

# The Future of Antitrust in the New Administration

Jon Leibowitz, D. Jarrett Arp, Howard Shelanski, Sheila R. Adams, and Suzanne Munck af Rosenschold

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# The Future of Antitrust in the New Administration

## SPEAKERS

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**D. Jarrett Arp**



**Howard Shelanski**



**Sheila R. Adams**



**Suzanne Munck af  
Rosenschold**

# The Future of Antitrust in the New Administration

## AGENDA

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**1** Litigation

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**2** Mergers

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**3** Policy

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# Litigation in the New Administration

## BIG TECH

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

United States of America, *et al.*,

Plaintiffs,

v.

Google LLC,

Defendant.

Case No. 1:20-cv-03010-APM

HON. AMIT P. MEHTA

### COMPLAINT

13. Absent a court order, Google will continue executing its anticompetitive strategy, crippling the competitive process, reducing consumer choice, and stifling innovation. Google is now the unchallenged gateway to the internet for billions of users worldwide. As a consequence, countless advertisers must pay a toll to Google's search advertising and general search text advertising monopolies; American consumers are forced to accept Google's policies, privacy practices, and use of personal data; and new companies with innovative business models cannot emerge from Google's long shadow. For the sake of American consumers, advertisers, and all companies now reliant on the internet economy, the time has come to stop Google's anticompetitive conduct and restore competition.

# Litigation in the New Administration

## CRIMINAL ANTITRUST ENFORCEMENT

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# Litigation in the New Administration

## CRIMINAL ANTITRUST ENFORCEMENT

### Teva Pharmaceutical's U.S. Unit Indicted on Price-Fixing Charges

Justice Department alleges generic drugmaker participated in three different conspiracies

By Brent Kendall and Jared S. Hopkins  
Updated Aug. 25, 2020 9:44 pm ET

WASHINGTON—The U.S. business of Teva Pharmaceutical Industries Ltd. was indicted Tuesday on charges the generic drugmaker fixed prices on cholesterol medication and other drugs.

The Justice Department's antitrust division brought the case in a Pennsylvania federal court, alleging Teva Pharmaceuticals USA engaged in anticompetitive conduct that resulted in at least \$350 million in overcharges to consumers.

Prosecutors accused the company of fixing prices, rigging bids and allocating customers in three different conspiracies, including for pravastatin, a commonly prescribed cholesterol drug, whose brand name is Pravachol. A second conspiracy involved price fixing on medications used to treat arthritis, seizures, pain, skin conditions, and blood clots, the Justice Department alleged. The third alleged conspiracy involved drugs used to treat brain cancer, cystic fibrosis, arthritis, and hypertension, the department said.

Teva participated in the conspiracies from May 2013 until at least December 2015, prosecutors alleged.

"Today's charge reaffirms that no company is too big to be prosecuted for its role in conspiracies that led to substantially higher prices for generic drugs relied on by millions of Americans," Assistant Attorney General Makan Delrahim, the Justice Department's top antitrust official, said in a statement.



The indictment is the highest-profile action in a long-running investigation of the generic-drug industry

Teva in a statement rejected the allegations and promised to defend itself in court, saying it was "deeply disappointed that the government has chosen to proceed with this prosecution." The company said its own internal investigation found no price-fixing.

The indictment is the highest-profile action in a long-running [investigation that has swept across the generic-drug industry](#) and has resulted in cases against seven companies and four executives so far.

Generic drugs account for some 90% of medications dispensed in the U.S. The lower-priced medications

serve to rein in drug costs. When a branded company loses its government-granted period of exclusivity, generic drugs can be greenlighted by regulators for companies to market them, creating competition and bringing prices down.

Most companies so far have agreed to settle charges by paying criminal penalties, admitting wrongdoing and agreeing to cooperate, in exchange for deferred prosecution agreements in which the government would drop the cases eventually, so long as the defendant companies fulfilled their obligations under the settlements.



# Litigation in the New Administration

## CRIMINAL ANTITRUST ENFORCEMENT

### Chicken Industry Executives, Including Pilgrim's Pride CEO, Indicted on Price-Fixing Charges

Indictment alleges current and former senior executives at Pilgrim's and Claxton Poultry Farms fixed prices and rigged bids from 2012 to 2017

By Brent Kendall and Jacob Bunge  
Updated June 3, 2020 11:59 pm ET

The chief executive of one of the country's biggest chicken producers and three other industry executives were indicted Wednesday on charges they conspired to fix prices on chicken sold to restaurants and grocery stores, the Justice Department's first charges in a continuing criminal antitrust probe.

Pilgrim's Pride Corp. CEO Jayson Penn and a former company vice president, Roger Austin, were charged in the one-count indictment, returned by a federal grand jury in Denver. Colorado-based Pilgrim's, majority owned by Brazilian meat conglomerate [JBS SA](#), is the nation's second-largest chicken producer. Also charged were the president of Georgia-based Claxton Poultry Farms, Mikell Fries, and a vice president, Scott Brady.

The indictment, filled with alleged instances of cozy discussions about pricing and text messages about holding the line on bids to customers, charged the executives with colluding to fix prices and rig bids from 2012 to 2017. The charges also referenced other unnamed executives and chicken suppliers and suggested the sharing of pricing information extended beyond the alleged discussions between Pilgrim's and Claxton



Colorado-based Pilgrim's Pride is the nation's second-largest chicken producer.

Neither Pilgrim's nor Messrs. Penn and Austin responded to requests for comment. A Claxton spokesman declined to comment. The companies have previously denied civil allegations of coordinating prices.

The charges sent share prices across the \$65 billion chicken industry sharply lower. Pilgrim's dropped 12%, and shares of chicken companies Tyson Foods Inc. and Sanderson Farms Inc. fell 3.8% and 6.2%, respectively.

The indictments come amid growing concern

among farmers, grocery stores and restaurants that declining competition among a smaller number of big meatpackers is pushing up meat prices for consumers while reducing farmers' and ranchers' income. Some of the country's biggest grocery chains, including Walmart Inc., Kroger Co. and Albertsons Cos., sued chicken companies last year, alleging anticompetitive practices.

"Executives who cheat American consumers, restaurateurs and grocers, and compromise the integrity of our food supply, will be held responsible for their actions,"

U.S. Assistant Attorney General Makan Delrahim, the Justice Department's antitrust chief, said.

The Justice Department said its efforts in the probe are continuing.

The indictment painted a picture of rival executives who kept close contact and weren't shy about sharing—and coordinating—pricing strategies in bids to chicken buyers.

When a restaurant chain in late 2012 was soliciting bids for dark meat for the coming year, Mr. Austin, then working for Pilgrim's, called Claxton's Mr. Brady, himself a former Pilgrim's employee, after both companies had submitted bids, according to the indictment.

After the call, the Justice Department alleged, Mr. Brady told Claxton's Mr. Fries that Mr. Austin had urged Claxton to raise its prices.

"Tell him we are trying!" Mr. Fries said in a text message, according to the complaint. Mr. Brady responded, "Will do."

Pilgrim's and Claxton that December both signed supply deals with the buyer, at or near the prices that Messrs. Austin and Brady had discussed, the Justice Department said.

While negotiating chicken prices with a purchasing cooperative in August 2014, Pilgrim's Mr. Austin and Claxton's Mr. Brady again talked about holding firm on prices, the indictment alleged, and both companies signed deals with the customer.

In the fall of 2014, the indictment alleged, Mr. Penn texted with a Pilgrim's colleague about ongoing price negotiations with a nationwide fast-food chain.

# Litigation in the New Administration

## CRIMINAL ANTITRUST ENFORCEMENT

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### DOJ is looking for its first prosecution related to employee no-poach agreements

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**2018** “In the coming couple of months you will see some announcements, and to be honest with you, I've been shocked about how many of these there are, but they're real.”  
— AAG Makan Delrahim, Law360, Jan. 19, 2018

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**2019** “I want to reaffirm that criminal prosecution of naked no-poach and wage-fixing agreements remains a high priority for the Antitrust Division.”  
— Prepared Remarks, Makan Delrahim, Oct. 23, 2019

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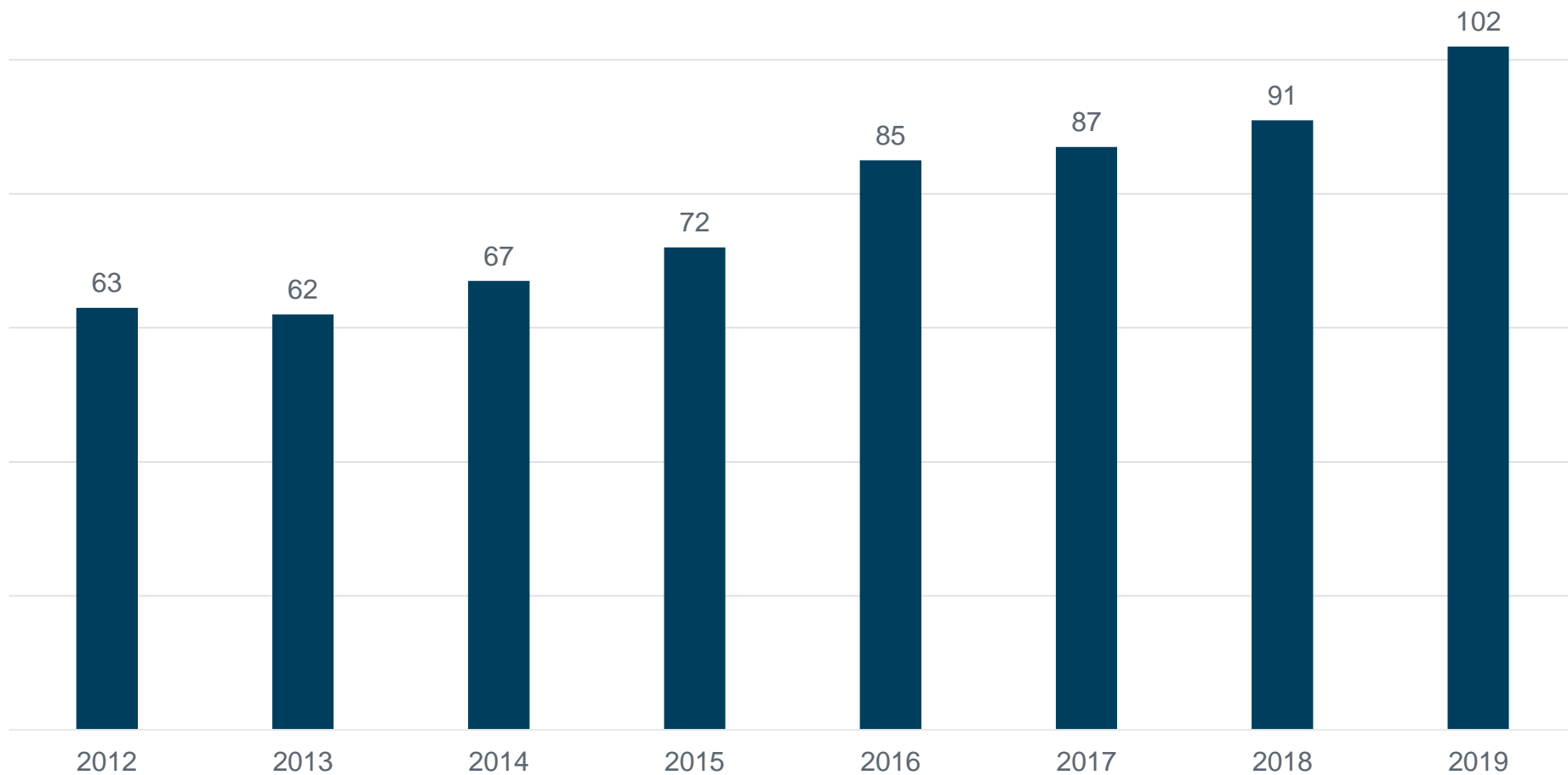
**2020** “Mr. Delrahim said the division separately expects to bring its first-ever criminal case accusing employers of colluding not to poach each other's workers . . . .’ We'll see a case in the first half of this year.’”  
— Wall Street Journal, Jan. 15, 2020

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# Litigation in the New Administration

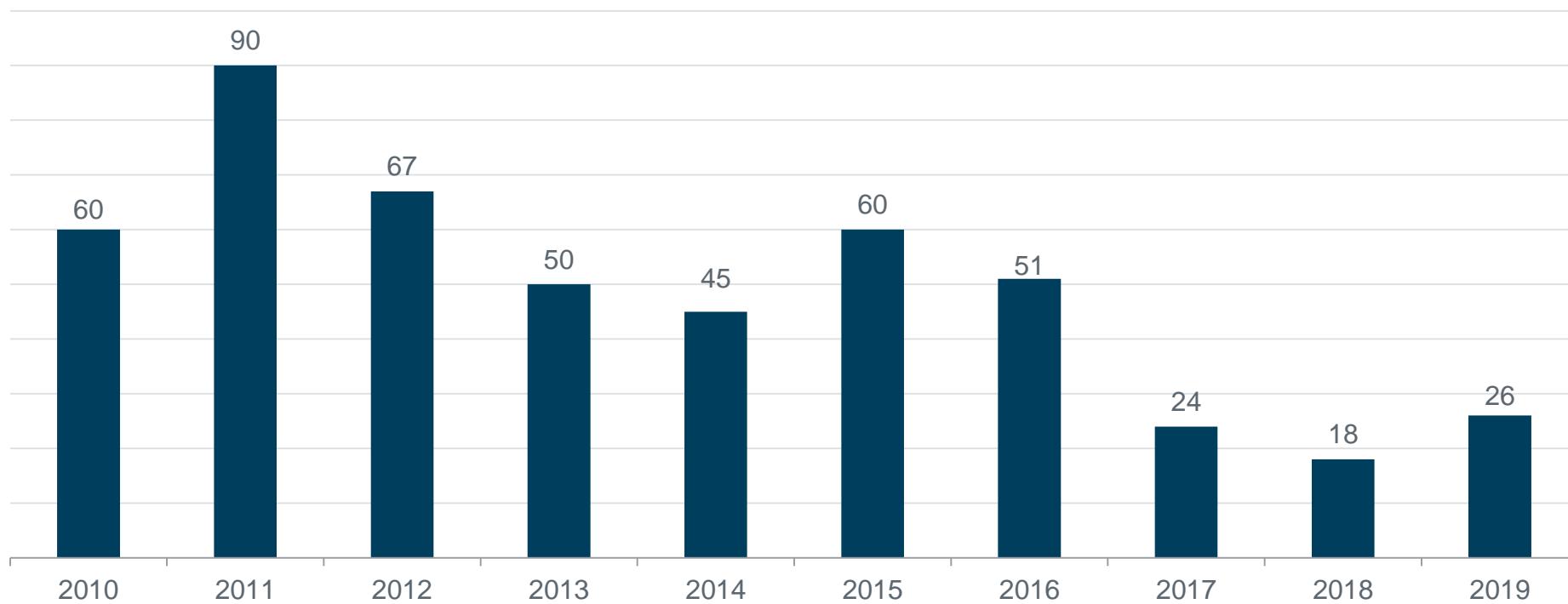
## PENDING CRIMINAL INVESTIGATIONS 2012-2019



Source: U.S. Department of Justice.

# Litigation in the New Administration

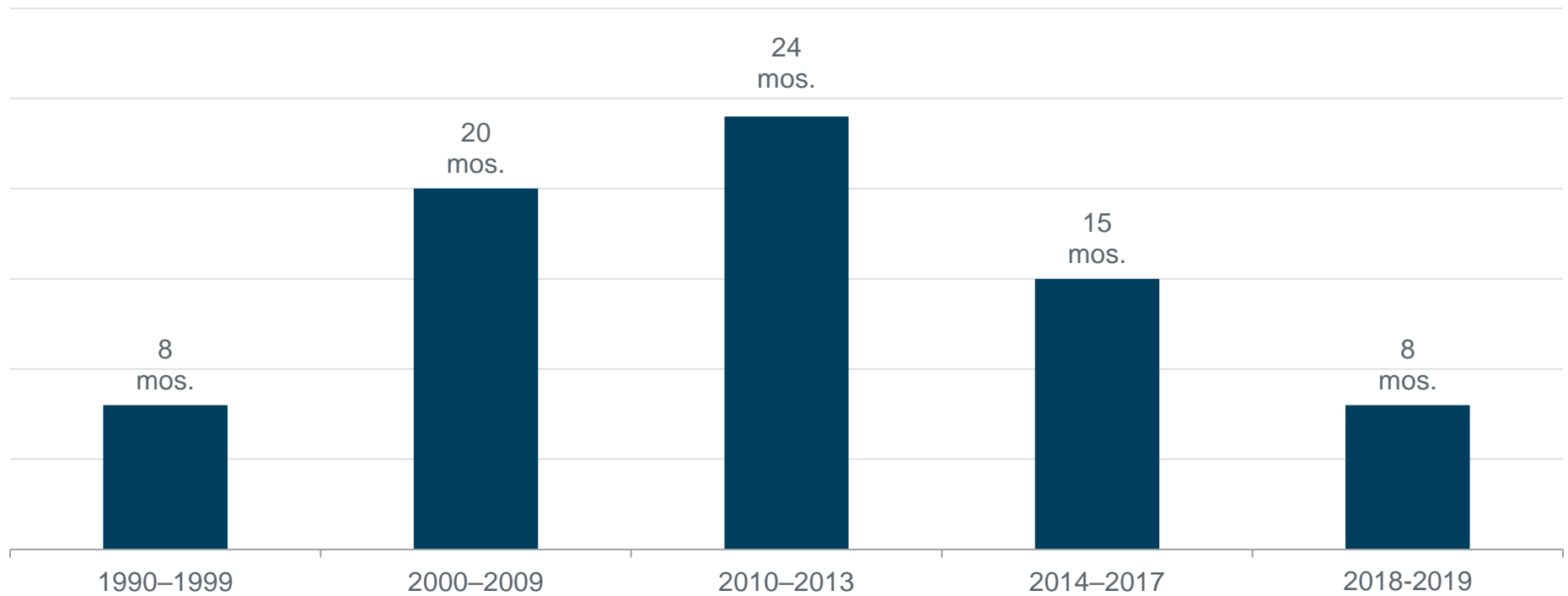
## TOTAL CRIMINAL CASES FILED 2010-2019



Source: U.S. Department of Justice.

# Litigation in the New Administration

AVERAGE PRISON TERM (MONTHS) 1990-2019



Source: U.S. Department of Justice.

# Litigation in the New Administration

## CRIMINAL ANTITRUST ENFORCEMENT

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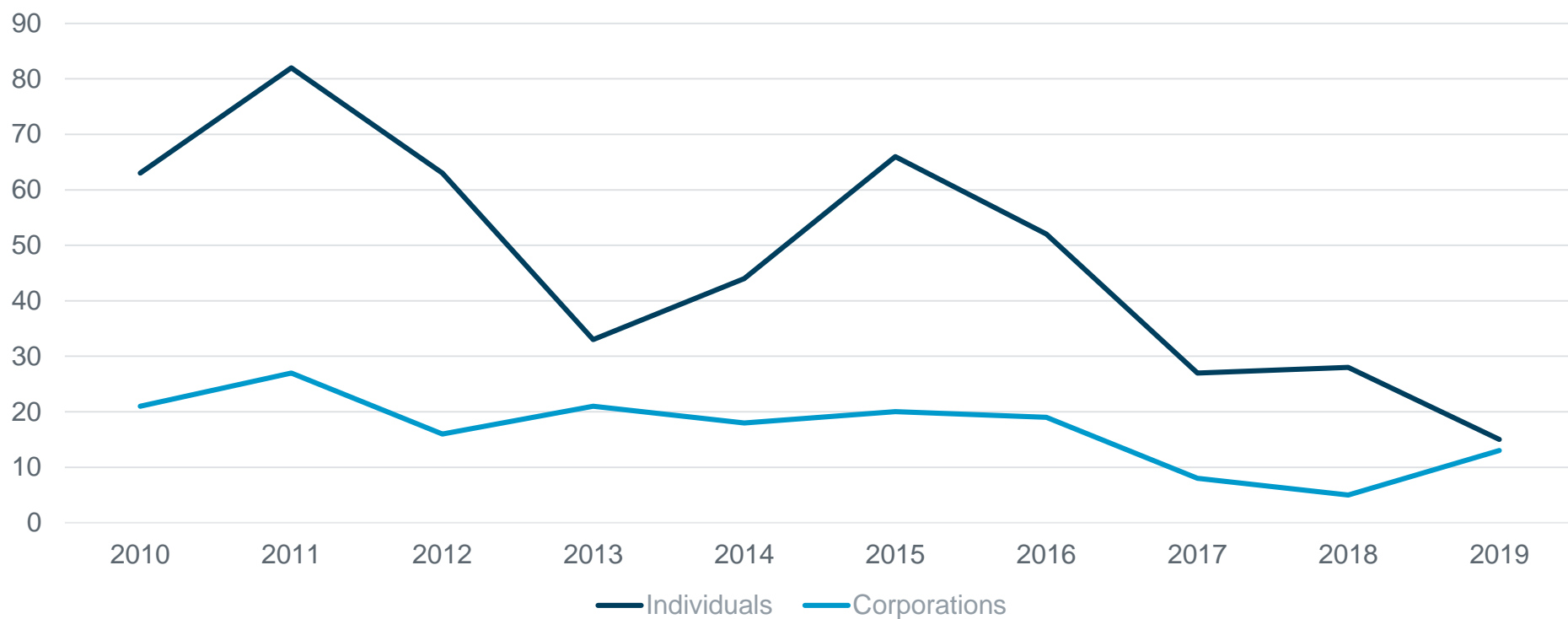


### **Some additional predictions:**

- Fresh focus on the leniency program
- More prosecutions in close cases
- Increased targeting of individuals, especially managers and senior executives

# Litigation in the New Administration

TOTAL INDIVIDUALS AND CORPORATIONS CHARGED 2010-2019



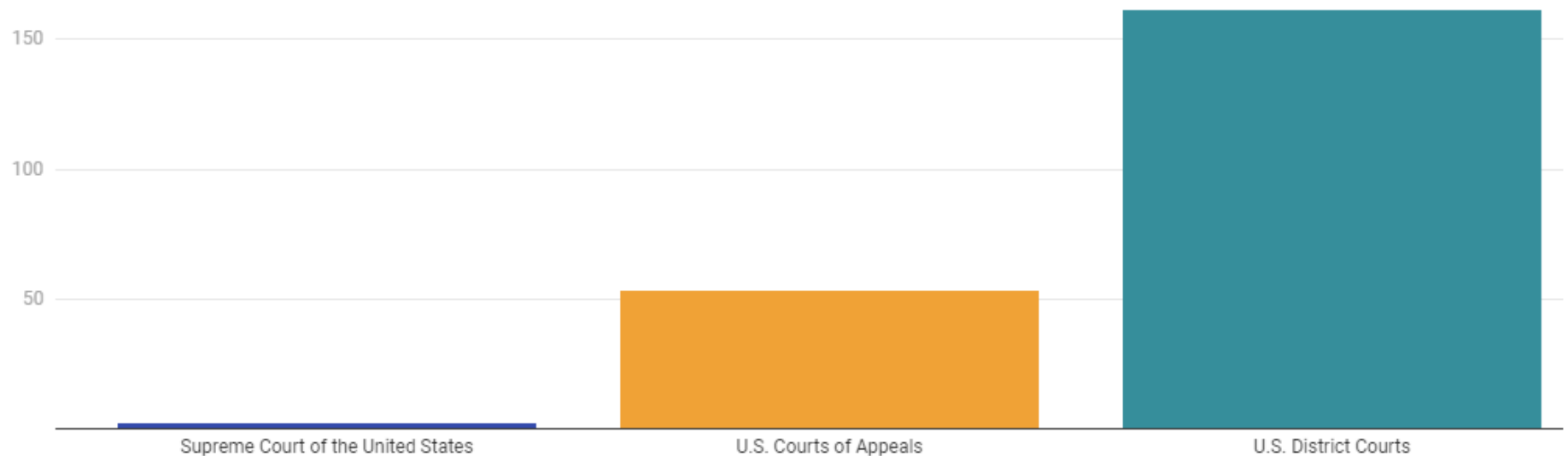
Source: U.S. Department of Justice.

# Litigation in the New Administration

## JUDICIAL CONSERVATISM

**President Trump appointed more than 200 federal judges during his term.**

Trump's judicial appointments as of October 1, 2020



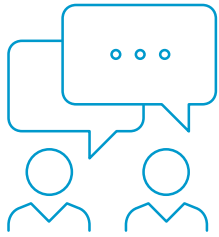
Source: [Federal Judicial Center](#)

**BALLOT**PEDIA



# Litigation in the New Administration

## JUDICIAL CONSERVATISM (CONT.)



- Democratic FTC Commissioner Rebecca Slaughter recently noted that the tools at her disposal are limited by jurisprudence and statutes, and **“those limitations are real.”**
  - US FTC’s Slaughter Sees Antitrust Agreement Among Democrats Going Into Potential Biden Administration, *Mlex* (Oct. 20, 2020).
- The Biden-Sanders Task Force Recommendations note that “Democrats will direct regulators to consider potential effects of future mergers **on the labor market, on low-income and racially marginalized communities, and on racial equity.**”
  - Biden-Sanders Unity Task Force Recommendations at 20.

# Mergers in the New Administration

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- Vertical Merger Guidelines
  - Substantially expand on unilateral theories of harm.
  - Passed on a party line vote—3 to 2 at the FTC, with both Democrats in dissent.
- Review of Past Mergers

# Mergers in the New Administration

## PHARMA AND HEALTHCARE



- “We will direct federal regulators to review a subset of the mergers and acquisitions that have taken place since President Trump took office, prioritizing the **pharmaceutical, health care, and agricultural industries**, to assess whether any have increased market concentration, raised consumer prices, demonstrably harmed workers, increased racial inequality, or reduced competition, and assign appropriate remedies.”
  - Biden-Sanders Unity Task Force Recommendations

# Policy in the New Administration

## SWEEPING CHANGES AND NEW APPOINTMENTS



- Sweeping Changes for Big Tech and Beyond
  - Proposed reforms in the recent House Subcommittee on Antitrust - Majority Staff Report and Recommendations:
    - **Regulating the Big Tech platforms.**
    - Strengthening laws relating to **mergers and monopolization**. These do not appear limited to the Big Tech platforms.
    - **Reviving Congressional oversight; strengthening agency enforcement; and invigorating private suits** by eliminating the standards of antitrust injury and antitrust standing, forced arbitration clauses, undue limits on class action formation, and the heightened pleading requirement of *Bell Atlantic Corp. v. Twombly*.
      - Not limited to Big Tech; would overturn certain recently established legal principles and doctrine.
    - Though sweeping, the Report consists of high-level recommendations, not particularized legislative language. Converting this policy to legislation would likely be arduous and contentious.
- New Appointments

# Policy in the New Administration

## BIPARTISAN SUPPORT FOR STATUTORY CHANGES AIMED AT BIG TECH BUT WITH A POTENTIALLY BROADER SCOPE

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“Today’s big tech companies have too much power . . . over our economy, our society, and our democracy. . . . That’s why my administration will make big, structural changes to the tech sector.”

— Senator **Elizabeth Warren**



“Big Tech . . . poses the single greatest threat to democracy in our day.”

— Senator **Ted Cruz**



“We have a major monopoly problem in this country.”

— Senator **Amy Klobuchar**

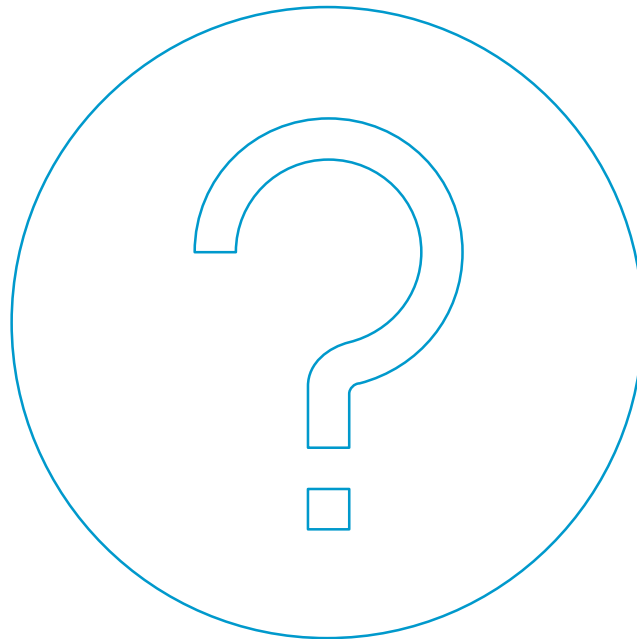


“Like many Americans across the political spectrum, I have been concerned by the exercise of market power held by Google and other tech giants. . . . [This hearing] will hopefully reaffirm the wisdom of focusing on better enforcement rather than the radical transformation of the antitrust laws demanded by the extreme left.”

— Senator **Mike Lee**

# Q&A

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# References

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- [U.S. v. Google \(2020\) – Complaint](#)
- [Federal Judges Nominated by Donald Trump, Ballotpedia](#)
- [US FTC’s Slaughter sees antitrust agreement among Democrats going into potential Biden administration, Mlex](#)
- [Biden-Sanders Unity Task Force Recommendations](#)
- [Vertical Merger Guidelines](#)
- [House Subcommittee on Antitrust – Majority Staff Report and Recommendations](#)
- [House Subcommittee on Antitrust – Rep. Jim Jordan’s Minority Report](#)
- [House Subcommittee on Antitrust – Rep. Ken Buck’s Minority Report](#)
- [Here’s how we can break up Big Tech, Medium](#)
- [Klobuchar Introduces Legislation to Deter Anticompetitive Abuses, Klobuchar.Senate.Gov](#)
- [Sen. Cruz: Big Tech Poses the Single Greatest Threat To Our Free Speech & Democracy, Cruz.Senate.Gov](#)
- [Sen. Lee Announces Antitrust Subcommittee Hearing on Online Advertising Market, Lee.Senate.Gov](#)
- [Section 13\(b\) of the FTC Act – 15 U.S.C. § 53\(b\)](#)
- [FTC v. Credit Bureau Center, LLC \(7th Cir. 2019\)](#)
- [FTC v. AbbVie Inc. \(3d Cir. 2020\)](#)
- [Regulators See Retrospective Deal Reviews As Helpful In Tech, Law360](#)
- [Transcript from Day 3 of FTC Hearing #6 on “Privacy, Big Data, and Competition”](#)
- [Prepared Remarks of Chairman Joseph J. Simons, ABA Section of Antitrust Law Fall Forum 2020](#)