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by Frank Busch*

AAG Varney, DAAGs Present "Update," Explain Priorities for 2011 and Beyond; First Appearance by Pozen as DAAG

On February 2, 2011, AAG Christine Varney and DAAGs Katherine Forrest, Sharis Pozen and Joseph Wayland appeared for a brownbag presentation entitled "Update from the United States Department of Justice Antitrust Division." Antitrust Section chair Allan Van Fleet of Greenberg Traurig LLP moderated by phone with an in-person assist from Hill Wellford of Bingham McCutchen LLP. The event was the first major appearance by Forrest and Wayland, who begin their terms in the fall. It was also the first appearance of any kind as DAAG by Pozen, who took over Deputy duties (adding to her existing title as Chief of Staff) from Molly Boast. Boast departed the Division that week.

The panel discussed a broad range of topics, identifying several enforcement priorities for the coming year.

Criminal and Civil Enforcement Statistics

Varney and the DAAGs referred several times to their enforcement statistics from fiscal year 2010, which ended September 30. The statistics are contained in charts released in a speech by economics DAAG Carl Shapiro at the ABA Antitrust Fall Forum in November. The charts show that DOJ's criminal enforcement, while down in some respects from the record year in 2008-2009, remains vigorous, and total "jail days" slightly increased:

Table 1: Antitrust Division Criminal Enforcement Data

	FY2006	FY2007	FY2008	FY2009	FY2010
Total Cases Filed	34	40	54	72	60
Defendants Charged	61	57	84	87	84
Fines Obtained	$473m	$630m	$701m	$1,007m	$555m
Total Jail Days Obtained	5,383	31,391	14,331	25,396	26,046

On the civil side, DOJ brought fewer cases in 2009 than in pre-recession years,** which Varney linked to the dramatically lower number of HSR filings. In 2010, however, its merger challenges were up. Also, although the absolute number of HSR second requests has decreased compared to the pre-recession, higher-filing year 2007, DOJ is issuing second requests in a higher *percentage* of matters.

Table 2: Antitrust Division Civil Enforcement Data

	FY2006	FY2007	FY2008	FY2009	FY2010
Civil Non-Merger Cases Filed[2]	2	2	4	2	4
HSR Filings	1768	2201	1726	716	1166
HSR Investigations Initiated by DOJ	77	81	70	49	55
DOJ Second Requests	17	32	20	16	22
% of HSRs Resulting in a DOJ Second Request	1.0%	1.5%	1.2%	2.2%	1.9%
Total DOJ Merger Investigations Initiated (HSR + Non-HSR)	96	101	84	66	64
Total DOJ Merger Challenges[3]	16	12	16	12	19

The chart shows that non-merger civil conduct enforcement has not risen during Varney's tenure, despite her emphasis of that area. Nevertheless, she stated that the DOJ is currently considering a number of non-merger civil investigations, particularly Section 2 matters, and that the antitrust bar should watch for developments. As this article went

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** These charts are exact screen-captured copies of the DOJ originals. Print in hard copy or zoom your browser for best legibility.

to press, DOJ announced just such a case: a Section 2 lawsuit and consent decree against United Regional Health Care System in Texas, alleging exclusionary hospital contracting practices. DOJ's press release stated that "[t]his is the first case brought by the department since 1999 that challenges a monopolist with engaging in traditional anticompetitive unilateral conduct," a comment apparently meant to distinguish more recent cases that included Section 2 claims among others, and to refer back to the successful 1999 case against Dentsply International, Inc.

Focus on Health Care and MFNs

Health care issues consumed a significant portion of the program. The discussion focused first on the Division's analysis of the health care market broadly, and second on its ongoing case against Blue Cross Blue Shield of Michigan (BCBS).

The Division has spent considerable resources on a task force analyzing the health care market. The task force concluded that nearly every state has a dominant provider. The task force concluded that the health care market is not experiencing the degree of new entry that standard economic modeling would predict, and that actual new entry is occurring primarily in segmented markets that already have three or four players. The task force will continue to examine the ways that concentration can harm the health care market this year.

The Division's decision to challenge BCBS's proposed acquisition of a Lansing-based insurance company last March is an early demonstration of the task force's practical impact. BCBS argued that the fact it would acquire 90% of Lansing's commercial health insurance market was not anticompetitive because new entry would emerge to provide consumers additional choices. The Division rejected that argument, in part based upon the task force's analysis regarding entry in the health care market.

As a consequence of its review of the proposed acquisition, the Division discovered a second element of the health care market it believes is anti-competitive in this particular situation: BCBS's insistence on "Most Favored Nation" (MFN) and "Most Favored Nation Plus" (MFN-Plus) clauses in its contracts with hospitals and other providers. An MFN clause requires a health care provider to charge a health care insurance company no more than the lowest prices the provider charges any other insurer (or in some cases, even individual patients). An MFN-Plus clause requires a lower price than the price charges to any other insurer.

DOJ's panelists, discussing the BCBS case, acknowledged that MFN and MFN-Plus clauses are not always anti-competitive, but argued that under some market conditions they can discourage provider discounting, deter innovation, and reduce meaningful consumer choices in health plans, either by facilitating collusive pricing among competing providers or by discouraging providers from offering lower rates or more cost-effective care to rival plans. For that reason, the Division's complaint seeks to remove all such clauses in BCBS contracts.

The panelists suggested that DOJ will scrutinize MFN and MFN-plus clauses as part of other health care investigations. And there is no reason to assume that the Division's focus on MFN and MFN-Plus clauses is limited to the health care industry.

Focus on Section 8

The Panel spent considerable time discussing Section 8 of the Clayton Act, which prohibits interlocking directorates among competitors. Section 8 has received attention since early in Varney's tenure at the Antitrust Division and the panel's emphasis of this provision suggests that it will continue to be an enforcement priority in the coming year.

In DOJ's view, Section 8 compliance likely was straightforward when the law was first passed

in 1914, as firms in the early 20th Century presumably had little difficulty determining the identity of their competitors. In today's economy, however, it can be difficult to identify the full scope of rivals and potential entrants, creating uncertainty over whether Section 8 would prevent some interlocks.

Focus on Employee Non-Solicitation Pacts

Varney emphasized the Division's continuing focus on employee non-solicitation agreements. She defined such non-solicitation agreements as understandings that restrain competition between two or more companies for certain classes of employees.

In the Division's view, companies engage in non-solicitation to restrict labor movement. This restrains competition for affected employees without any pro-competitive justification, thereby distorting the competitive process. The Division believes it is a clear Section 1 violation.

The Division's settlement with Apple, Google, Intel, Adobe, Intuit, and Disney's Pixar unit includes an obligation by the companies to refrain from entering into non-solicitation agreements. The panel suggested that this settlement is only the beginning of Antitrust Division enforcement in this area.

Varney said that non-solicitation agreements exist outside the tech industry and that the Division will be "very aggressive" in identifying them. She also noted that these agreements are unusual in that they can be made and effectively enforced by personnel at a relatively low level in the corporate structure. Her specific example was an agreement among human resources employees, about which the companies' general counsel had no knowledge. She noted that there is no blanket general-counsel-is-ignorant defense, and that such an agreement would place the companies in DOJ's sights; therefore, legal departments should affirmatively monitor relevant hiring practices and inform lower level employees of their obligations under the antitrust laws.

Changes to the Merger Guidelines

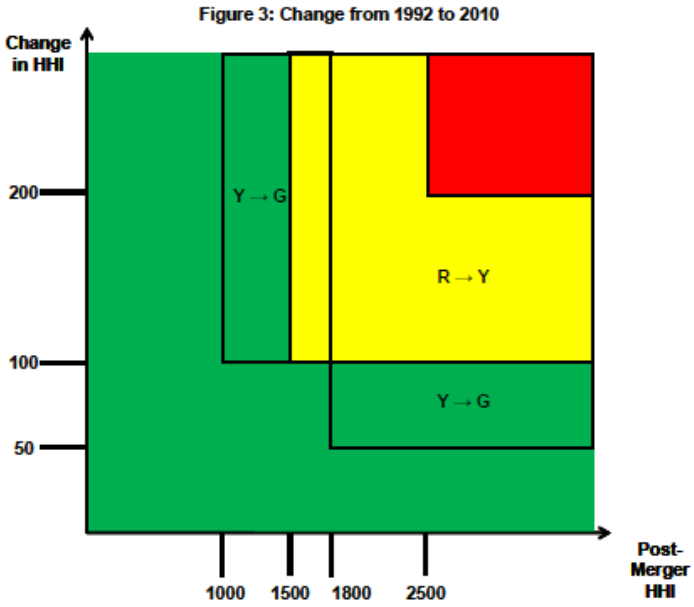
The last major topic discussed was the DOJ and FTC's 2010 update to the Horizontal Merger Guidelines. In response to a question about whether the new Guidelines represent a change in policy, the panelists all stated that they do not. Varney believes the update promotes transparency and, to a large degree, merely describes how the Division has been assessing horizontal mergers for the past seven or eight years.

In Varney's view, the 1992 Guidelines had become outdated. She said that the 1992 Guidelines promised one form of analysis, while a small number of specialized practitioners knew mergers actually would be analyzed in a different way. The 2010 update is intended to resolve this problem.[*]

One important change is that the 1992 Guidelines essentially ignored certain types of analysis that have become more important. The 2010 revision adds that missing information. For example, the 1992 version discussed price discrimination in a footnote, while the 2010 revision gives it a full treatment.

Along with adding specific enforcement guidelines, the 2010 revision also changed the market concentration assumptions used for HHI analysis. The figure below—from the November speech by Shapiro—shows that a market now will not be considered highly concentrated unless it has an HHI over 2,500, and will not be considered moderately concentrated unless it has an HHI over 1,500. In the 1992 version, those figures were 1,800 and 1,000. The figure shows that the Division's allowance for changes in HHI was similarly relaxed.

[*] This Newsletter covered the new Guidelines in more depth in the March-April 2010 issue.



These changes have two effects. First, they expand the concentration-based "safe harbors" shown in green. Second, they remove the jump from green to red that occurred at a mere 100 point change in an 1,800 point market under the 1992 version. Both changes are expected to reduce the odds of a second request.

Conclusion

The update by Varney and the rest of the panel provided some important insight into their priorities in the coming year. Health care issues will be a major focus but the Division also plans to aggressively investigate Section 8 and non-solicitation issues. The panelists expect the 2010 update to the Horizontal Merger Guidelines to provide better transparency about the Division's analysis, allowing attorneys better to understand DOJ's enforcement process and to avoid second request letters whenever possible.