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An Early Look Into Merger Review in the Obama Administration

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After the election, there was no shortage of comments predicting much more aggressive merger review in the Obama Administration. As always, any meaningful conclusions on how things will change must be based on what the new leadership actually does once on the job. The Federal Trade Commission's Jon Leibowitz became Chairman in March 2009, and new Assistant Attorney General Christine Varney took her oath in April, in the midst of a business decline and historically low merger filings. Despite this, the new enforcers already look busy. Both agency heads and their new senior leadership have made enough public statements and enforcement decisions to give business and M&A counselors some indication of how merger enforcement will develop going forward. As an extra bonus, we likely will get more insights into the new Administration's policies soon, given the recent announcement that the FTC and DOJ will hold workshops to consider revising the Horizontal Merger Guidelines, the bible of agency merger review.

FTC: Pedal to the Metal

Since Chairman Leibowitz took over at the FTC a little over six months ago, the agency already has challenged three mergers in court, obtained a consent settlement in four matters, forced the parties to abandon one deal by continuing to investigate, and settled the long-running litigation challenging Whole Foods' acquisition of Wild Oats. Below is a brief summary of these actions.

The FTC's three recent merger challenges in court include:

- *CSL Limited acquisition of Talecris Biotherapeutics*—The FTC filed action to block deal involving plasma-derivative protein therapies; parties immediately abandoned the transaction.

- *Carilion acquisition of Virginia outpatient clinics*—The FTC filed administrative complaint seeking to undo $20 million acquisition; shortly thereafter, Carilion agreed to an order requiring the divestiture of the two clinics.
- *Thoratec acquisition of HeartWare International*—The FTC challenged medical device deal; a day later, the parties abandoned the deal.

So far in the Chairman Leibowitz era, the FTC has obtained four merger consent decrees:

- *BASF acquisition of Ciba Holding*—The FTC required BASF to sell assets related to two high-performance pigments used in the automotive and construction industries.
- *K+S acquisition of Morton International*—The FTC required K+S to divest its bulk-deicing salt assets in Maine and Connecticut.
- *Pfizer's acquisition of Wyeth*—The FTC required Pfizer to divest numerous animal vaccine and pharmaceutical products.
- *Schering-Plough acquisition of Merck*—The FTC required Schering-Plough to divest interest in an animal health joint venture and anti-nausea pharmaceutical product.

Chairman Leibowitz has overseen two other matters worth noting:

- *Endocare/Galil Medical merger*—FTC Commissioners issued conflicting statements after Endocare announced it had abandoned its $16 million merger with Galil because of the agency's continuing investigation.
- *Whole Foods/Wild Oats*—The FTC announced it had reached a consent order settlement with Whole Foods, bringing to an end the ongoing litigation involving the 2007 acquisition of rival Wild Oats; Whole Foods to divest 32 Wild Oats stores.

DOJ: Just Warming Up?

While Christine Varney's Antitrust Division has not brought many merger enforcement actions in the last few months, any upswing in merger filings will allow her to demonstrate her public commitment that DOJ will not "sit on the sidelines."

Three actions at the Division worth noting are:

- *Sapa Holding's acquisition of Indalex*—Division required Sapa to divest facility that manufactures aluminum sheathing used in coaxial cable.
- *Settlement of U.S. v. Microsemi Corp.*—Division settled 2008 lawsuit seeking to block non-reportable acquisition of certain semiconductor assets from Semicoa Inc.; Microsemi will divest all of the assets it acquired.
- *AT&T's acquisition of Centennial*—Division required AT&T to divest wireless mobile phone business in eight markets.

Observations

These enforcement decisions, as well as the agencies' decisions not to take action in other cases, provide some guidance on their future direction.

1. *Both agencies intend more vigorous merger enforcement and are willing to litigate*. Continuing trends from recent years, new agency management has thus far only challenged mergers involving high market shares, although in relatively small markets or industries. But under new management both agencies have suggested merger review should be more strict.

Christine Varney, beginning with her confirmation hearings and first speeches as AAG, has been talking tough on antitrust enforcement. In her first speech on the job, AAG Varney explained that the Division would "push forward" to explore more controversial areas of merger enforcement, including vertical theories where the parties are not competitors in the same market but rather have a potential supplier-customer relationship or operate in adjacent markets. The Division will have the opportunity to explore some of these theories as it looks at several high-profile deals, including Ticketmaster/Live Nation and Microsoft/Yahoo. Varney has built a team with strong prior government experience, including two deputies with significant litigation experience, Molly Boast and Bill Cavanaugh. The new Antitrust Division likely will need that experience if it tries to push the envelope on merger enforcement.

Chairman Leibowitz too has predicted vigorous merger enforcement in his tenure, and he already has led the FTC on a number of merger challenges, including three in court. This is less a change at the Commission, whose pro-enforcement majority turned up the enforcement dial even under the previous admin-

istration. There is no reason to think the Commission will slow down in the months to come.

The FTC and DOJ also have announced that, starting in December, they will together hold a series of public workshops to consider revisions to the Horizontal Merger Guidelines that are used by the agencies to evaluate deals. In her comments on the potential revisions, AAG Varney explained that two reasons for amending the Guidelines are to more accurately describe current agency practice and to capture "advances in research or evolution in best practices." The first is not all that surprising or controversial, as there is broad consensus that in certain ways the Guidelines no longer mirror agency practice and could use refreshing. But the second may provide an opportunity for this Administration to raise the bar for mergers. This could be accomplished by strengthening the Guidelines' presumptions that a merger is anticompetitive or adding new types of evidence that the agencies could use to show a deal is unlawful. Stay tuned.

2. New management is aggressive, but not foolhardy. Proving wrong some early critics who predicted no merger of any consequence had a snowball's chance in this Administration, both agencies have continued to allow mergers that likely would survive a court challenge. Despite statements of aggressive intention, both DOJ and FTC have shown restraint and that they can consider each merger on its facts, even those that appear to involve close calls or were subject to vocal opposition.

The Division recently closed its investigation of Oracle's proposed $7 billion acquisition of Sun Microsystems. According to public reports, the Division explored potential vertical theories and considered whether post-acquisition Oracle would raise the price of Sun's Java product. There were several signs that the Division might continue the investigation, including the high profile of the merger, the fact that the European Commission is closely scrutinizing the deal and the potential for a rematch against Oracle after the failed challenge of the PeopleSoft acquisition in 2004. But just one month after the parties received a second request, the Division closed its investigation. Thus, it appears that the Division will consider its own view of the facts of each case and will close investigations even when there is pressure to do otherwise.

Similarly, the FTC closed its investigation of Arch Coal's acquisition of Rio Tinto's Jacobs Ranch mine in Wyoming. According to public reports, the transaction would have increased the already high concentration among mine companies in the Southern Powder River Basin coal-producing region. With an impact on the country's energy supply and high market shares, the antitrust bar would not have been surprised if the Commission pressed forward with its review of the transaction. The Commission has a history in this market, however, having failed in court to stop Arch Coal from acquiring a mine under very similar facts in 2004. By closing its investigation, the Commission demonstrates that, while it can be aggressive, it will not be foolhardy in challenging transactions where the odds of prevailing in court are low.

3. Worldwide economic distress will not temper antitrust enforcement. Over the last year, a favorite topic at antitrust gatherings has been whether relaxing antitrust rules could help businesses more quickly recover and improve the economic situation. The general conclusion has been, of course, that allowing anticompetitive mergers does not promote healthy markets any more than hindering procompetitive mergers. Predictably, more companies have tried to take advantage of the "failing firm" defense. Although those arguments may have more credibility in the current environment, that does not mean the standards for evaluating mergers will change.

Moreover, the new antitrust enforcers have emphasized the importance of vigorous antitrust enforcement in economic hard times. In her first speech as AAG in May, Christine Varney compared the economic hardship of the 1930s during regulated competitor coordination with the subsequent financial recovery in the 1940s following increased antitrust enforcement, to reinforce the principle that competition and antitrust are good for the economy. "First, there is no adequate substitute for a competitive market, particularly during times of economic distress. Second, vigorous antitrust enforcement must play a significant role in the Government's response to economic crises to ensure that markets remain competitive." Her statements should end speculation that the economic downturn will slow merger enforcement. It will not.

4. Enforcers have more time for small deals and consummated deals. In the weak economy of the last year, most businesses have refrained from new trans-

actions, and the count of Hart-Scott-Rodino Act filings has fallen to new lows. Like the industries they oversee, the antitrust agencies have excess capacity, some of which has been applied to investigations that in busier times would not have gotten much attention. The DOJ, and more so the FTC, have increased their focus on smaller mergers below the HSR filing thresholds and on consummated transactions. The FTC's recent challenge to Carilion's acquisition of two small medical clinics in Roanoke and its investigation of the proposed Endocare/Galil merger highlight this trend. Both were well below the $65.2 million HSR threshold, and the Carilion deal had already been completed. The DOJ's lawsuit to block Microsemi's Semicoa acquisition similarly confirms DOJ's willingness to challenge non-reportable, previously-consummated transactions.

5. *Healthcare and high-tech are targets*. Devoting extra enforcement resources to particular industries is back in fashion, and the new leaders have identified markets they think are not showing enough competition. Chairman Leibowitz has made it clear in speeches and testimony that his number one priority is competition in healthcare, with an even finer emphasis on so-called "reverse payment settlements" involving pharmaceutical patent litigation. This summer's three FTC merger challenges all involved medical products and services, and the FTC appears to have brought DOJ closer to its side in the pharma debate by way of the *Cipro* brief filed in the Second Circuit (opposing reverse payment settlements). Similarly, AAG Varney has announced technology industries as one of her chief targets. The Antitrust Division will take the lead in antitrust enforcement in technology industries, as it has begun with investigations of Google, Microsoft, IBM, and technology company hiring practices.

Conclusion

The agency's enforcement record so far is consistent with the rhetoric, but certainly does not reflect the sea change predicted by some. But the transactions considered by the new team have been fewer in number and those challenged have been relatively small. It remains to be seen how the agencies will treat more significant mergers and acquisitions that, as economic troubles fade, are presented for antitrust review.