Obama: The First Year

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AS A PRESIDENTIAL CANDIDATE, then-Senator Obama made a series of pointed criticisms of the Bush administration for lackluster antitrust enforcement and, unlike any other candidate in recent history, made reinvigorating antitrust enforcement part of the platform for his campaign. Now that we have passed the one-year anniversary not only of his inauguration but also the confirmation of Christine Varney as Assistant Attorney General for Antitrust and the appointment of Jon Leibowitz as Chairman of the Federal Trade Commission, it is fair to ask whether President Obama has made good on his campaign promise.

After reviewing the evidence, the answer appears to be mostly "yes." Both the FTC and Department of Justice have increased the frequency of Second Requests, though only the FTC has increased the frequency with which it challenges transactions. Moreover, although the DOJ has abandoned the Bush administration's Report on Single-Firm Conduct Under Section 2 of the Sherman Act, only the FTC has actually brought a monopolization case. Furthermore, the Obama administration was unsuccessful in getting Congress to either repeal the McCarran-Ferguson Act or include a ban on "pay for delay" generic settlements in the health care bill, both of which were specific promises in Obama's antitrust policy statement. Finally, the agencies have proposed new Merger Guidelines, which one DOJ official stated will permit the agencies to bring more and better cases.[1]

Given these efforts, it seems clear that the fact that the DOJ has yet to bring a monopolization case and has only litigated one merger challenge, together with the Administration's inability to win congressional approval for important antitrust provisions in the health care bill, reflects not a lack of commitment by the Obama administration to increase antitrust enforcement but rather the reality that our constitutional system of checks and balances constrains the ability of the executive branch to change policy.

Obama the Candidate

During his 2008 presidential campaign, then-Senator Obama shone a very harsh light on the Bush administration's record of antitrust enforcement, claiming that "the [Bush] administration has what may be the weakest record of antitrust enforcement of any administration in the last half century."[2] This claim was supported by statistical evidence showing a substantial decline in the number of mergers challenged by the FTC and DOJ over the past eight years and the fact that "in seven years, the Bush Justice Department has not brought a single monopolization case."[3]

Furthermore, Candidate Obama drew a connection between lax antitrust enforcement and spiraling health care costs, alleging that there had been over 400 health care mergers in the last ten years that had resulted in 95 percent of insurance markets being "highly concentrated" and an "87 percent" increase in premiums over the past six years.[4] He also made a number of specific promises in his policy statement including: (1) increasing review of merger activity; (2) taking aggressive action to curb the growth of international cartels; (3) outlawing "pay for delay" reverse settlement payments; (4) repealing the antitrust exemption for medical malpractice insurance; and (5) strengthening competition advocacy in the international community as well as domestically.[5]

Perceptions to Date of Obama Antitrust Enforcement

Although there was a widespread perception that Obama would reinvigorate antitrust enforcement soon after he was inaugurated, some commentators have suggested that there was more bark than bite to Candidate Obama's promises. For example, one editorial reported that

> for all of the saber rattling that took place last May when Christine Varney, Obama's antitrust cop, warned that "vigorous antitrust enforcement must play a significant role in the government's response to economic downturns to assure markets remain competitive," the deals that have come under review haven't undergone major changes in order to get the Justice Department's OK.[6]

Similarly, another commentator noted that "[d]espite the Obama administration's tough talk about antitrust enforcement and merger scrutiny, attorneys said they have seen little change in regulators' handling of deal challenges."[7]

A closer review of both the statistics and the details of specific cases, however, suggests that there have, in fact, been significant differences between the Bush and Obama administrations when it comes to antitrust enforcement.

Merger Enforcement

There is no question that it is difficult to compare merger enforcement across time, given differences in macroeconomic

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conditions. This is especially true, given that there was a 60 percent decline in Hart-Scott-Rodino filings between 2008 and 2009.[8] Thus, a decrease in the absolute number of Second Requests or Merger Challenges may simply reflect a decline in the number of mergers, as opposed to a decline in merger enforcement. Moreover, even if macroeconomic factors remained constant, there would still be the problem that each merger has its own unique issues that make it difficult, if not impossible, to reduce to statistical analysis.

But these complicating factors are not a sufficient reason to refrain from comparing the first year of the Obama administration to the Bush administration. After all, Candidate Obama—as well as many in the antitrust community—used rough statistical metrics in order to support his claim that merger enforcement declined dramatically under Bush compared to Clinton. Furthermore, the statistical comparison between the Bush and Clinton administrations was complicated by the substantial decline in HSR filings caused by the popping of the 2000 Internet bubble.

Fortunately, there are ways of taking into account a decline in HSR filings—for example, by looking at the percentage of HSR filings cleared to an agency that receive Second Requests from that agency, as well as by looking at the percentage of Second Requests issued by an agency that result in a Merger Challenge. Using these statistics, it appears that both the FTC and DOJ increased the frequency of Second Requests in 2009.[9] There are, however, significant differences in both agencies' resolutions of these Second Requests. The FTC challenged a higher percentage of transactions than the DOJ, while the DOJ was more willing to agree to somewhat unconventional remedies to allow transactions to proceed.

Merger Enforcement at the DOJ. The DOJ issued 16 Second Requests in 2009, as compared to 20 in 2008.[10] When the decline in HSR filings is taken into account, however, there was actually an 86 percent increase in the frequency of Second Requests at the DOJ as a percentage of HSR filings cleared to the Antitrust Division in 2009.[11]

Significantly, however, there was a slight decline in the number of Merger Challenges[12] by the Antitrust Division in the first year of the Obama administration—from 16 merger challenges in 2008 to 12 Merger Challenges in 2009.[13] Similarly, there was a slight decline in the percentage of Second Requests that resulted in Merger Challenges—from 80 percent in 2008 to 75 percent in 2009. There was also a substantial decline in the number of complaints filed in district court by the Division—from 15 transactions challenged in court in 2008 to 7 transactions challenged in court in 2009—as well as substantial decline in the percentage of Second Requests challenged in district court—from 75 percent of Second Requests resulting in complaints in 2008 to 44 percent in 2009.[14]

It should be noted, however, that there was a substantial increase in the level of merger enforcement at the DOJ in 2008 as compared to 2007, perhaps in response to some of the criticism leveled at the Antitrust Division. Given this increase,[15] it is also useful to compare the Division's merger record in 2009 to the entire eight years of the Division under the Bush administration. In this light, the Division challenged a substantially higher percentage of Second Requests (75 percent) in 2009 than the Division had challenged during the eight years of the Bush administration (59 percent).[16] Moreover, the Division also filed a higher percentage of complaints in district court in 2009 (44 percent) than in the eight years of the Division under President Bush (30 percent).[17]

Notwithstanding these trends, there does appear to be a desire on the part of the current DOJ to fashion remedies that allow transactions to proceed, instead of litigating them in court. For example, in the Ticketmaster/Live Nation decree, the Division fashioned a novel remedy that establishes two new ticketing enterprises to compete against Live Nation Entertainment (LNE) even though the transaction only removed one ticketing competitor, Live Nation, from the market.[18] Specifically, LNE was required to provide Anschutz Entertainment Group (AEG), the second largest concert promoter in the United States, with an option to acquire a perpetual, fully paid-up license to the Ticketmaster Host Platform software, including a copy of the source code.[19] In addition, the decree provided that AEG would pay LNE a royalty on every ticket sold through the LNE platform "on such reasonable terms and conditions that will enable the Ticketmaster Host Platform Acquirer to compete effectively against Ticketmaster."[20] The decree also established a second competitor by requiring LNE to divest its Paciolan ticketing business to Comcast-Spectacor.[21] When combined with Comcast-Spectacor's ticketing business and venue presence, the Paciolan business will provide Comcast-Spectacor with sufficient scale to compete effectively against LNE in the market for primary ticketing services to major concert venues.[22]

Merger Enforcement at the FTC. The FTC can make a much stronger quantitative case that there has been an increase in merger enforcement in the first year of the Obama administration. Specifically, while Second Requests at the FTC declined very slightly between 2008 and 2009, from 21 Second Requests issued in 2008 to 15 Second Requests issued in 2009, the number of Second Requests expressed as a function of total HSR filings actually increased by more than 73 percent.[23] There was also an increase in the percentage of Second Requests that resulted in enforcement action—from 57 percent in 2008 to 87 percent in 2009.[24] Moreover, the FTC obtained six federal injunctions in 2009 on merger cases; in contrast, between 2004 and 2008, the FTC only obtained a total of six injunctions.[25]

Interestingly, the FTC was also more aggressive than the DOJ in merger enforcement during both the Bush and Clinton administrations, with approximately 70 percent of Second Requests resulting in challenges between 1996 and 2000 and approximately 80 percent of Second Requests resulting in challenges between 2001 and 2006.[26] In contrast,

approximately 60 percent of all Second Requests issued by the DOJ resulted in challenges between both 1996 and 2000, and 2001 and 2006.[27] Similarly, over the last forty years the FTC has been more successful in litigating Merger Challenges, with a record of 16 wins and 12 losses, for a success rate of nearly 60 percent. In contrast, the DOJ over the same time period has a record of 9 wins and 16 losses, for a success rate of only 36 percent.[28]

Because there is no reason to believe that harder cases are somehow cleared to the DOJ, nor any reason to believe that the FTC has better litigators than the DOJ, it would appear that the reason the FTC consistently challenges a larger number of mergers and prevails on those challenges with greater frequency than the DOJ is due to procedural differences between the agencies. Specifically, under Section 13(b), the FTC need only show that it has "raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination."[29] Thus, in a case brought by the FTC, the district court is not required "to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance."[30]

Many practitioners and commentators believe that Section 13(b) sets forth a lower standard for injunctions than that faced by the DOJ.[31] Indeed, the Antitrust Modernization Commission recommended that "Congress should ensure that the same standard for the grant of a preliminary injunction applies to both the Federal Trade Commission and the Antitrust Division of the Department of Justice by amending Section 13(b) of the Federal Trade Commission Act."[32] In fact, the mere perception among practitioners that the FTC has a lower standard under Section 13(b) creates the reality that practitioners are more likely to counsel clients that they should accept a settlement rather than litigate the merger in court.

This is equally true with respect to the FTC's ability to bring Part III proceedings against a merger if a court declines to issue an injunction. Although the FTC has adopted rules that streamline the Part III process,[33] such proceedings still entail a multi-month delay where the FTC acts as both prosecutor and judge. In this way, Part III represents a significant timing and completion risk to a transaction, which, in turn, increases the leverage that the FTC has in persuading parties to either abandon the transaction or agree to a consent decree. Again, it was for this reason that the AMC recommended that Congress amend Section 13(b) to prohibit the FTC from pursuing administrative litigation in HSR merger cases.[34]

While it is difficult to determine with precision whether the Section 13(b) standard and the availability of Part III proceedings make a difference in litigated cases, it is hard to believe, for example, that the FTC would not have obtained a preliminary injunction under Section 13(b) pending a more thorough investigation under Part III in a case like *United States v. SunGard Data Systems, Inc.*,[35] where the DOJ lost because "a more detailed analysis was needed before one could draw any generalizations" about market definition.[36] Thus, it is possible that the persistent fact that the FTC challenges a higher percentage of Second Requests than the DOJ reflects the real or perceived fact that it is easier for the FTC to prevail in court or Part III.

Changes to the Merger Guidelines. No report card on the first year of the Obama administration would be complete without a discussion of the proposed revisions to the Merger Guidelines.[37]

At the outset it is important to recognize that the Guidelines are widely cited and accepted by the courts as having persuasive if not almost precedential weight. Judicial interpretations of the Guidelines, however, have not always resulted in decisions for the agencies. To the contrary, the government has lost 28 of the 53 merger cases citing various iterations of the Merger Guidelines.[38] In this context, the revisions to the Guidelines can be seen as an effort to correct what the government may have viewed as incorrect application of the Guidelines by these courts, in effect attempting to create a body of law that will potentially supersede or at least clarify existing case law.

For example, in both *United States v. Baker Hughes, Inc.*[39] and *FTC v. R.R. Donnelley & Sons Co.*,[40] the court refused to grant the requested injunction, in part, on the grounds that "[w]ell-established precedent and the *United States Department of Justice Merger Guidelines* recognize that the sophistication and bargaining power of buyers play a significant r[o]le in assessing the effects of a proposed transaction . . . [and] make any anticompetitive consequences very unlikely."[41] The Proposed Merger Guidelines respond by stating that "the Agencies do not presume that the presence of powerful buyers alone forestalls adverse competitive effects flowing from the merger. Even buyers that can negotiate favorable terms may be harmed by an increase in market power."[42]

In *FTC v. Arch Coal, Inc.*,[43] the court denied the FTC's request for an injunction after giving little weight to customer concerns about increased consolidation, writing "[c]ustomers do not, of course, have the expertise to state what will happen in the [relevant] market" after the merger.[44] Customer opposition to the merger was also given little weight in *United States v. Oracle Corp.*[45] The Proposed Merger Guidelines respond by stating that customer testimony may be "highly relevant" and in particular "[t]he conclusions of well-informed and sophisticated customers on the likely impact of the merger itself can also help the Agencies investigate competitive effects."[46]

In United States v. Waste Management, Inc.,[47] the court denied the government's requested injunction on the grounds that entry was likely, notwithstanding the fact that it had not occured in the past.[48] Section 9 of the Proposed Merger Guidelines responds to this holding by stating that "[t]he Agencies consider the actual history of entry into the relevant market, and give substantial weight to this evidence."[49]

In both *SunGard* and *Oracle*, the court rejected the government's market definition, in part, because they believed that a significant number of customers—but by no means all—would switch to alternative products other than those offered by the merging parties.[50] The Proposed Merger Guidelines respond that "unilateral price effects based on the value of diverted sales need not rely on market definition or the calculation of market shares" and that evidence of switching "between products sold by merging firms and those sold by non-merging firms have at most secondary predictive value."[51]

. . . it seems clear that Section 4.1.3 of the Proposed Guidelines, which states that higher margins "make it more likely that the predicted loss is less than the critical loss," is intended to limit the ability of defendants to use critical loss analysis to defeat the agencies' market definition.

Finally, the agencies have lost a series of cases on critical loss, including *United States v. Long Island Jewish Medical Center*,[52] *United States v. Mercy Health Services*,[53] and *FTC v. Tenet Health Care Corp.*[54] Although the court of appeals in *FTC v. Whole Foods Market, Inc.*[55] reversed this trend, it seems clear that Section 4.1.3 of the Proposed Guidelines, which states that higher margins "make it more likely that the predicted loss is less than the critical loss," is intended to limit the ability of defendants to use critical loss analysis to defeat the agencies' market definition.[56]

By making these changes, the Proposed Merger Guidelines will make it easier for the agencies to claim that mergers violate the agencies' Guidelines. The courts will also be on notice that the agencies do not agree with the position that courts have taken on entry, power buyers, critical loss, diversion of sales to non-merging parties, and customer statements. That does not mean, however, that the courts will decide that the Guidelines trump prior judicial decisions. In fact, a district court has already rejected the claim that the Upward Pricing Pressure (UPP) test set forth in the Proposed Guidelines[57] can be used as a substitute for market definition, writing that the court's own "research has not revealed a single decision of a federal court adopting this [UPP] test. In light of the case law's clear requirement that a Plaintiff allege a particular product market in which competition will be impaired, this absence of authority is hardly surprising."[58] In this context, it is possible that the Proposed Guidelines may have an unintended consequence of undermining the persuasive, if not almost precedential, value of the Guidelines. Ironically, then, the unintended consequence of a revision to the Merger Guidelines is that it may be harder for the agencies to block mergers that violate their internal Guidelines.

Criminal Antitrust Enforcement

There was little criticism levied at the Bush Antitrust Division for a lack of criminal antitrust enforcement. That makes sense because conservative administrations typically devote resources to criminal antitrust enforcement on the grounds that the harm to consumer welfare is more certain than in merger cases.

That said, it should be noted that the Division assessed $974 million in corporate fines in 2009, well above the $695 million assessed in 2008, which itself represented an eight-year-high mark in criminal antitrust enforcement.[59] It also should be noted that there was a more than 200 percent increase in restitution imposed by the Division in connection with criminal cases, increasing from $5 million in 2008 to $17 million in 2009.[60] Further, there was a substantial decrease in the number of individual fines imposed, declining from $1.5 million in 2008 to only $605,000 in 2009.[61] Given that, there was a substantial increase in the actual days of incarceration, rising from more than 14,000 days in 2008 to more than 25,000 days in 2009.[62]

In sum, it does not appear that the increased frequency of issuing Second Requests at both agencies (though not merger challenges at the DOJ) diverted resources or attention away from criminal enforcement at the Division.

Monopolization Cases

One of the principal complaints levied by Candidate Obama against the antitrust enforcement record of the Bush administration was its failure to bring a single monopolization case in its eight-year history. The Obama administration's record on this front is only slightly better, although it is still early to make that assessment. The DOJ, to date, has also not brought any monopolization cases, although it initiated seven new monopolization investigations in 2009.[63] While these seven investigations represent a significant increase over the number of monopolization investigations commenced in 2008 by the Antitrust Division—zero—it should be noted that the Bush Antitrust Division in fact commenced 58 monopolization investigations between 2001 and 2008.[64]

Indeed, the seven new investigations begun by the Division in 2009 was roughly in line with the average number of monopolization investigations commenced annually by the Bush administration between 2001 and 2008. Put another way, the real complaint by those who want more aggressive antitrust enforcement was not that the Bush Antitrust Division did not commence monopolization investigations, it was that they failed to act upon them. It is much too early to tell whether the same complaint can be levied against the Obama Antitrust Division, but the DOJ's withdrawal on May 11, 2009, of the Single-Firm Conduct report issued under the Bush administration is a telling sign that a monopolization case by the DOJ is soon to come.[65]

The FTC, however, has already brought a major monopolization case against Intel.[66] Again, it is significant that the FTC has done so using Section 5 of the FTC Act, which enables the Commission to challenge conduct that may not violate Section 2 of the Sherman Act. This allows the FTC to do an end-around potentially unfavorable judicial precedent developed in recent years by Bush appointees.[67] In this way, the FTC is again relying upon a procedural advantage that the DOJ lacks.

Antitrust Enforcement in Health Care

Candidate Obama made a number of pointed statements about the importance of antitrust enforcement in health care. The two examples he set forth in his policy statement were attacking reverse payment settlements and repealing the McCarran-Ferguson Act.[68] Both, however, were stripped out of the final health care legislation that represents Obama's signature domestic achievement.

A ban on "pay for delay" was included in the health care bill passed in the House but not in the version passed in the Senate.[69] Congress dropped the "pay for delay" ban in the reconciliation bill for the stated reason that its principal purpose was to change policy, not to save money, which is a requirement for reconciliation.[70] There was also some doubt as to whether the Senate would actually pass the bill with a ban on "pay for delay," given opposition to this provision by both generic and branded pharmaceutical industry groups.[71]

In contrast to Congress, the antitrust agencies have taken clear action to oppose "pay for delay" settlements. Specifically, the FTC issued a report in January 2010 that estimated that "pay for delay" settlements will cost consumers approximately $35 billion over the next ten years (including $2 billion for the federal government),[72] which calls into question the position taken by some that this provision was not appropriately included in the health care bill.[73] Moreover, the Antitrust Division in July of 2009 submitted an amicus brief in *Arkansas Carpenters Health & Welfare Fund v. Bayer AG* (*Cipro*) in which it argued that reverse payment settlements should be treated as "presumptively unlawful."[74] This position reversed the position of the Bush Antitrust Division, which, among other things, requested that the Supreme Court not grant certiorari to review the Eleventh Circuit's decision in *Schering-Plough Corp. v. FTC*, on the grounds that "the mere presence of a reverse payment in the Hatch-Waxman context is not sufficient to establish that the settlement is unlawful."[75]

The health care bill also did not fulfill Candidate Obama's promise to repeal the McCarran-Ferguson Act. Again, the repeal was included in the House bill but not included in either the Senate bill that was ultimately passed by the House or the reconciliation bill. Significantly, the benefits of repeal have been either misunderstood or overstated by proponents of repeal. For example, Robert Reich argued in a *New York Times* op-ed that the McCarran-Ferguson Act was somehow responsible for a series of mergers that resulted in "highly concentrated" insurance markets and skyrocketing premiums.[76] Leaving aside the fact that there is no quantitative evidence to date that clearly or reliably links highly concentrated insurance markets to higher premiums,[77] this statement creates the misleading impression that the McCarran-Ferguson Act somehow exempts health insurance mergers from antitrust review by the FTC and DOJ. This is certainly not the case. In fact, the Bush DOJ filed a number of complaints and obtained divestitures in health insurance mergers.[78]

International Cooperation

Although Candidate Obama promised more international cooperation between the agencies and international antitrust authorities, the statistics released by the agencies do not strongly support an increase in international cooperation. For example, while there was a slight increase in the number of cases in which the FTC cooperated with a foreign competition authority—79 cases in 2008 and 87 cases in 2009—there was a substantial decrease in the number of consultations with or comments to a foreign competition authority—from 89 in 2008 to 56 in 2009—as well as a substantial decline in the number of written submissions to international fora—from 30 submissions in 2008 to 19 submissions in 2009.[79] There was, however, a doubling in the number of international events attended by FTC staff—from 68 events in 2008 to 125 events in 2009, indicating a clear effort to ensure that the FTC's views were expressed to the international antitrust community.[80]

Moving beyond statistics, the FTC has cooperated with the Europeans in a number of high-profile antitrust cases. For example, there were reports that the FTC was cooperating closely with the European Commission with respect to the $1.45 billion (€1.06 billion) fine against Intel for "using rebates to discourage computer makers from purchasing chips" from AMD.[81] This fine was soon followed by a complaint issued by the FTC against Intel under Section 5 of the FTC Act for acts of monopolization for much of the same conduct.[82] In addition, the FTC has made efforts to urge international antitrust authorities to take a close look at reverse payments by brand name pharmaceutical companies.[83] The European Commission has listened and sent out information requests to a number of pharmaceutical companies seeking copies of their patent settlement agreements.[84]

As these two cases demonstrate, statistical evidence probably sheds very little light on the level of international cooperation because it is not possible to determine whether the comments made by a U.S. antitrust agency were in support of or in opposition to the action that the international agency was planning to take. In this light, international cooperation can also be measured by the extent to which there is convergence between the views of the EC, for example, and the FTC and DOJ. And on this score, it seems quite clear that there has been an increase in international cooperation. For example, the DOJ's withdrawal of its Report on Single-Firm Conduct Under Section 2 of the Sherman Act reduced the

substantial disharmony between the views of the DOJ and the EC with respect to firms with market power. As a speech by Christine Varney prior to her confirmation makes clear, the withdrawal of that report was critical to ensure that the United States has a "s[ea]t at the table" so that U.S. and European regulators can "jointly continue to pursue the evolution" of Section 2 of the Sherman Act.[85]

Conclusion

There is no doubt that President Obama has taken significant steps to increase antitrust enforcement. The lawyers he chose to lead the FTC and DOJ both expressed strong views about aggressive antitrust enforcement in their confirmation hearings. Once in office, both officials made very real changes in the enforcement direction of their agencies. Both the FTC and DOJ have substantially increased the frequency of Second Requests and have together proposed implementation of methodologies that may eliminate the requirement of market definition and therefore make it potentially easier to enjoin mergers they believe harm consumer welfare.

And yet, Obama has not made good on all of his antitrust campaign promises. Obama was unable to convince Congress to repeal the McCarran-Ferguson Act and to outlaw "pay for delay" settlements. And his Antitrust Division has not yet brought a monopolization case to court, perhaps in recognition of the body of Section 2 law that has developed over the last decade that is skeptical of antitrust claims.

That the FTC can avoid judicial constraints by using Section 5 of the FTC Act and Part III proceedings is a very real reminder that the FTC and DOJ occupy different places in our constitutional democracy. In this context, it is worth remembering that at the time the FTC was created many believed that the antitrust laws had been so diluted by the courts that, in the words of Teddy Roosevelt, the antitrust laws "usually accomplished nothing, [and] generally left the worst conditions wholly unchanged."[86] The FTC Act was designed both to create a substantive law—Section 5 of the FTC Act—and a quasi-judicial body that was subject to judicial deference—Part III—that would allow the FTC to, in the words of Woodrow Wilson, serve "as an instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts are inadequate."[87]

Thus, it is not surprising that the FTC has taken full advantage of its unique procedural context to circumvent the courts. Without these powers, the DOJ's challenge in litigating monopolization and merger cases will be to change the precedents developed during the Bush administration (as well as before) or to find cases that fit within them. We will wait and watch to see which approach they take. ■

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[1] Molly S. Boast, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Address at the ABA Section of Antitrust Law Annual Spring Meeting: New Merger Guidelines—The Role of Economic Tests and the Relevance of Market Definition (Apr. 21, 2010), *available at* http://www.abanet.org/antitrust/at-spring/10/word/Wednesday.doc.

[2] Senator Barack Obama, Statement for the American Antitrust Institute (Sept. 27, 2007), *available at* http://www.antitrustinstitute.org/archives/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf [hereinafter Obama Policy Statement].

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Josh Kosman, *Obama's Antitrust Policy Is Toothless*, N.Y. Post, Feb. 2, 2010, at 26, *available at* http://www.nypost.com/p/news/business/obama_antitrust_policy_is_toothless_TXDe9M2hxeXMIm1j77OJDJ.

[7] Christie Smythe, *Deal Scrutiny Under Obama Less Harsh than Expected*, Law360, Feb. 22, 2010, http://www.law360.com/articles/135057.

[8] There were 1,656 and 713 HSRs filed in 2008 and 2009, respectively. U.S. Dep't of Justice, Antitrust Division Workload Statistics FY 2000–2009, at 2, *available at* http://www.justice.gov/atr/public/workstats.pdf [hereinafter DOJ Statistics].

[9] The fiscal years for both the DOJ and FTC run from October 1 through September 30. For fiscal year 2009, this results in a 3.5 month overlap between the Bush and Obama administrations, which slightly skews the data.

[10] DOJ Statistics, *supra* note 8, at 3.

[11] In 2008, the DOJ issued Second Requests for 1.21 percent of HSR filings, and for 2.24 percent of HSR filings in 2009.

[12] The DOJ defines a merger challenge to include filing complaints and voluntary abandonment or restructuring of a transaction. U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Challenge Data, Fiscal Years 1999–2003 (Dec. 18, 2003), *available at* http://www.justice.gov/atr/public/201898.pdf.

[13] DOJ Statistics, *supra* note 8, at 3.

[14] *Id.*

[15] In addition, in 2006, 94 percent of Second Requests resulted in merger challenges and 59 percent of those Second Requests ended up with complaints filed in district court. Thus, in both 2006 and 2008, the Bush Administration demonstrated a greater willingness to challenge mergers in court than the Obama Administration in 2009. *Id.*

[16] In 2009, the DOJ issued 16 Second Requests and challenged 12 of these cases. From 2001 through 2008, the DOJ issued 194 Second Requests and challenged 114 of these cases. *Id.*

[17] In 2009, the DOJ filed 7 complaints in district court, and from 2001 through 2008 it filed 59 complaints. *Id.*

[18] United States v. Ticketmaster Entm't, Inc., No. 1-10-cv-00139 (D.D.C. Jan. 25, 2010) ([Proposed] Final Judgment), *available at* http://www.justice.gov/atr/cases/f254500/254558.pdf.

[19] *Id.* at 8.

[20] *Id.* at 9–10.

[21] *Id.* at 11–12.

[22] United States v. Ticketmaster Entm't, Inc., No. 1-10-cv-00139, at 15 (D.D.C. Jan. 25, 2010) (Competitive Impact Statement), *available at* http://www.justice.gov/atr/cases/f254500/254544.pdf.

[23] In 2008, the FTC issued Second Requests for 1.27 percent of HSRs filed, and in 2009 issued Second Requests for 2.20 percent of HSRs filed. Fed. Trade Comm'n, Performance and Accountability Report Fiscal Year 2009, at 59 (Nov. 17, 2009), *available at* http://www.ftc.gov/opp/gpra/2009parreport.pdf [hereinafter FTC Performance and Accountability Report].

[24] In 2008, the FTC took enforcement action in 12 cases, and in 2009 took action in 13 cases. *Id.*

[25] It appears that three of these cases were filed in the last three months of 2008, and thus the enforcement decision would be properly attributed to the Bush administration. Fed. Trade Comm'n, FTC Competition Enforcement Database: Merger Enforcement Actions, http://www.ftc.gov/bc/caselist/merger/index.shtml.

[26] See John D. Harkrider, *Antitrust Enforcement During the Bush Administration—An Econometric Estimation*, Antitrust, Summer 2008, at 43, 45.

[27] *Id.*

[28] These numbers only represent Section 7 cases litigated by the FTC and DOJ in which the court cites to one of the various iterations of the Merger Guidelines.

[29] FTC v. Whole Foods Mkt., Inc., 533 F.3d 869, 882–83 (D.C. Cir. 2008) (Tatel, J., concurring).

[30] *Id.* at 883.

[31] *See, e.g.*, Leon B. Greenfield & William J. Kolasky, *Antitrust Modernization: Picking Up the European Gauntlet*, ANTITRUST, Summer 2008, at 56, 59.

[32] ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS, Recommendation 26 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/introduction.pdf [hereinafter AMC REPORT].

[33] Press Release, Fed. Trade Comm'n, FTC Issues Interim Final Rules Amending Parts 3 and 4 of Its Rules of Practice; Rules Are Designed to Expedite and Streamline the Entire Part 3 Proceeding (Dec. 23, 2008), *available at* http://www.ftc.gov/opa/2008/12/part3.shtm.

[34] AMC REPORT, *supra* note 32, Recommendation 25.

[35] 172 F. Supp. 2d 172 (D.D.C. 2001).

[36] *Id.* at 193 n.24.

[37] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines for Public Comment: Released on April 20, 2010, *available at* http://www.ftc.gov/os/2010/04/100420hmg.pdf [hereinafter Proposed Merger Guidelines].

[38] Since 1968, the DOJ has lost 16 of the 25 Section 7 cases that it has litigated, and the FTC has lost 12 of the 28 Section 7 cases that it has litigated.

[39] 908 F.2d 981 (D.C. Cir. 1990).

[40] No. 90-1619 SSH, 1990 U.S. Dist. LEXIS 11361 (D.D.C. Aug. 27, 1990).

[41] *Id.* at *10; *see also Baker Hughes, Inc.*, 908 F.2d at 986; United States v. Archer-Daniels-Midland Co., 781 F. Supp. 1400, 1416 (S.D. Iowa 1991).

[42] Proposed Merger Guidelines, *supra* note 37, § 8, at 27.

[43] 329 F. Supp. 2d 109 (D.D.C. 2004).

[44] *Id.* at 146.

[45] 331 F. Supp. 2d 1098, 1168 (N.D. Cal. 2004).

[46] Proposed Merger Guidelines, *supra* note 37, § 2.2.2, at 5.

[47] 743 F.2d 976 (2d Cir. 1984).

[48] *Id.* at 979, 982–83.

[49] Proposed Merger Guidelines, *supra* note 37, § 9, at 27.

[50] *SunGard Data Sys.*, 172 F. Supp. 2d at 190–92; *Oracle*, 331 F. Supp. 2d at 1132–33, 1149, 1168.

[51] Proposed Merger Guidelines, *supra* note 37, § 6.1, at 21.

[52] 983 F. Supp. 121, 143 (E.D.N.Y. 1997).

[53] 902 F. Supp. 968, 980–81 (N.D. Iowa 1995).

[54] 186 F.3d 1045, 1053 (8th Cir. 1999).

[55] 533 F.3d 869, 888 (D.C. Cir. 2008) (Tatel, J., concurring).

[56] Proposed Merger Guidelines, *supra* note 37, § 4.1.3, at 12.

[57] *Id.* § 6.1, at 21.

[58] City of New York v. Group Health Inc., No. 06 Civ. 13122 (RJS), slip op. at 7 n.6 (S.D.N.Y. May 11, 2010), *available at* http://online.wsj.com/public/resources/documents/05112010sullivanupp.pdf.

[59] DOJ Statistics, *supra* note 8, at 14.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 15.

[63] *Id.* at 1.

[64] *Id.*

[65] Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Vigorous Antitrust Enforcement in This Challenging Era, Remarks as Prepared for the Center for American Progress 8 (May 11, 2009), *available at* http://www.usdoj.gov/atr/public/speeches/245711.pdf; *see also* Press Release, U.S. Dep't of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), *available at* http://www.usdoj.gov/atr/public/press_releases/2009/245710.pdf.

[66] Intel Corp., FTC Docket No. 9341 (Dec. 16, 2009) (complaint), *available at* http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf.

[67] Jon Leibowitz, Chairman, and J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, Statement in the Matter of Intel Corporation, FTC Docket No. 9341 (Dec. 16, 2009), *available at* http://www.ftc.gov/os/adjpro/d9341/091216intelchairstatement.pdf.

[68] Obama Policy Statement, *supra* note 2.

[69] Christopher Norton, *Pay-For-Delay Ban Dropped from Health Care Bill*, LAW360, Mar. 18, 2010, http://www.law360.com/articles/156390.

[70] *Id.*

[71] *Id.*

[72] Letter from Douglas W. Elmendorf, Director, Cong. Budget Office, to Hon. John D. Dingell, Congressman, U.S. House of Representatives 23, tbl. 4 (Nov. 6, 2009), *available at* http://www.cbo.gov/ftpdocs/107xx/doc10710/hr3962Dingell_mgr_amendment_update.pdf.

[73] Fed. Trade Comm'n, *Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions* 2 (Jan. 2010), *available at* http://www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf.

[74] Brief for the United States as Amicus Curiae, Arkansas Carpenters Health & Welfare Fund v. Bayer AG, No. 05-2851, at 10–11 (2d Cir. July 6, 2009).

[75] Brief for the United States as Amicus Curiae, FTC v. Schering-Plough Corp., No. 05-273, at 11 (S. Ct. May 2006).

[76] Robert B. Reich, *Bust the Health Care Trusts*, N.Y. TIMES, Feb. 24, 2010, at A27, *available at* http://www.nytimes.com/2010/02/24/opinion/24reich.html.

[77] The GAO in 2009 concluded that the quantitative evidence to date has found "that mergers have not led to sustained premium increases." Letter from John E. Dicken, Director, Health Care, Gov't Accountability Office to Hon. Herb Kohl, Senator, Subcomm. on Antitrust, Competition Policy and Consumer Rights 4 (July 31, 2009), *available at* http://www.gao.gov/new.items/d09864r.pdf.

[78] *See, e.g.*, United States v. UnitedHealth Group Inc. and Sierra Health Servs. Inc., No.1:08-cv-00322 (D.D.C. Sept. 24, 2008) (final judgment), *available at* http://www.justice.gov/atr/cases/f237600/237613.pdf; United States v. UnitedHealth Group Inc. and PacifiCare Health Sys., Inc., No. 1:05CV02436 (D.D.C. May 23, 2006) (final judgment), *available at* http://www.justice.gov/atr/cases/f216400/216423.pdf.

[79] FTC Performance and Accountability Report, *supra* note 23, at 14.

[80] *Id.*

[81] Mary Jacoby, *FTC and EU to Coordinate on Intel Antitrust Probe*, MAIN JUSTICE, May 15, 2009, http://www.mainjustice.com/2009/05/15/ftc-and-eu-to-coordinate-on-intel-antitrust-probe.

[82] Intel Corp., FTC Docket No. 9341 (Dec. 16, 2009) (complaint), *available at* http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf.

[83] *See* Alden F. Abbott, Deputy Director, Fed. Trade Comm'n, Office of Int'l Affairs, The IP-Antitrust Balance: A U.S. Government Perspective, International Conference on Intellectual Property Rights Convergences and Divergences 15 (Dec. 3, 2009), *available at* http://www.ftc.gov/oia/speeches/091203abbott-ipantitrust.pdf.

[84] Antitrust: Commission Launches Monitoring of Patent Settlements Concluded Between Pharmaceutical Companies (Jan. 12, 2010), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/12.

[85] Thomas A. Miller & Ryan W. Marth, Promoting Greater Consistency in Single Party Conduct Policy: Is Section 5 of the FTC Act a "Third Way" to Converge European and U.S. Interests? 5 (Draft Paper Presented to the Am. Antitrust Inst. 10th Annual Conference) (June 18, 2009), *available at* http://www.antitrustinstitute.org/archives/files/Marth%20Miller%20Convergence%20Article_071420091600.pdf.

[86] Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 24 (2003).

[87] *Id.* at 53.