

Morgan Lewis

# NAVIGATING THE NEXT.

## Antitrust Enforcement in the New Administration

December 9, 2020

# Before we begin

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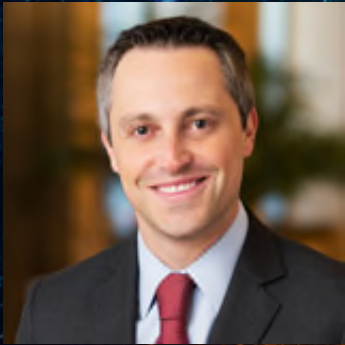
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# Presenters



**Ryan Kantor**  
Washington, DC



**Richard Taffet**  
New York



**Willard Tom**  
Washington, DC

**Morgan Lewis**

# Agenda

- Agency Leadership
- Transition Issues
- Impact on Pending Matters
- Enforcement Priorities for New Administration
- Potential Legislative Efforts

# AGENCY LEADERSHIP

# Department of Justice Antitrust Division

- Assistant Attorney General Delrahim has announced he will be leaving the Division in January 2021
  - Likely departures of front office, including DAAGs, at same time or soon to follow
- New AAG will require Senate confirmation
  - Control of Senate and new Administration's promptness in nominating AAG may impact timing
  - Confirmation may, however, occur more promptly than at beginning of Trump Administration
  - DAAGs and other front office personnel can be appointed more quickly

# Federal Trade Commission

- Current Commissioners and Terms
  - Joe Simons (Chair) – September 2024
  - Rohit Chopra – Carryover (term expired)
  - Rebecca Slaughter – September 2022
  - Noah Phillips – September 2023
  - Christine Wilson – September 2025
- President designates Chair from among Commissioners
- Various scenarios for change dependent on vacancies created by term expirations or resignations

# TRANSITION ISSUES



# Interim leadership and staffing

- Sections and Divisions
- Office heads
- Potential budget and workload constraints

# Pending Matters

- Staff engagement should continue unabated
  - Mergers
  - Litigation
- Possible increased efforts by States
- Potential acceleration or delay in final determinations
  - Mergers
  - Litigation
- Policy initiatives likely to pause pending new leadership
  - But not necessarily – possible 11<sup>th</sup> hour announcements

# **ENFORCEMENT PRIORITIES**

# ENFORCEMENT PRIORITIES

- DOJ
  - Current enforcement efforts aggressive in certain areas – e.g., mergers
    - Challenges to vertical and “nascent competitor” mergers
    - DOJ has some lack of success in courts
  - New Administration priorities may not reflect a material change in priorities
    - Possible political pressure for expanded doctrinal focus
    - Must balance against judicial resistance
- FTC
  - Current enforcement efforts have met with significant court resistance – scope of FTC jurisdiction; Section 2 theories
  - Competition with DOJ
  - New Administration may be undeterred
    - May depend on make up of Commissioners – possible that Republican majority remains
    - Increased consumer protection focus possible

# LEGISLATIVE PRIORITIES

# Legislative Priorities

- Pending proposals
  - Pending Warren and Klobuchar Senate bills
  - House Report on Competition in Digital Markets
- Substantive proposals
  - Mergers
    - Bright line presumptions of dominance and liability
    - Lower standards for liability and burden shifting
  - Section 2
    - Override precedent – *Spectrum Sports, Trinko, linkLine, Brooke Group*
    - Resurrect leveraging, essential facilities theories
    - Change standards for predatory pricing and refusal to deal theories to more plaintiff-friendly
- FTC Act § 13(b)
- Appropriations



# THANK YOU

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