so, the agencies and private parties mostly challenge one relatively narrow class of conduct—naked horizontal agreements to restrict price or output or, to divide markets.

> *Despite recent success of private enforcers in obtaining restitution for victims of anticompetitive abuse, Section 1 cases involving illegal agreements are becoming more difficult to bring and win.*

Despite the recent success of private enforcers in obtaining restitution for victims of anticompetitive abuse, however, Section 1 cases are becoming more difficult to bring and win. This is due to a number of factors, including increased difficulty of certifying a class and a tightening of judicial standards on what constitutes illegal price fixing. For example, circumstantial evidence of price increases, pled with "plus factors," may not be sufficient in many courts to constitute a violation without pleading *additional* facts, such as direct evidence of a conspiracy. The central focus of this trend is judicial interpretation of what distinguishes independent decision-making by companies that simply takes rivals' actions into account from conduct that is impossible without illegal collusion. These developments highlight that the courts are not simply imposing the standard articulated in *Matsushita*, but are raising the bar beyond it.[130] Namely, circumstantial evidence that courts of the *Matsushita* era would have found "inconsistent" with independent conduct, and therefore sufficient to support an inference of conspiracy, is now being found "equally consistent" with conspiracy *and* non-conspiracy and therefore insufficient to support inference of a conspiracy.

Several examples illustrate these concerns. One is the Third Circuit's decision in *In re Ry. Indus. Employee No-Poach Antitrust Litig*.[131] This case may set precedent that requires private plaintiffs to develop more facts at the initial stages of litigation about market structure and defendants' collusive behavior, as well as its impact on the class in order to survive a motion to dismiss or strike. In mid-2019, a federal district court dismissed class claims from a suit accusing railroad equipment suppliers of reaching no-poach agreements under which defendants agreed not to hire or solicit each other's employees. Plaintiffs alleged that defendants conspired to restrict the hiring and soliciting of *all* their employees and sought damages and injunctive relief. The court held, among other things, that plaintiffs failed to set forth sufficient facts showing that all defendants were engaged in an overarching conspiracy.[132]

---

[130] 475 U.S. 574 (1986).
[131] No. 18-798, 2019 WL 2542241 (W.D. Pa. Jun. 20, 2019).
[132] *Id.*

In another case, *Valspar Corp. v. E.I. Du Pont De Nemours & Co*., a class of titanium dioxide purchasers filed a price-fixing action against suppliers.[133] Valspar cited evidence that rivals implemented numerous parallel price increases over more than a decade, along with other circumstantial evidence. But a federal district court found that evidence of an actual agreement to fix prices was lacking, a decision that was affirmed by an appeals court. The court reasoned that oligopolies tend to exhibit such patterns and Valspar failed to show that parallel pricing "went beyond mere interdependence and was so unusual that in the absence of advance agreement, no reasonable firm would have engaged in it."[134] The decision tightens the standard of evidence needed to prove a conspiracy to proof of an explicit, manifest agreement. The *Valspar* court essentially required plaintiffs to provide affirmative evidence of an agreement, whether direct or indirect.

Another example is *Kleen Prods. LLC v. Int'l Paper*.[135] In 2010, a class of direct purchasers of containerboard filed suit against an oligopoly of paper producers and sellers in the containerboard industry, alleging that they engaged in a price fixing conspiracy. Plaintiffs' provided evidence of defendants' lockstep announcements of price increases, supply reductions, trade association meetings, phone calls and other communications between the paper companies. Defendants argued that their conduct was consistent with normal competition. The district court agreed, finding that defendants' interdependent conduct was known as "conscious parallelism, tacit collusion, follow-the-leader strategy, or interdependent parallelism . . . . [and] is lawful."[136] The district court granted defendants' motion for summary judgement, explaining that to prevail, plaintiffs must offer evidence that rules out that defendants acted independently as price-taking firms and supports that they acted interdependently as oligopolies."[137] The appeals court agreed, finding that a lack of direct evidence did not "tend to exclude the possibility that [defendants] engaged only in tacit collusion."[138]

A last example is *In re Packaged Seafood Prods. Antitrust Litig*.[139] There, a federal district court held that, absent allegations of a substantive agreement, no inference could be made of a conspiracy among packaged seafood companies involving illegal pricing. Defendants moved to dismiss complaints for failure to state a plausible tuna-specific conspiracy, asserting that plaintiffs' allegations amounted only to parallel conduct. They also rejected Plaintiffs' claims that opportunities to collude (in an industry that was conducive to collusion), a DOJ investigation, and foreign antitrust violations supported an interference of conspiracy. The court found that circumstantial evidence was insufficient because each allegation was equally susceptible to an interpretation of non-conspiracy and instead merely showed parallel behavior.[140] In sum, the court concluded that the conduct "may just as easily be explained by factors or business decisions that are completely independent of any conspiratorial conduct."[141]

[133] *Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, 873 F.3d 185, 190 (3d Cir. 2017); *see also In re Titanium Dioxide Antitrust Litig.*, 959 F.Supp.2d 799, 832 (D. Md. 2013).
[134] *Id*. at 193.
[135] 276 F. Supp. 3d 811 (N.D. Ill. 2017), *aff'd sub nom. Kleen Prods. LLC v. Georgia-Pac. LLC*, 910 F.3d 927 (7th Cir. 2018).
[136] *Id*. at 819.
[137] *Id*. at 820 (citing *Matsushita*, 475 U.S. at 587–88).
[138] *Kleen Prods. LLC v. Georgia-Pac. LLC*, 910 F.3d 927, 934 (7th Cir. 2018). *Id*. at 942.
[139] No. 15-MD-2670 JLS (MDD), 2017 WL 35571 (S.D. Cal. Jan. 3, 2017).
[140] *Id*., at 11.
[141] *Id*.

4.C: POLICY CHANGE AND PRIVATE ENFORCEMENT

Successful private antitrust litigation can generate social benefits beyond the individual parties and markets that are the subject of an alleged violation. Among other things, successful suits often shift popular debate and bring attention to imbalances or wrongdoing. The outcomes of private cases can thus serve as a catalyst for increased public discourse and public policy action on anticompetitive practices. This illustrates another important dimension of private enforcement in playing an essential role in protecting competition, consumers, and workers. A number of cases illustrate these developments. For example, a series of suits by college athletes over the last decade have challenged the "amateurism" rules of the National Collegiate Athletic Association (NCAA) as violations of the antitrust laws because they effectively restrain wages through a horizontal agreement among member schools.

> *"Successful private antitrust litigation social benefits beyond the parties and markets involved and often shift popular debate and bring attention to imbalances or wrongdoing."*

In the pioneering *O'Bannon v. NCAA* case, the court held that NCAA compensation limits do in fact violate the Sherman Act.[142] That result was reaffirmed and expanded on in *In re: National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation (Alston)* where the district court ruling prohibited NCAA caps on payments that are "education-related."[143] In early 2019, a federal district court ruled that the NCAA's caps on education-related payments violated Section 1 of the Sherman Act.[144] Shortly after these rulings, states began introducing legislation to allow college athletes to earn even broader compensation.[145] While the plaintiffs in the *O'Bannon* and *Alston* cases secured meaningful recoveries, their more important impact may have been to change public attitudes and generate continuing policy consequences.[146]

For example, in late 2019, the governor of California signed the Fair Pay to Play Act, which enables college student athletes to benefit financially from their name, image, and likeness (NIL).[147] Twenty or more other states have considered similar legislation. As perhaps the starkest evidence of how far the national conversation has shifted, a conservative Republican Congress-member introduced a bill to strip the NCAA's tax-exemption if it continued to deny players NIL compensation and even the NCAA itself has now moved to broaden the compensation it permits.[148] Noting that the policy change was driven by concern over "how best to respond to the state and federal legislative

[142] 802 F.3d 1049 (9th Cir. 2015).
[143] *In re: NCAA Athletic Grant-in-Aid Cap Antitrust Litigation*, 375 F. Supp. 2d 1058 (N.D. Cal. 2019)
[144] *Id.*, at 1109.
[145] *See* S.B. S6722, 2019-2020 Reg. Sess. (N.Y. 2019); H.B. 251, 2020 Reg. Sess. (Fla. 2019); H.B. 3904, 101st Gen. Assemb. (Ill. 2019).
[146] The cases held the compensation limits illegal, but found they could be remedied by certain specific modifications of the existing rules. *Alston* is still pending appeal, but if it survives, the NCAA must permit member schools to provide any compensation that is "education related," and that does not erode the distinction between amateur and professional sports.
[147] S.B. 206, 2019-2020 Reg. Sess. (Cal. 2019).
[148] Student-Athlete Equity Act, H.R. 1804, 116th Cong., 1st Sess. (Mar. 14, 2019), introduced by Rep. Mark Walker of North Carolina.

environment," the body's governing board voted unanimously in late 2019 to authorize consideration of expanded NIL compensation rights and permit student athletes to benefit from them.[149] This decision was a stark reversal from the NCAA's arguments defending amateurism as procompetitive.[150] It remains to be seen how seriously the NCAA intends to serve player interests. There are indications that its only real goal is to hold the line and to stave off further steps toward genuine pay-for-play compensation. However, there is no question that the movement in national opinion in favor of expanded player rights has been dramatic and that it began when *O'Bannon* was filed in 2009.

The pharmaceutical industry has also been the center of burgeoning public discourse following litigation over the prices of generic drugs. In *In re Generic Pharmaceutical Pricing Antitrust Litigation*, purchasers alleged that generic pharmaceutical companies unlawfully colluded to fix the prices of generic drugs, causing prices to increase.[151] Following purchaser lawsuits, forty-six Attorneys General initiated an antitrust enforcement action against pharmaceutical manufacturers for the same conduct.[152] As a result, federal lawmakers and 2020 presidential candidates have spoken frequently about the need to reduce the prices of generic drugs and offered proposals to do so.[153]

Private enforcement in the automobile sales market has similarly driven lawmakers to action. In *In re Dealer Management Systems Antitrust Litigation*, car dealerships and third-party software vendors accused dealer management system (DMS) providers of colluding to drive out competition and raise prices by allowing only the DMS provider to determine which third parties can access information stored on the DMS.[154] Litigation is still ongoing but states including Arizona, Hawaii, Montana, North Carolina, and Oregon have already enacted or introduced laws that allow the dealership, instead of the DMS provider, to decide which third parties can access information stored on the DMS.[155] By enacting these laws, the states have provided structural relief in addition to and beyond whatever relief may result from the ongoing litigation.

4.D: STATE ENFORCEMENT ACTIVITY

A major source of antitrust enforcement resides with the state Attorneys General, which the Supreme Court has often reaffirmed as an important part of congressional design.[156] States may initiate suits, much like private plaintiffs, under the Sherman and Clayton Acts by demonstrating injury to their citizens or to themselves in their individual capacities.[157] They may also initiate suits under state antitrust law. The states' role has typically been cooperative or complementary to federal enforcement, with the establishment of periodic coordination protocols with the federal agencies.[158] But the states have

[149] NCAA, *Press Release, Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities* (Oct. 29, 2019), *available at* https://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities

[150] *See, e.g.*, 375 F.Supp.3d at 1070.

[151] *See In re Generic Pharm. Pricing Antitrust Litig.*, 338 F. Supp. 3d 404, 410 (E.D. Pa. 2018).

[152] *Id.* at 413¬–14.

[153] Katie Thomas, *Drug Prices Are a Populist Campaign Issue. Here Are the Latest Proposals to Lower Costs.*, N.Y. Times (Jun. 16, 2019), *available at* https://www.nytimes.com/2019/06/16/health/drug-prices-congress-trump.html.

[154] *See In re Dealer Mgmt. Sys. Antitrust Litig.*, 362 F. Supp. 3d 510, 520–25 (N.D. Ill. 2019).

[155] H.B. 2418, 54th Leg., 1st Reg. Sess. (Ariz. 2019); S.B. 2490, 2018 Reg. Sess. (Haw. 2018); H.B. 617, 2019 Reg. Sess. (Mont. 2019) ; H.B. 455, 2019-2020 Reg. Sess.(N.C. 2019); H.B. 3152, 80th Leg., Reg. Sess. (Or. 2019).

[156] *Calif. v. Am. Stores Co.*, 495 U.S. 271 (1990); cf. *California v. ARC America Corp.*, 490 U.S. 93, 101-02 (1989).

[157] *See* 15 U.S.C. §§ 4, 4c.

[158] *Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General* (1998), *available at* https://www.justice.gov/sites/default/files/atr/legacy/2011/12/21/1773.pdf. *See also* U.S. Dep't. Just. Antitrust Div., Antitrust Division Manual, Ch. VII(C) (5th ed. 2012).

sometimes taken distinct stances of their own and occasionally those have been in direct conflict with federal decisions during periods of federal inactivity.[159] While state activity has been controversial, it has provided an important counterpoint and protected local interests not prioritized at the national level.

There are indications that weak federal enforcement during the Trump administration may prompt another phase of invigorated state activity. For example, more than 40 states have filed their own state-level civil complaints in response to the price fixing schemes perpetrated by the generic drug companies.[160] And in early in 2019, the states formed an ad hoc task force, as a supplement to a long-standing National Association of Attorneys General antitrust coordination committee, to consider competition problems in high technology. This action may be a precursor to a challenge to one or more of the large digital technology players.[161]

> *Weak federal enforcement may prompt a phase of invigorated state activity, including merger challenges and state-level civil complaints in response to the price fixing schemes.*

The states have been particularly active on the merger enforcement front. Several states filed a lawsuit against the merger of Sprint and T-Mobile in mid-2019. The suit was filed while the deal was still in the midst of an extended HSR review process.[162] The conflict became more politicized and partisan when the DOJ approved the deal under a settlement joined by a number of Republican states. The outcome was not favorable to plaintiff states, as revealed in an opinion that appeared to misunderstand basic economic incentives surrounding market power and the factors that legitimately inform an analysis of anticompetitive effects.[163] Finally, a coalition of California, Iowa, Massachusetts, Mississippi, and Oregon submitted comments under the Antitrust Penalties and Procedures Act objecting to the terms of the DOJ's approval of the settlement in the merger of agricultural biotechnology giants Bayer and Monsanto. The states highlighted the anticompetitive nature of the transaction, including the recent and rapid elimination of rivals in relevant agricultural biotechnology markets. The states also asked for significantly stronger conditions on the merger and the requirement that retrospective analysis of the merger be performed.[164] It is too soon to know whether these cases signal a trend, but they do provide some encouraging signs that states will rise to the challenge of absent federal enforcement.

---

[159] *See generally* Patricia A. Conners, *Current Trends and Issues in State Antitrust Enforcement*, 16 Loyola Consumer L. Rev. 37 (2003); and Robert H. Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 35 N. Y. L. Sch. L. Rev. 1047 (1990).

[160] *See, e.g.*, Steve Leblanc and Martin Crutsinger, *States bring new price-fixing suit against generic-drug makers*, Ass. PessS (May 12, 2019), *available at* https://www.statnews.com/2019/05/12/states-bring-new-price-fixing-suit-against-generic-drug-makers/.

[161] Joshua Brustein & Peter Robison, *State Attorneys General Lay Groundwork for Google Investigation*, Bloomberg, Mar. 15, 2019.

[162] *New York v. Deutsche Telekom AG*, No. 1:19-cv-05434-VM-RWL (S.D.N.Y. Jun. 11, 2019). *See also* Tony Romm, *State Attorneys General Sue to Block Merger Between Sprint and T-Mobile*, Wash. Post (Jun. 11, 2019).

[163] Letitia James, Attorney General, New York, *Press Release: T-Mobile/Sprint Megamerger Remains a Bad Deal for Consumers, Innovation, and Workers* (Jul. 26, 2019), *available at* https://ag.ny.gov/press-release/ag-james-t-mobilesprint-megamerger-remains-bad-deal-consumers-innovation-and-workers.

[164] Comments of Attorneys General of California, Iowa, Massachusetts, Mississippi, and Oregon on the Proposed Final Judgment in *U.S. v. Bayer AG, Monsanto Company, and BASF SE*, Case 1:18-cv-01241-JEB (Jan. 29, 2019), *available at* https://www.justice.gov/atr/page/file/1111086/download.

4.E: LEGISLATIVE ANTITRUST REFORM PROPOSALS

The history of legislative initiatives in the U.S. tells an important story about lawmakers' interest in competition and antitrust enforcement. Proposed changes to the antitrust laws are indicia of voters' interest in competition, free and open markets, and abuses of market power. Proposals that target competitive practices and consolidation in particular sectors, such as pharmaceuticals and agriculture, are clear indications of specific concerns about the pricing and availability of essential commodities. Since the 93rd Congress (1973-1975), the highest level of legislative activity involving antitrust and monopoly was in the 1990s.[165] This corresponds to the beginning of a major merger wave in the U.S. which peaked between 1998 and 2000. After 2000, legislative antitrust proposals fell off, reaching a low in 2015. But between 2015-2016, there was a 75% increase in the number of bills introduced. As of the 116th Congress (2019-2021), almost 60 bills pertaining to antitrust and monopoly have been introduced. Extrapolating for 2021, we might expect this number to reach over 100. If so, it would reflect a significant increase in legislative activity.

> *Between 2015 and 2017, there was a 75% increase in the number of antitrust reform bills introduced in Congress, a clear signal that voters are concerned about declining competition.*

Our review of the composition of the higher volume of proposed antitrust legislation over the last two years appears to be a response to the cumulative effects of weak federal enforcement, a continued policy of inaction under the Trump administration, and a tightening of standards by the courts. Proposals addressing antitrust reforms fall into three major categories: (1) comprehensive reform to core areas of antitrust law such as mergers, monopolies, and anticompetitive agreements; (2) targeted concerns or specific violations that harm competition, consumers, and workers; and (3) provisions for specific industries. There are three major examples of legislative proposals in the first category. Senator Klobuchar introduced the Merger Enforcement Improvement Act in the Senate in early 2019.[166] Among other things, the bill requires government agencies to study common ownership, the effectiveness of merger remedies, and the impact of mergers on wages, employment, and innovation. A companion bill, the Consolidation Prevention and Competition Promotion Act of 2019, strengthens and clarifies merger requirements and, among other provisions, shifts the burden of proof to defendants in cases of highly concentrative mergers to show that their transaction will not harm competition.[167] Finally, Senator Klobuchar introduced the Anticompetitive Exclusionary Conduct Prevention Act in early 2020. The bill aims to deter anticompetitive abuses that distort the competitive process and makes reforms to improve antitrust enforcement.[168]

---

[165] Bills and Resolutions, GovTrack.us, database queried for bills containing "antitrust" and "monopoly, *available at* https://www.govtrack.us/congress/bills/browse?text=antitrust#sort=relevance, last visited Mar. 8, 2020.

[166] S. 306, 116th Congress: Merger Enforcement Improvement Act (Dec. 18, 2019), *available at* https://www.govtrack.us/congress/bills/116/s306.

[167] S. 307, 116th Congress: Consolidation Prevention and Competition Promotion Act of 2019 (Dec. 18, 2019), *available at* https://www.govtrack.us/congress/bills/116/s307.

[168] S. 3426, 116th Congress: Anticompetitive Exclusionary Conduct Prevention Act (Mar. 11, 2020), *available at* https://www.govtrack.us/congress/bills/116/s3426.

Legislative antitrust reform proposals that target specific antitrust issues and problems include the Economic Freedom and Financial Security for Working People Act of 2018.[169] The legislation would amend the Clayton Act to clarify that an acquisition that tends to create a monopsony violates the Clayton Act. The Restoring and Improving Merger Enforcement Act of 2018 provides that under the Clayton Act, the defendant has the burden to establish by a preponderance of the evidence that any claimed merger efficiency will eliminate any loss of competition from the merger.[170] Industry-specific legislative reform proposals include the 2019 Food and Agribusiness Merger Moratorium and Antitrust Review Act, a bill that would impose a moratorium on large agribusiness, food and beverage manufacturing, and grocery retail mergers.[171] Likewise, the Journalism Competition and Preservation Act would establish a temporary antitrust exemption for the publishers of online content to collectively negotiate distribution terms with dominant online platforms.[172]

The magnitude of potential damage due to the cumulative effects of lax enforcement and under-enforcement by the Trump antitrust agencies highlights the need for a coherent and constructive policy-driven approach to legislative reform. Antitrust reform bills introduced in the 116th Congress raise a number of important questions. For example, legislation directed at specific sectors risks substituting industrial policy for antitrust, diluting antitrust as an instrument of law enforcement and creating potential conflicts across sectors. Legislative proposals for sectors that have been hard hit by consolidation and competitive abuse, but that have higher political priority than others, create asymmetries in the application of "generalist" antitrust laws. Provisions that prohibit or make certain forms of business organization in certain sectors a violation potentially raise the same type of concern.

Another question is how reform proposals that narrowly target specific antitrust issues could potentially conflict with others that address similar or related concerns. For example, a bill that heightens merging parties' requirements for showing legitimate merger-related efficiency claims should be closely coordinated with a bill that shifts the burden to merging parties to demonstrate that their merger will not result in anticompetitive effects. Because efficiencies claims are the central focus of both types of proposals, their provisions should be crafted to avoid conflicts or asymmetries. Finally, some legislative proposals that propose new violations and new standards for existing violations should be carefully crafted to ensure that they do not cause confusion in the courts or weaken existing law. Any antitrust reform proposals should be particularly careful around standards for antitrust injury.

Another response to the effects of cumulative accretion of market power, and continued enforcement inaction under the current administration is to "breakup and regulate" dominant companies, particularly in the digital technology sector.[173] While this response

---

[169] H.R. 5630, 115th Congress: Economic Freedom and Financial Security for Working People Act of 2018 (Dec. 18, 2019), *available at* https://www.govtrack.us/congress/bills/115/hr5630.

[170] H.R. 5642, 115th Congress: Restoring and Improving Merger Enforcement Act of 2018 (Mar. 7, 2020), *available at* www. Govtrack.us, *available at* https://www.govtrack.us/congress/bills/115/hr5642.

[171] S. 1596, 116th Congress: Food and Agribusiness Merger Moratorium and Antitrust Review Act of 2019 (Dec. 18, 2019), *available at* https://www.govtrack.us/congress/bills/116/s1596.

[172] H.R. 2054, 116th Congress: Journalism Competition and Preservation Act of 2019, December 18, 2019, *available at* https://www.govtrack.us/congress/bills/116/hr2054.

[173] Elizabeth Warren, *It's Time to Break Up Amazon, Google, and Facebook*, medium.com (Mar. 8, 2019), *available at* https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c.

The potential damage due to the cumulative effects of lax enforcement and current under-enforcement highlights the need for coherent and constructive policy legislative reform.

has not yet been translated into proposed legislation, proponents appear to envision an outsized role for break-ups in solving economic, social, and even political problems raised by large digital technology companies. This contrasts with proposals that are designed to fit within a portfolio of policy tools that could include competition, regulatory, interoperability, and intellectual property policies.[174] The rare historical breakup remedies fashioned through antitrust law were applied in sectors that are very different from the digital ecosystems of today, which feature strong network effects and a role of data in fueling connectivity across markets.[175] Breakup proposals in digital technology and any other sector require significant analysis, including criteria for mandated restructuring, and the implications of a mixed regime of permissible integration, structural separation, competition, and regulation.

While breakup proposals appear to require further thought, we also note that there is no indication that the Trump enforcement agencies are willing to revisit prior merger decisions and challenge consummated mergers of digital technology companies where post-merger harm is evident. Without a more aggressive enforcement approach to reviewing consummated acquisitions of potential rivals in digital technology and other sectors, the focus on breakup proposals is likely to intensify. Neither antitrust enforcement nor legislative action on this front therefore appears capable of effectively addressing concerns, with potentially adverse consequences for a coherent public policy approach.

SECTION 5: CONCLUSION

This report was undertaken to assess the state of enforcement in the U.S. The interpretation of hard data on enforcement levels is augmented by an assessment of "soft" factors such as federal agency policy and advocacy initiatives. Our conclusion is that federal enforcement under the current administration is not responsive to the dilemma posed by the cumulative effects of four decades of lax antitrust enforcement. And despite a few bright spots, the apparent step-down in enforcement under the Trump agencies will exacerbate the problem of declining competition. Without strong federal

[174] *See, e.g.*, Diana L. Moss, *Breaking Up Is Hard to Do: The Implications of Restructuring and Regulating Digital Technology Markets*, Antitrust Source (Oct. 2019), *available at* https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/2018-2019/atsource-october2019/oct19_mossc.pdf.

[175] Two antitrust cases involved structural separation as a remedy: *Standard Oil Co. v. United States*, 22 U.S. 1 (1911), and *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). *See* e.g., Fiona Scott Morton, *Why 'Breaking Up' Big Tech Probably Won't Work*, Wash. Post (Jul. 16, 2019), *available at* https://www.washingtonpost.com/opinions/2019/07/16/break-up-facebook-there-are-smarter-ways-rein-big-tech/.

enforcement—and in anticipation of even weaker enforcement in light of the trends identified herein—we assessed possible responses.

Private and state enforcers remain vitally important to the enforcement infrastructure in the U.S. And while they can take up some of the slack in federal under-enforcement, both are limited by a combination of tightening judicial standards, the costs of litigation, and resources. Change in the way the U.S. promotes competition and protects the market system is therefore badly needed. This need is best viewed and solved as a public policy problem. More vigorous enforcement of the antitrust laws is part of the solution and achievable likely only through comprehensive and coordinated legislative reforms that strengthen and clarify the laws. But these efforts must be complemented through the use of other tools, including social and economic regulation, standard-setting and interoperability, labor policy, and intellectual property law.