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Antitrust Enforcement Under President Obama: Where Have We Been and Where Are We Going?

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What Did He Say He Would Do?

Prior to his election in 2008, then-Senator Obama said that he intended to “direct [his] administration to reinvigorate antitrust enforcement.”¹ Senator Obama’s campaign had stated that: “The Bush administration’s abdication of serious antitrust enforcement must be addressed by a new administration. An Obama administration will recommit federal policy to the support of consumer protection measures where there is a demonstrated need.”² And shortly before his first election, then-Senator Obama published the following: “In short, an Obama administration will take seriously its responsibility to enforce the antitrust laws so that all Americans benefit from a growing and healthy competitive free-market economy.”³

What Has He Done For Antitrust Lately?

The Obama administration started off its antitrust enforcement aggressively. One of the first things that the Obama Antitrust Division did was withdraw the 2008 *Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act Report*, explaining that the Report “raised too many hurdles to government antitrust enforcement and favored extreme caution and the development of safe harbors for certain conduct within reach of Section 2.”⁴ Additionally, in 2009, the Antitrust Division pursued seventy Sherman Act Section 1 investigations and four Sherman Act Section 2 investigations, up from sixty-six Section 1 and no Section 2 investigations pursued by the Division in 2008.⁵ As a percentage of merger filings, DOJ merger investigations increased to approximately 10% in 2009, from less than 5% in 2008, and the number of Civil Investigative Demands (“CIDs”) went from 355 in 2008 to 510 in 2009. In the criminal sphere, the number of grand jury investigations that were initiated and were pending increased in 2009, as did the number of criminal antitrust cases that were filed. The notable exceptions to these upward trends were in the areas of DOJ civil antitrust cases filed and cases pending, each of which were down in 2009 as compared to 2008.

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¹ Statement of Senator Barack Obama for The American Antitrust Institute (Sept. 2007), available at http://www.antitrustinstitute.org/files/aa-i-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.

² 10/28/08 Obama campaign response to questions from *RCR Wireless News* Washington Bureau Chief Jeffrey Silva.

³ 8/5/08 <http://www.barackobama.com/issues/technology/>.

⁴ http://www.justice.gov/atr/public/press_releases/2009/245710.htm.

⁵ The statistics cited herein are sourced from the U.S. Dep't of Justice Antitrust Div. Workload Stats. FY 2002-2011, available at <http://www.justice.gov/atr/public/workload-statistics.html>. 2012 figures are not yet available.

In many ways, 2009 represented the statistical high point of antitrust enforcement of the first Obama term. In 2010 and 2011, there was a sharp reduction and plateau of Section 1, Section 2, and merger investigations from 2009 levels. The number of CIDs issued reduced to 480 (in 2010) and 476 (in 2011) from the high of 510 (in 2009). The number of grand jury investigations that were initiated and were pending also fell off sharply in 2010 and 2011 (to lower than 2008 levels). In contrast, however, the number of criminal cases filed in 2011 (90) was the highest it had been throughout the prior decade, and the number of civil antitrust cases exhibited a marked upward trajectory (cases filed: 9 (2009), 14 (2010), 18 (2011); cases pending: 14 (2009), 17 (2010), 24 (2011)); most of these civil litigations were merger cases.

In addition to these statistical indicia of enforcement activity, under the guidance of Joseph Wayland, who was Deputy Assistant Attorney General (“DAAG”) for Litigation from September of 2010 until he became Acting Assistant Attorney General in April 2012 (he has since returned to private practice), the Antitrust Division took noteworthy practical steps to improve its antitrust litigation capability. Wayland led by example, serving as the Division’s lead trial counsel on two contested litigations, *United States v. H&R Block* and *United States v. AT&T*, each of which resulted in the proposed deals not consummating as a result of DOJ’s efforts. He also oversaw the creation of the new Director of Litigation position, which is tasked with continuing to strengthen the Division’s litigation capabilities and with oversight of its litigation training programs. And of course, 2012 has seen the ongoing e-books litigation, *United States v. Apple Inc.*, further evidencing the willingness and capacity of the DOJ to take cases to court.

What’s Next?

The answer to this question may be more influenced by economic realities than extant enforcement philosophy; for example, the impact on the American economy of the fiscal cliff compromise resolution reached on January 1, 2013 remains unpredictable. Nevertheless, based on the people who have been tapped for key antitrust positions during the second Obama administration, we can infer that President Obama’s antitrust enforcement agenda will be as strong and robust as the economy can handle.

The Antitrust Division of the Department of Justice

On January 3, 2013, William Baer, most recently an antitrust partner at Arnold & Porter in Washington, D.C., was sworn in as the Assistant Attorney General (“AAG”) in charge of the Antitrust Division. Baer is extremely well regarded and is a leader of the antitrust bar. Like Christine Varney, President Obama’s first Antitrust Division AAG, Baer has a prominent enforcement background; from 1995 through 1999, he was the Director of the Bureau of Competition for the Federal Trade Commission. It is clear that at this juncture of his exceptionally successful career, Baer could have chosen to continue his practice at Arnold & Porter or to retire.

Since he has opted instead to accept the AAG position, it would appear that Baer wants to leave his mark on the Division through active and noteworthy enforcement.

Given DOJ's relatively robust activity in the merger area during the first term, it is not surprising that President Obama's new AAG has a depth and breadth of expertise with mergers. In addition to Baer's private merger practice, while Director of the FTC's Bureau of Competition, he led the Commission's successful challenge of Staples' proposed acquisition of Office Depot. This merger proficiency should translate into a pragmatic analysis of pending deals, and possibly, a greater willingness to challenge mergers as opposed to accepting carefully crafted conduct remedies proposed by the merging parties that may not actually ameliorate much potential anticompetitive impact. Any reluctance to accept conduct remedies would represent a shift from recent front office merger policy, which has embraced such remedies.⁶

Section 1 issues may move higher on the DOJ enforcement agenda. The economic community, including the most recent Deputy Assistant Attorney General for Economic Analysis, has been expressing increased skepticism regarding the purported procompetitive benefits of various distribution terms that are commonly used in numerous industries throughout the American economy, including, for example, most favored nations clauses, loyalty discounts, exclusive dealing arrangements, and meet or release provisions.⁷ Creative use of these types of contractual terms by corporate entities often abounds during difficult economic times, so an enforcer predisposed to looking for anticompetitive impacts of agreements of this nature will have a lot of conduct to investigate.

In the criminal enforcement area, the agenda will not likely change in the second term. The DOJ has been very active in this space for a long time, and boasts of the efficacy of the leniency program. The Division prides itself on the ever-increasing number of companies and individuals it criminally indicts, and touts the longer jail terms recently imposed on individual defendants. Additionally, the Division's criminal enforcement efforts result in payments of significant fines and penalties. There is no basis to believe that any of these influential factors will materially alter during the second Obama administration.

The Federal Trade Commission

Even though the FTC is an independent agency, President Obama can exert some influence on the enforcement agenda of that agency through his nominations to the Commission and by his designation of the FTC Chairman. It is rumored that Chairman Jon Leibowitz will be stepping down early in 2013. Although there are a number of candidates to fill that position, it appears most likely

⁶ See, e.g., *United States v. Ticketmaster*; U.S. Dep't of Justice, *Policy Guide to Merger Remedies* (June 2011), available at <http://www.justice.gov/atr/public/guidelines/272350.pdf>.

⁷ See, e.g., Fiona Scott Morton, U.S. Dep't of Justice, *Contracts that Reference Rivals* (April 5, 2012), available at <http://www.justice.gov/atr/public/speeches/281965.pdf>.

that Commissioner Julie Brill will become the new Chair. (The two other contenders most prominently mentioned are Commissioner Edith Ramirez and Howard Shelanski, Director of the FTC's Bureau of Economics.) Brill's antitrust agenda is heavily influenced by her extensive background in consumer protection. She has also expressed a desire to define with greater specificity the conduct prohibited by Section 5 of the FTC Act (which the FTC broadly, but vaguely, argues prohibits certain conduct beyond that which would support a finding of a Sherman Act Section 1 or 2 violation). That said, whoever ascends to the Chairmanship would not likely significantly change the FTC antitrust enforcement agenda during the second Obama administration.

It is also worth noting that Republican Commissioner Tom Rosch's has stepped down from the FTC; his enforcement agenda was surprisingly interventionist for a Republican. His replacement, Joshua Wright, was sworn in as the newest Commissioner on January 11, 2013. Wright is likely to be less oriented than Rosch toward such active regulatory intervention.

The biggest possible change to the FTC enforcement agenda may come in the healthcare sector. The Supreme Court has granted certiorari in the Watson Pharmaceuticals case, in which the FTC has challenged defendant's reverse payment, or so-called "pay for delay," settlement. Despite the FTC's serial losses, these "pay for delay" cases have been a long-standing FTC enforcement agenda item. Once the Supreme Court weighs in, and absent subsequent Congressional intervention altering the edict published by the Court, these cases will either stop being brought, or will likely settle within a much shorter time frame than they presently take to litigate.

Will President Obama Keep His 2008 Antitrust Campaign Promises?

What the first Obama administration antitrust enforcement agenda might have looked like absent the recession is anyone's guess. It seems undeniable, however, that during the last four years, antitrust enforcement was not as "reinvigorated" as the Obama campaign predicted it would be. It appears that as a result of the extremely troubled economy during the first term, the administration was reluctant to pursue civil Section 1 or 2 cases against corporate entities that were doing well despite the odds. Given the dialectic around the "too-big-to-fail" concept since 2008, the fact that the civil litigation activity pursued by DOJ during the first term was primarily in the area of mergers suggests that the administration's enforcement philosophy was heavily influenced by that broader dialogue.

I submit that the second Obama administration will pursue a policy of increased, consumer welfare driven antitrust enforcement. Look for more vigorous investigations and litigation regarding Section 1 issues, including those challenging vertical agreements and distribution practices. Also expect a harder line on mergers; DOJ is feeling emboldened by its recent successes in those cases. However, I would expect that Section 2 enforcement will continue to lag behind, and that there will not be much uptick of activity in that area until the economy is on firmer footing.

Overall, the new key personnel discussed above, combined with some of the changes implemented during the first term to increase the trial capabilities within the Antitrust Division, suggest that President Obama intends to deliver on the strong antitrust enforcement promises made during his 2008 campaign.