

ALL HANDS ON DECK: BRACING FOR THE “ANTITRUST” TECH STORM

By [Kevin S. Schwartz](#), [Ilene Knable Gotts](#), and [Ronald C. Chen](#)

October 2020

Corporations have never been immune to political and societal controversy. But in the past few years, an unprecedented range of investigations and litigation, as well as changing societal expectations fueling new business pressures, together have increased the stakes for companies in navigating social and political issues. The heightened scrutiny of technology companies in the last year is illustrative, as they have faced an array of business and multilateral regulatory pressures to address sweeping public concerns — everything from platform access and the role of online platforms in the lives of consumers, to data stewardship and privacy. The breathtaking scope of this scrutiny is still unfolding. The Federal Trade Commission, the U.S. Department of Justice, nearly every state attorney general, and a host of international regulators are considering the use of current antitrust and consumer protection paradigms to shape how technology companies address these public concerns. In addition, following a 16-month investigation and widely viewed congressional hearings involving the top leaders from Big Tech, the House of Representatives antitrust subcommittee issued a sweeping report calling for fundamental policy reforms to provide additional tools for enforcers to address these political and social concerns.

Technology companies of all sizes must prepare effectively to deal with this “antitrust” tech storm. And the same is true for companies in other industries that increasingly engage in data collection and digital operations. The current environment creates significant legal and business risks that are different in kind from the traditional agency, tort, and business litigation with which most companies are familiar. This Article lays out key considerations and recommendations to assist companies effectively in preparing for and weathering the storm. We emphasize the importance of being proactive, of not waiting for investigations or court orders, and the need for companies to expand beyond the traditional, silo-specific focus on particular lawsuits or regulatory inquiries. We offer pointers regarding the distinct challenges and opportunities

that antitrust, consumer protection, and state tort investigations and lawsuits pose, as well as measures that boards and management should consider in an effort to mitigate the potential damage that accompanies complicated, high-profile, and multipronged scrutiny.

THE TECH STORM

The stakes in this recent scrutiny, which one commentator dubbed the “Techlash Era,” could not be higher. The U.S. Assistant Attorney General for Antitrust declared that all options — including breaking up Big Tech — are “on the table.” And federal authorities have shifted to an offensive posture that extends beyond traditional antitrust silos. This is encapsulated in Attorney General

Barr’s launch of a wide-ranging probe of top social media, retail, and search platforms, with oversight charged to his Deputy Attorney General, Jeff Rosen; and in the launch of the FTC’s new Technology Enforcement Division, which FTC Chairman Joseph Simons already seeks to double in size. Mr. Rosen, whose responsibilities at the DOJ include investigating potential anticompetitive conduct in the U.S. technology markets, has declared that the DOJ does “not view antitrust law as a panacea for every problem in the digital world” but will “not ignore any harms caused by online platforms that partially or completely fall outside the antitrust laws.” And in August, Mr. Simons reminded lawmakers that the FTC is even considering unwinding past

transactions, a prospect reiterated in the House of Representative’s recent report. The FTC has expanded its investigations by ordering Amazon, Apple, Facebook, Microsoft, and Alphabet to provide detailed information about what may amount to hundreds of acquisitions over the prior decade.

These initiatives are not limited to the federal level: The attorneys general of nearly every State in the Nation are reportedly coordinating a host of antitrust and consumer protection investigations that involve one or more of Google,

We emphasize the importance of being proactive, of not waiting for investigations or court orders, and the need for companies to expand beyond the traditional, silo-specific focus on particular lawsuits or regulatory inquiries.

Facebook, Amazon, and Apple. And an executive committee of these state attorneys general reportedly has met with the DOJ to discuss possible theories to assert against Google. Moreover, the European Union, Germany, France, and other foreign governments all are reportedly investigating the conduct of the largest technology companies.

Of course, antitrust scrutiny of a large technology company is not new: Microsoft's experience two decades ago is the prototype for use of antitrust laws to check perceived market power and conduct by a U.S. tech giant. That Microsoft's experience over 20 years ago remains the best example of a technology company subjected to multipronged antitrust scrutiny is a telling indicator of the unique nature of the regulatory environment today.

The breadth of companies caught up in today's antitrust and consumer protection dragnet is notable, as is the range of companies that could eventually find themselves in this position. Political attention aimed at our nation's technology giants is now bipartisan, as lawmakers from both parties have joined calls targeting "bigness" as the cause of all manner of social ills. This public focus on everything from privacy to data stewardship to platform access has trained heightened antitrust scrutiny even on smaller tech companies. As those companies grow and mature, that scrutiny and its attendant risks promise only to increase. The experience of companies in such crucibles outside the antitrust arena — from climate change and natural resources, to tobacco and opioids — also warns of immense business pressures that will increasingly be brought to bear on directors and executives of tech companies.

INVESTIGATIONS

The first sign of antitrust and consumer protection scrutiny will often arrive with a civil investigative demand or subpoena and can come from a wide variety of authorities, here and abroad. At the federal level in the United States, there are two primary enforcement authorities: the FTC and DOJ. After decades of a process in which one of the two agencies would be "cleared" to investigate a particular company's conduct, the agencies have recently embarked

on investigations that appear to be overlapping in scope. Federal scrutiny may also come from congressional committees and from other agencies, such as the Federal Communications Commission. Although congressional committees cannot sue to attempt to impose legal liability, their inquiries can be nonetheless invasive and their hearings present substantial reputational risk. As demonstrated by the hearings in late July, congressional committees may make

Each state attorney general has his or her own political incentives that shape the length and strategy of whether to coordinate such investigations with federal regulators and/or other States. And state attorneys general may also have available state tort law as a potential source for related investigations and litigations against technology companies.

public use of produced documents, exposing companies to reputational risk as well as potentially damaging their litigation positions in private suits. The upshot is that today, technology companies must be prepared to coordinate engagement across multiple federal stakeholders with broad investigatory powers.

Historically, large-scale antitrust investigations were primarily the province of federal regulators, with state attorneys general playing a secondary role. Today, however,

far from just an observer, state attorneys general have demonstrated their willingness to meaningfully "partner" with federal regulators or to launch their own independent investigations, either state-by-state or through task-force platforms like the National Association of Attorneys General.

Investigations by state attorneys general present unique challenges. At the investigation stage, each state attorney general has his or her own state statute authorizing diverse investigative powers, with different degrees of protection for parties compelled to produce evidence. Federal authorities and independent state attorneys general may collaborate on potential enforcement actions against a particular company. But collaboration among enforcers at the outset does not mean that state attorneys general will necessarily "partner" with those agencies throughout an investigation, or in any resolution. Each state attorney general has his or her own political incentives that shape the length and strategy of whether to coordinate such investigations with federal regulators and/or other States. And state attorneys general may also have available state tort law as a potential source for related investigations and litigations against technology companies.

In light of this investigative landscape, a company at the early stages of a multilateral antitrust or consumer protection probe should consider the following:

- The host of agencies with antitrust and consumer protection investigative powers employ separate rules and regulations. A company facing even the prospect of antitrust scrutiny should become well-acquainted with its rights and obligations specific to each authority.
- Ascertaining whether investigators in one agency are working alone or in coordination with another government authority can be critical. Depending on the circumstances, a company can evaluate whether to encourage the authorities to coordinate — potentially making it easier to reach an efficient resolution, but also potentially affording greater leverage to the collective authorities and carrying important implications for issues of privilege and document confidentiality.
- While information at the investigative stage typically flows down a one-way street, it is important to seek feedback from investigators and use professionals who can engage with the investigators’ experts to glean as much information as possible.
- Identifying and addressing the political dynamics that may have thrust the company into authorities’ spotlight is essential to an effective defense. That means cultivating relationships with regulatory stakeholders so the company can understand its constituents’ frustrations, and that means developing allies and surrogates who can help to explain the company’s position to enforcement officials, lawmakers, and the public. To that end, a targeted company should ensure that it has the right team in place to engage with government officials to obtain timely information and to engage the public with a unified message and communications strategy. In fact, given the current enforcement environment and the speed with which multijurisdictional investigations can evolve, there may be benefit to a company laying the groundwork for such initiatives before it becomes the subject of such scrutiny.
- In continually assessing the risk that an investigation could expand from civil to criminal, a targeted company’s team should include experienced white collar counsel with criminal defense expertise (and independent counsel may be necessary for certain employees).
- A targeted company should pay close attention to the protections (or lack thereof) that may be available for commercially sensitive materials that could be “requested” by investigators. Although federal authorities have relatively

strong confidentiality protections, state attorneys general may have less robust procedures or statutory protections for handling the types of commercially sensitive materials routinely produced in investigatory proceedings. Negotiating confidentiality agreements and discovery processes with state attorneys general that minimize risk of third-party access to produced documents can be critical to ensuring that a company protects its business interests during an investigation. If companies fail to agree upon a mutually acceptable framework, then given what is at stake it may be necessary to explore other options, including a legal challenge to the manner in which confidential material is handled.

- When creating attorney work product and attorney-client privileged materials, the company should be cognizant that the scope of privilege protections may differ significantly outside the United States, including in jurisdictions like the European Union, and ensure that board members, management and employees conduct themselves accordingly.
- Although not yet clearly manifested in the antitrust arena, in other contexts States have turned to private plaintiffs’ lawyers to investigate and litigate actions on their behalf. The common contingency-fee structure employed by plaintiffs’ lawyers can create incentives meaningfully different from those that typically shape the enforcement decisions of government regulators.

LITIGATION

Federal antitrust and consumer protection authorities bring cases under federal law in federal courts or, in the case of the FTC, at the FTC’s option, before its administrative court. But state attorneys general can pursue cases under either state or federal law and in either state or federal court. In the case of investigations by multiple authorities, resolving matters with a single agency may not end governmental review.

State attorneys general present distinctive challenges as litigation adversaries. They can choose to bring complicated antitrust, consumer protection, or tort lawsuits in their home state courts, where judges may have less experience with some of these issues. If the lawsuits are brought exclusively under state law, it may not be possible for the defendants to remove the case to federal court. And there may be little precedent available applying that state law, rendering the result of such a suit all the more unpredictable.

Additionally, because state attorneys general often purport to bring suit on behalf of an entire state, city or county on a *parens patriae* basis, they attempt to seek damages on behalf of the whole community at issue for the alleged antitrust, consumer protection, or tort injury. For certain types of claims, this can have the effect of purportedly justifying enormous aggregate damages, similar to those sought in class actions — except, crucially, state attorneys general purport to be free from the limitations and protections applicable to traditional class action litigation.

In addressing the increasing litigation risk that a company may face in connection with the public issues now under scrutiny through an antitrust or consumer protection lens, there are a number of actions that companies should take, or prepare for, to manage these challenges:

- Aim to avoid the unpredictability of state courts in these areas of litigation, unless there are strong countervailing factors, and bear in mind that removal to federal court may be more difficult to secure when antitrust, consumer protection, or tort litigation is brought in state court by state attorneys general.
- Attempt to pin down the capacity in which state attorneys general are suing or may sue in order to limit damages sought or to expose legal defects in their claims.
- Carefully consider arguments across litigations and investigations: a powerful antitrust defense addressing one geographic market may be harmful to a defense in another geographic market.
- Keep in mind the possibility of follow-on private litigation at all times. For instance, private plaintiffs can use the record adduced, or final judgment secured, in a federal (and possibly state) government antitrust proceeding as prima facie evidence against the defendant in a later private suit, and further can use materials disclosed to governmental authorities to develop their case. Such private antitrust claims also may carry broad remedies that include injunctive relief, treble damages, and of course attorneys' fees.
- Track issues related to statutes of limitations. For example, under federal law, the statute of limitations to bring most private antitrust claims is suspended during government proceedings, and private plaintiffs have the ability to sue at least one year after government proceedings end, giving them ample time to mine the record for helpful information. Additionally,

some state attorneys general may at least contend that they are not subject at all to statutes of limitations when bringing *parens patriae* suits.

- Maintain close communication with enforcement authorities in the aftermath of a settlement, in case suits are brought by state attorneys general or private plaintiffs. The DOJ has shown an increased willingness to contribute as an amicus in cases where the United States is not a party, and the subject company should consider the impact of having the DOJ weigh in (on either side).

SETTLEMENT

There will be times when a company finds it is in its long-term interest to continue to fight what may be numerous investigations and/or lawsuits to the bitter end — even if it means years of distraction for executive and legal team members, and considerable expense. But there will also be times when a confluence of factors weighs strongly in favor of a settlement with one or more of the enforcers, regardless of the merit of the underlying claims. Lawsuits must be viewed as not just a legal problem, but a business problem too.

For example, even if the company believes that it could prevail after years of litigation, the intervening market reaction and reputational effects on the brand and executives during the litigation could become so problematic from a business standpoint that it makes more sense to settle. Goldman Sachs has warned that antitrust scrutiny could affect corporate equity valuations and set the stage for a sector-wide slump in technology. As one commentator has observed, two decades ago Microsoft managed to repel the U.S. government's effort to break the company into pieces, "but even as it kept regulators from cleaving it apart, Microsoft seemed to fall into something of an antitrust-induced stupor...slowing innovation." As Bill Gates recently said:

There's no doubt that the antitrust lawsuit was bad for Microsoft, and we would have been more focused on creating the phone operating system and so instead of using Android today you would be using Windows Mobile...If it hadn't been for the antitrust case...we were so close, I was just too distracted. I screwed that up because of the distraction.

Ongoing large-scale litigation also can be a significant challenge from disclosure, rating agency, and accounting perspectives

(which, if not handled correctly, could lead to separate litigation). And of course, there can be a significant benefit to putting politically sensitive issues to rest in a way that forestalls the risk of reputational damage. For all of these reasons, the benefits of settling are heightened when a company is able to negotiate a resolution before litigation is brought.

Though antitrust or consumer protection settlements can be expensive in damages paid, value lost, and/or decreased flexibility in business decision-making due to conduct or structural remedies, the settlement process can also present opportunities to manage broader risks. Ideally, a company may be able to negotiate a global settlement, resolving at once all government and private litigation and definitively putting certain antitrust concerns to rest. And even more limited settlements can help a company to achieve important goals. For instance, a settlement with a group of States creates an opportunity to lessen the risk of patchwork State resolutions and the associated administrative challenges. Sometimes, there will be an advantage in picking one of the authorities to settle with first, and then using that settlement advantageously to facilitate others closing their investigation and/or settling. Depending on the case, the settlement process can also be a way for multiple companies within an industry to agree to the same measures or standardized practices.

Political actors' policy interests also can facilitate settlements that are structured differently from those with private plaintiffs. Specifically, regulators may be flexible in designing the financial component of a settlement so as to accomplish policy and legal objectives without endangering or significantly impacting the company's business lines or products or strategy. Examples of unconventional structures include payments distributed over many years, sunsets on certain conduct remedies, or changes to the remedy if certain competitive dynamics occur.

Accordingly, in assessing and crafting the most beneficial settlement possible, resolving a large number of related investigations and lawsuits, a company should consider at least the following:

- Whether the agreed-to remedies (conduct, structural, or damages) can be thoughtfully designed to avoid subjecting the company to a patchwork of resolutions.
- Whether any conduct or structural remedies appropriately account for the passage of time and the potential for changed circumstances.

- Whether the agreed-to release is broad enough to capture all permutations of similar claims to the ones being resolved.
- Whether the payment of damages is structured in a way that permits a company to organize its payments so as not to endanger or significantly impair the company's business lines, products, or strategy.
- Whether there is an opportunity for dispute resolution measures like rule-making rather than retributive penalties or conduct restrictions.

GOVERNANCE AND OTHER CONSIDERATIONS

The antitrust and consumer protection tech scrutiny presents important and unique challenges for boards of directors tasked with risk oversight of technology companies, and for the management teams that assist and help to manage that risk. The sources of concern that have fueled this storm of scrutiny are varied, from platform access to data stewardship to privacy, and often touch upon the very core of a technology company's business strategies and operations. Heightened pressures and criticism — warranted or not — for failure to effectively oversee the array of risks associated with these issues may come from institutional investors, activist investors, and legislators and other governmental constituencies, as well as state law fiduciary duties, federal and state laws and regulations, stock exchange listing requirements, and evolving best practices.

As environmental, social, and governance (ESG) issues become mainstream business topics and priority concerns for investors and other stakeholders, boards of technology companies will need to stay abreast of ESG risks affecting their companies — including the regulatory, reputational and financial risks that may arise from anticompetitive behavior and related business ethics concerns. It is incumbent upon boards to ensure that proper oversight processes are in place to ensure that ESG risks are identified, reported and addressed by management. Major institutional investors have emphasized the importance of effective oversight of ESG risks by boards and have indicated their willingness to hold directors responsible where companies lag in efforts to manage and address such risks. BlackRock's Chairman and CEO, Larry Fink, noted in his 2019 letter to CEOs that "society is increasingly looking to companies, both public and private, to address pressing social and economic issues." Meanwhile, State Street's President and

CEO Cyrus Taraporevala stated in his 2020 letter to boards that State Street “believe[s] that addressing material ESG issues is good business practice and essential to a company’s long-term financial performance—a matter of value, not values.”

Investors have also increasingly called for enhanced disclosures on ESG performance. Among the key ESG reporting frameworks, the Sustainability Accounting Standards Board (SASB), the Global Reporting Initiative (GRI) and the World Economic Forum’s (WEF) proposed ESG metrics, all identify issues such as anticompetitive behavior — in addition to issues such as data privacy and data security — as potential areas of material concern to technology companies, among others. With respect to anticompetitive behavior, SASB and WEF’s metrics call for disclosure on the total amount of monetary losses as a result of legal proceedings associated with anticompetitive behavior regulations, while GRI calls for disclosure on related legal proceedings and outcomes. Such disclosures will likely inform future engagement between investors and companies.

In the context of the increasing pressures facing boards today, our firm has emphasized the importance of subscribing to what we have called “The New Paradigm,” which recalibrates the relationship between public corporations and their major institutional investors and conceives of corporate governance as a collaboration among corporations, shareholders and other stakeholders working together to achieve long-term value. The New Paradigm provides a roadmap for boards to demonstrate that they are providing thoughtful, engaged oversight and that management is diligently pursuing credible, long-term business strategies. This means, among other things, recognizing consumers, employees and other societal stakeholders in making business decisions, including decisions relating to behaviors that, rightly or not, could subject a company to scrutiny and criticism as potentially anticompetitive and harmful to society at large. Companies that are sensitive to the societal implications of their businesses and that make efforts to engage in responsible behavior vis-à-vis their employees and consumers will be less likely to draw the ire of political activists and politicians and less likely to get caught up in the antitrust dragnet.

A company’s efforts at focusing on their diverse stakeholders should be well-documented through appropriate record-keeping, meeting minutes, and carefully considered company policies. In the same vein, companies will benefit from developing an internal

and external communications strategy to ensure that their employees, customers, and the general public are aware of their efforts at responsible corporate citizenship. Such efforts will not immunize a company from antitrust or consumer protection scrutiny, but they can help a company to avoid having a bullseye pinned to its back and, for companies that become the subject of scrutiny, can help to foster support amongst various constituencies in defending against any claims.

The risk of shareholder litigation against directors arising from their risk oversight duties to the company and its stockholders remains an important source of additional pressure on boards. Under the long-recognized *Caremark* line of cases in Delaware, directors can be liable where there is “sustained

or systemic failure of the board to exercise oversight — such as an utter failure to attempt to assure a reasonable information and reporting system exists.” In the opioids arena, for example, the directors of the McKesson board faced a lawsuit on this basis for alleged failure to oversee the company’s controlled substances distribution regarding opioids in the face of alleged “red flags,” putting the directors on notice of purported violations. Further, to prepare for that lawsuit, investors used the well-recognized practice of books-and-records demands to review the board’s oversight. Books-and-records demands pose particular challenges and opportunities that must be carefully managed, from enabling directors to build a record for use on a later motion to dismiss ensuing litigation, to structuring confidentiality agreement provisions, and recognizing and preparing for the possibility that such records will not remain confidential when they are used in litigation. In the *McKesson Corporation Derivative Litigation* case, for example, the court unsealed the complaint, which contained numerous references to information disclosed to plaintiffs in the books-and-records production.

To be sure, it is critical that boards not wait for investigations, litigation, or settlement obligations before taking steps to oversee and attempt to address the various issues that may serve as the

As environmental, social and governance (ESG) issues become mainstream business topics and priority concerns for investors and other stakeholders, including regulators, boards of technology companies will need to stay abreast of ESG risks affecting their companies — including the regulatory, reputational and financial risks that may arise from anticompetitive behavior and related business ethics concerns.

basis for multilateral antitrust and consumer protection scrutiny. The failure to proactively and effectively address sensitive social issues can negatively impact a company's business efforts in myriad ways. A company that comes to be viewed as toxic from a public relations standpoint, that is facing many high-profile antitrust investigations or that is perceived as poorly managing risk with respect to consumer protection, may find it more challenging to engage in transactions beneficial to the long-term value of the company or may make the company more vulnerable to activist shareholders. To the extent equity values are depressed as a result of a failure to effectively manage antitrust and consumer protection risk, investor support may quickly begin to erode.

In this challenging landscape, to manage the risk as well as business and legal pressures that will accompany today's multilateral antitrust and consumer protection probes, boards of directors and management of technology companies should consider the following:

- Review with management the risk of antitrust scrutiny of the company's actions, including identifying the potential sources of such risk, the impact on the company if such a risk materializes, and mitigating measures and action plans with respect to any such risk.
- Stay informed of, and potentially weigh in on, corporate policymaking and public statements on the political and societal issues implicated by their conduct of business in the areas of data stewardship, platform access, and privacy.
- Incorporate "stakeholder" thinking into board decisions, including those that might have antitrust implications. This means focusing on consumers, employees, and communities as important stakeholders in the company.
- Educate directors on social and political risks associated with different aspects of the company's business plan, as well as the consequences for M&A and other transactions, and potential pressures from activist and institutional investors.
- Increase oversight of environmental, social, and governance risk and integrate sustainability-related risks into corporate strategy.
- Assess and refine the company's external reporting on environmental, social, and governance issues.

CONCLUSION

There is no reason to think that this new breed of multilateral, high-profile antitrust and consumer protection scrutiny will depend on the outcome of the 2020 election. Nor is there any reason to think that antitrust and consumer protection enforcement efforts will be limited to the technology companies currently under investigation or to the investigative tools, litigation challenges, and business pressures set out above. The explosion in regulatory scrutiny, as well as the potential for private lawsuits, faced by companies in the public spotlight warrants deployment of more than just a silo-specific focus — effectively assessing and addressing the potential risks to the company requires a multipronged approach that considers the entire legal and political ecosystem.

Kevin S. Schwartz is a partner in the Litigation Department of Wachtell, Lipton, Rosen & Katz. He serves on the Executive Committee of the New York City Bar Association, where he was previously Chair of the Judiciary Committee, and is also a Visiting Lecturer in Law at Yale Law School.

Ilene Knable Gotts is a partner in the Antitrust Department of Wachtell, Lipton, Rosen & Katz. Mrs. Gotts is regularly recognized as one of the world's top antitrust lawyers, including being recognized by "Euromoney's Women in Business Law" with a Lifetime Achievement Award in 2019.

Ronald C. Chen is a partner in the Corporate Department at Wachtell, Lipton, Rosen & Katz. He is also a Lecturer in Law at Stanford Law School, where he teaches a course on Mergers and Acquisitions, and Co-Chair of the International Bar Association's annual conference on Mergers and Acquisitions in the Technology Sector.

The views in this article are the views of the authors and not the views of the firm or their clients. ©2020 Wachtell, Lipton, Rosen & Katz. All rights reserved. The reproduction or retransmission of the content of this article is prohibited without prior written consent of Wachtell, Lipton, Rosen & Katz.