Interview with Sharis A. Pozen, Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice

Editor's Note: *Sharis Arnold Pozen was appointed Acting Assistant Attorney General of the Antitrust Division on August 4, 2011, on the eve of Christine Varney's resignation from that post. Ms. Pozen will step down on April 30. This marks a transitional period for the Division as it awaits the confirmation of President Obama's nominee to lead the Division, William J. Baer. In the interim, Joseph Wayland, Deputy Assistant Attorney General, will be Ms. Pozen's successor.*

In this interview with The Antitrust Source*, Ms. Pozen discusses recent changes at the Division, coordination with the Federal Trade Commission, the 2010 Horizontal Merger Guidelines, budgetary concerns, high-tech markets, MFN provisions, remedies, and recent litigation, including the* H&R Block *and* AT&T/T-Mobile *cases.*

Before joining the Antitrust Division as the Chief of Staff and Counsel in February 2009, Ms. Pozen was the Practice Group Director and a partner in Hogan & Hartson's (now Hogan Lovells) Antitrust, Competition and Consumer Protection Group, where she had worked since 1995. Before joining Hogan & Hartson, Ms. Pozen spent five years at the Federal Trade Commission as an Attorney Advisor, the Assistant to the Director of the Bureau of Competition, and a staff attorney.

Editor Hugh Hollman conducted this interview for The Antitrust Source *on March 21, 2012.*

ANTITRUST SOURCE: Let's start with a question about what your priorities have been since assuming the role of Acting AAG in August 2011.

SHARIS POZEN: As set out in Attorney General Holder's statement announcing my appointment as Acting Assistant Attorney General, there was an expectation that I would provide a seamless transition from former AAG Christine Varney. The core of that transition is continuing to robustly and vigorously enforce the antitrust laws. That is my number one priority for both the criminal and civil programs. Substantively, we have focused on what I call the "pocketbook" issues that affect consumers directly, including significant actions in the financial services, technology and telecommunications, health care, and agriculture industries. An additional priority has been our criminal program's auto parts matter. We have taken several actions in this industry, including significant fines and a number of plea agreements with both corporations and individuals.

ANTITRUST SOURCE: Would you tell us how responsibilities at the Division have been reshuffled since you joined the Division and what the Division hopes to accomplish with its new allocation of responsibilities?

POZEN: I arrived at the Division in February 2009, and Christine Varney was confirmed in April 2009. We started looking closely at the Division and determining what if anything could enhance the work here and help make it more efficient and effective. And, as I said at the 2011 ABA Fall Forum, we did make some changes. In particular, we focused on the Office of Operations, which is the heart of the Antitrust Division. We have four great leaders there: our Director of Civil Enforcement, Patty Brink, our Director of Criminal Enforcement, John Terzaken, our Director of Economics, Bob Majure, and our latest addition, Director of Litigation Mark Ryan. Adding a

Litigation Director covering both civil and criminal litigation was a significant change. Mark is a terrific resource for our litigators and will help ensure our litigation capabilities are "institutionalized" across the Division. The enhanced Office of Operations helps the Division work efficiently and effectively, which is increasingly important in an environment of shrinking budgets and resources.

Another significant addition is the Office of General Counsel that Bob Kramer leads. Bob is a Division veteran and previously served as the Director of Operations. He agreed to become the General Counsel and now heads a multifaceted General Counsel's Office. The idea was to have one repository within the Division for issues that had wide-ranging impact, particularly those kinds of legal issues that affect both our criminal and civil program. He works across all parts of the Division and liaises with the Federal Trade Commission's General Counsel's Office. He also has two Assistant General Counsel, one for criminal issues and one for civil issues.

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The General Counsel's Office also manages consent order compliance. Traditionally, that responsibility had been handled by the lawyers in the section that brought the enforcement matter. We moved the coordination of that effort to the General Counsel's Office so that we could more systematically track compliance with all Division decrees. Bob has been serving as General Counsel for almost two years now.

Another change was hiring an experienced litigator as Deputy Assistant Attorney General for litigation. Our first was Bill Cavanaugh, and now Joe Wayland is our DAAG for litigation. Both are members of the American College of Trial Lawyers. It's unusual, not just in the Antitrust Division but in the Department of Justice in general, to have a DAAG who actually litigates and is the lead attorney on a trial team. Joe was our lead attorney on *H&R Block* and on *AT&T*.[1] To have that caliber of trial lawyer working with our staff, many of whom are experienced litigators themselves, is important to our successes.

ANTITRUST SOURCE: We'd like to turn now to the 2010 Horizontal Merger Guidelines. You commented in a speech at last year's ABA Antitrust Fall Forum that the Guidelines are a "building block to create ever more clarity and certainty for businesses." Now that the final Guidelines have been around for more than a year, how do you think they have been received?

POZEN: Let me start with some background. We first set out to determine whether the Guidelines, which hadn't been updated for seventeen years, needed to be revised. We went through a process soliciting views from a wide variety of sources, and it was unanimous we should update them. We worked collaboratively and effectively with the FTC to do that. The revised Guidelines describe what we were already doing at each agency—assessing competitive effects by looking closely at the facts of each transaction and using a number of different economic tools to evaluate those likely effects. We also adjusted the description of HHI thresholds based on our actual practice.

The revised Guidelines have been very well received. One marker is the *H&R Block* decision. Judge Howell wrote an eighty-plus page decision citing extensively to the revised Horizontal Merger Guidelines. In terms of private practitioners, those in the circle of antitrust lawyers who appear regularly before the agencies already know how we conduct our analyses and the range of economic tools we use to analyze competitive effects. But my sense is that the increased transparency in the revised Guidelines has assisted businesses and lawyers who aren't before us reg-

[1] United States v. H&R Block, Inc., Civ. Action No. 11-00948 (BAH), 2011 U.S. Dist. LEXIS 130219 (D.D.C. Nov. 10, 2011); Complaint, United States v. AT&T Inc., Case: 1:11-cv-01560 (D.D.C. Aug. 31, 2011), *available at* http://www.justice.gov/atr/cases/f274600/274613.htm.

ularly. The revised Guidelines are also important on the international front. They are a ready and accessible guide for emerging authorities as to how merger analysis is conducted in the United States. Although there were some concerns expressed regarding unilateral effects and product market definition when we first issued the revised Guidelines, they've been put to rest by our applications of the Guidelines and, more importantly, by court treatment and acceptance of them.

ANTITRUST SOURCE: One of the main features of the 2010 Guidelines is the statement that merger analysis "need not start with market definition." But the Division in every one of its complaints since the release of the 2010 Guidelines has stuck to a traditional market definition analysis. As you said, the court in the *H&R Block* case also extensively quoted the 2010 Guidelines and performed a traditional market analysis. When do you expect the Division or courts will move away from a traditional market analysis?

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POZEN: Carl Shapiro talked about this at the Fall Forum in 2010, and he hit the nail on the head on that question. The idea behind the revisions was providing increased transparency into how we conduct merger analyses and how we go about determining whether a merger violates Section 7 of the Clayton Act. When we go forward and plead a case in court, the Division will continue to plead a product market. That is what courts expect to see, and that's what our complaints include. How we plead a case in court in a complaint so that judges and defendants can understand and apply the law is one thing. How we conduct our analyses internally and evaluate competitive effects is another.

ANTITRUST SOURCE: You also noted in your 2011 Antitrust Fall Forum speech that the Guidelines reflect what has been Division practice for years. Do you see any areas in need of improvement?

POZEN: One can always improve—for example, if we can get better data, if we can get better computers to analyze the data. And new analytical tools may come to light that we need to describe or test. So while we can always improve in our specific application of those principles to any particular matter or add a description of any new tools or analysis we're employing in our review, the Guidelines themselves are solid. One final bit of background on the Guidelines is that we put them out in draft and solicited comments on them. The final version reflects a lot of input from a broad range of stakeholders.

ANTITRUST SOURCE: Shifting from horizontal merger analysis to vertical mergers, the Division has brought a number of high-profile vertical merger cases recently, including Comcast/NBCU, LiveNation/Ticketmaster, and Google/ITA. Yet the DOJ and FTC have not put out official guidelines for vertical mergers since 1984. Is there any consideration being given to issuing updated vertical merger guidelines?

POZEN: Each of those cases presented its own unique facts, of course. Ticketmaster, for instance, had an important horizontal overlap involving ticket sales, which led to structural divestitures. But it also included a conduct remedy aimed at the vertical issues that case presented. In general, as we described in our competitive impact statements in those matters, we approached those cases with a scalpel as opposed to a blunt instrument, seeking to ensure that the playing field remained open yet avoiding overly interfering with the market. We addressed some of those issues in our revised Guide to Merger Remedies, which clarifies that we generally look for struc-

tural remedies in the horizontal merger context but we will not shy away from conduct remedies in the vertical merger context and also provides significant transparency into that analysis.

In terms of your specific question on vertical merger guidelines, I don't see us updating the guidelines any time soon. But you never know what my successors may choose to do, so I don't want to foreclose the possibility. More generally, however, our Merger Remedies Guide and competitive impact statements describe the sort of considerations that drive our analysis of vertical mergers.

ANTITRUST SOURCE: The *Wall Street Journal* and others have recently commented on what they perceive to be escalating tensions between the DOJ and FTC on clearance issues.[2] What are your thoughts on this perception? Is there any consideration being given to reviving the Clearance Agreement from 2002?

POZEN: Those reports are old news, and exaggerated. Our relationship with the FTC is as strong as it ever has been and has been strong since I walked in the door in 2009. Contrast that to what we walked into in 2009. There had been very public disagreements between the Department and the FTC on reverse payments' legal analysis and on the Department's report on Section 2 of the Sherman Act. AAG Varney withdrew the Section 2 report. She noted that tremendous work and effort went into it and that it was a valuable resource, but that it no longer reflected the views of the Department. So that brought the Department and the FTC much closer. In the reverse payments area, we had an opportunity to work with the Solicitor General's Office and the FTC on the *Cipro* case and then again on the *K-Dur* case to develop a position regarding reverse payments that is a rebuttable presumption. The two agencies grew much closer in their analysis on those issues. We also worked on the revised Horizontal Merger Guidelines, which was a great success. And with respect to clearance, virtually all matters are cleared with absolutely no issue because there's a clear division of responsibilities between the two agencies. There are certain industries that are evolving and changing where we both have expertise. But we don't fight about those areas. We work together to ensure the best results for consumers. That was the attitude that Christine Varney championed and I have carried forward.

Also worth noting is we've just inaugurated working sessions with the FTC. We had our first one on February 28. In past eras with different budgets, there were management retreats attended by both FTC and Division officials. We can't do that now in view of today's budgets, so we approached the FTC about working sessions that would allow us to hone our skills together. Jon Leibowitz and I kicked off the February session, and it was a packed house at the FTC conference center and people participated via video conference. We discussed some of the issues involved in government litigation to help hone our skills. I'm hoping that's a legacy that will be carried forward, helping to improve what is already a good working relationship.

ANTITRUST SOURCE: The U.K. is evaluating the possibility of consolidating the Competition Commission and the Office of Fair Trading; France recently merged its competition agencies into a single Autorité de la Concurrence; and under Brazil's new competition law, the former triangular institutional system is being merged into one agency, the Administrative Council for Economic Defence (CADE). What are your views on this trend towards streamlining agencies and their func-

[2] Thomas Catan, *This Takeover Battle Pits Bureaucrat vs. Bureaucrat*, WALL ST. J., Apr. 12, 2011, *available at* http://online.wsj.com/article/SB10001424052748703784004576221100894386950.html?mod=WSJ_hp_MIDDLENexttoWhatsNewsThird.

tions? Do you think there are reasons that may justify a merger of the antitrust responsibilities of the DOJ and the FTC?

POZEN: Some of these issues were raised in my oversight hearing. I will say the same thing here: We live in the system that we live in, and I'm not going to comment on any potential changes. We do the best we can with the system we have.

ANTITRUST SOURCE: The Division was successful in blocking the *H&R Block* merger in court. What, from your perspective, are the key lessons from the case?

POZEN: There has been a trend of defendants seeking to move antitrust cases to their home turf through motions to change venue. One of the first things that the defendants did in *H&R Block* was to try to move this case to Kansas City. We resisted the motion and won. So one important lesson is to anticipate and be prepared to resist forum shopping.

With regard to the merits decision, Judge Beryl Howell's opinion was terrific and incredibly thorough. As others have noted, her eighty-plus page opinion reads like an antitrust treatise. She went through the documents, testimony, and other evidence and carefully applied the law to the specific facts of the case. It's a great precedent that will be guiding merger law for years to come. In terms of litigation, Joe Wayland, our Deputy AAG for litigation, led an excellent team. He's an innovative trial lawyer and approached the case with an interesting, compelling strategy. He believes in telling a clear story, and in *H&R Block* we told that story through the merging parties' own documents and executives, whom we called in our case as hostile witnesses. And his opening and closing statements were extremely persuasive because they made it clear that precedent supported the government's case. He made it very clear to the judge that we were well within the existing jurisprudence of the D.C. Circuit and that liability should be found. And finally I'll again highlight the Judge's extensive reliance on the revised Horizontal Merger Guidelines. Her citations affirmed our view that the revised Guidelines and the increased transparency they bring to the merger review process are a significant contribution. Overall, *H&R Block* was a great victory for the Division—our first litigated merger victory since 2003.

ANTITRUST SOURCE: The Division recently announced that it closed several investigations into the wireless industry, namely Google's acquisition of Motorola Mobility and the acquisitions by Apple, Microsoft, and Research in Motion of certain Nortel patents. The Division's closing letter[3] indicated that the basis for the Division's concern was raising rivals' costs or foreclosure, which are concerns more common under Section 2 than Section 7. Is this an example of an investigation concerned with "exclusionary conduct"—something recognized for the first time as a possible Section 7 concern in the 2010 Merger Guidelines—rather than unilateral or coordinated conduct?

POZEN: Those cases were interesting because they dealt with the intersection of antitrust law and intellectual property. We have a history at the Division of trying to find the right balance between protecting intellectual property rights and making sure intellectual property isn't used to harm competition. Those three transactions were before us at the same time, and we engaged in an

[3] Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd. (Feb. 13, 2012), *available at* http://www.justice.gov/atr/public/press_releases/2012/280190.htm.

extensive review of them, including by our intellectual property experts in our Legal Policy Section. We concluded that the proposed transactions did not violate Section 7 because they did not increase any incentive or ability to harm competition. But we also indicated in our closing statement that we would be monitoring the situation, particularly the ways that standard essential patents are utilized. Regarding your specific question, we analyzed the transactions as vertical mergers, so the revised Horizontal Merger Guidelines were not specifically at issue. Our closing statement provides a detailed explanation of our analysis.

ANTITRUST SOURCE: The closing statement suggests that the Division's decision was based in part on public commitments by Google, Apple, and Microsoft concerning their licensing policies. Why was the Division content to rely on a public commitment, rather than a consent decree in this case?

The antitrust laws as written and interpreted are extraordinarily flexible, and they can be applied effectively to any industry, including technology industries.

POZEN: Competition in the relevant markets is significantly affected by market participants' interactions with standard-setting organizations, as well as associated FRAND and RAND commitments. Microsoft and Apple made commitments not to seek injunctions, and that was important to our analysis. Google also made commitments, which, as we noted in our statement, were not as robust as Apple and Microsoft's commitments. We considered all three letters when we assessed the competitive effects.

ANTITRUST SOURCE: An argument that one often hears and was advanced in the *Microsoft* case was that antitrust is ill-suited to high-technology industries as they undergo rapid change because large market shares are necessary to reward firms for the risks of innovating. What are your thoughts on this view? Was this a consideration in the *AT&T/T-Mobile* case?

POZEN: I strongly disagree with that view. The antitrust laws as written and interpreted are extraordinarily flexible, and they can be applied effectively to any industry, including technology industries. That being said, we are of course mindful of the potential for rapid change in any technology industry we investigate. But we have to make sure that there aren't bottlenecks in these rapidly expanding markets and that the playing field is open and fair. The key is to strike the right balance. To achieve that balance, as I said before, when assessing remedies in this area, we employ a scalpel as opposed to a blunt instrument. Here at the Division we have a group of career lawyers who are experts in analyzing technology markets. They have worked in evolving technology industries covering lots of different sectors, including telecommunications, health care, and software. Our *H&R Block* case, for instance, involved do-it-yourself tax software. Technology is so important to our world and very important to the U.S. economy. Innovation is how our economy grows, and allowing competition to flourish ensures that innovation thrives.

ANTITRUST SOURCE: A number of representatives in Congress wrote a letter to President Obama asking him to approve the AT&T/T-Mobile transaction. They pointed out, among other things, that it would bring jobs back to America from overseas and could create tens of thousands of new jobs for Americans. To what extent does the Division consider factors extraneous to the competitive implications of a transaction?

POZEN: The antitrust laws ensure an open and fair playing field, allowing competition to flourish. Competition drives innovation, and innovation is what drives our economy and creates jobs.

That's how job creation fits into our mission—promoting competition is what leads to a more robust economy.

ANTITRUST SOURCE: In 2010, the Antitrust Division and the Department of Agriculture held a series of workshops to explore competition issues affecting the agricultural sector. What did the Division learn from this process and will there be a report this year about its findings?

POZEN: Those workshops were an incredible undertaking. Our Legal Policy Section and our special advisor for agriculture Mark Tobey worked closely with the USDA and forged a strong partnership in the process of setting up those workshops and going forward after them. The Secretary of Agriculture and the Attorney General were both personally engaged and attended the workshops. Those workshops explored the intersection of agriculture policy and competition. At typical antitrust conferences, the audience is full of antitrust lawyers and business executives. In contrast, our workshops were attended by industry participants—farmers and ranchers. And we provided an open microphone where people could raise issues with us and the USDA. We learned so much about what was going in the industry. We learned a lot about the intersection of the agricultural policy and antitrust. And we carry that with us every day. That learning has, for instance, helped inform our enforcement actions in the agricultural section, including the Dean Foods/Foremost merger and our *George's* action in the Shenandoah Valley. That learning has also helped us in matters where we didn't bring an enforcement action, such as the Perdue/Coleman matter, where we issued a closing statement explaining our approach to the issues. I have an article in *Antitrust* magazine discussing some of these issues.[4] The hearings also strengthened our relationship with USDA.

ANTITRUST SOURCE: MFN clauses appear to have received a lot of attention at the Division, including the Division's challenge to Blue Cross Blue Shield of Michigan's use of MFN clauses in its contract with providers and reports of investigations of health plans' use of similar provisions in other states. What has prompted the recent interest in these contractual provisions?

POZEN: That action grew out of our investigation of Blue Cross Blue Shield of Michigan's attempt to acquire Physicians Health Plan of Mid-Michigan (PHP). The proposed acquisition would have resulted in market shares exceeding 90 percent in certain areas within Michigan. We told the parties that we were going to challenge that transaction, and they abandoned it. In the course of that investigation, we came across the MFNs that Blue Shield was using in Michigan. Our complaint lays out our allegations in detail, but in short we found the MFNs to have distorted competition and stifled the growth of rivals and their potential to undermine Blue Cross's market power. In general, we're very concerned about the lack of entry in markets characterized by high market shares. We made clear at the time we brought the case that we were going to look across the health care industry at these kinds of contractual arrangements, and we continue to do so. That's prompted us to look at MFNs in other industries. It's not that all MFNs lead to competitive harm. But we take a close look at them when employed by firms with significant market power, not only in the health care sector but also in other industries.

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[4] Sharis A. Pozen, *Agriculture and Antitrust: Dispatches and Learning from the Workshops on Competition in Agriculture*, ANTITRUST, Spring 2012, at 8.

ANTITRUST SOURCE: There is relatively little guidance from the courts or either enforcement agency about the circumstances under which MFNs may be anticompetitive. Has the Division by itself or in conjunction with the FTC considered releasing enforcement guidelines for MFNs or other contractual provisions that reference rivals?

POZEN: Our chief economist, Fiona Scott Morton, has addressed some of these issues in her writings and speeches. And our court papers in *Blue Cross* speak for themselves. More generally, we have made it a point of emphasis to issue robust competitive impact statements so the antitrust community gets a clear picture of how we analyze competitive effects. For instance, our closing statement in our Wichita Falls matter—involving, again, a dominant firm in the health care arena using contractual provisions to maintain market power—provides a detailed discussion of our concerns.[5] So guidelines are not the only way that we can explain our enforcement intentions.

These cases highlight another important priority at the Division: vigorous civil non-merger enforcement. In addition to our health care cases, we've brought, for instance, actions against high-tech companies that secretly agreed not to recruit the other's employees. We're also in active litigation against American Express regarding contractual provisions that we believe harm competition. We settled our case against MasterCard and Visa involving these contractual rules.[6] So we've been active in the civil non-merger area, focusing on contractual arrangements that stifle entry.

ANTITRUST SOURCE: Earlier, you mentioned budget austerity. Last year, the Division announced a proposal to close four regional offices. Could you give us an update on where this stands? More generally, are you concerned about the current austere budgetary environment affecting the Antitrust Division's mission?

POZEN: We work hard to ensure that we use the money in our budget efficiently and effectively. I'll briefly mention our criminal program. Last year we had about sixty cases and this year we have about ninety. In the first six months of this year, we've collected close to a billion dollars in criminal fines, and that will just keep going up. We've spent most of this interview talking about our civil program, and, as I've noted, our criminal program is extremely active too. With regard to office closures, the process is ongoing. We have a notification process in place with Congress, and that's all I have to report for now.

ANTITRUST SOURCE: You have said that you plan to step down April 30. What current programs or initiatives would you like your successor to continue or emphasize?

POZEN: I'll leave that to my successor, Joe Wayland. I have every faith that he and the Division will continue to vigorously enforce the antitrust law and continue the efforts that we have started in all areas. We have a fabulous team here, and we have a fabulous career staff who are committed to protecting competition and consumers. I expect another seamless transition.

ANTITRUST SOURCE: Thank you for talking with us today about what is happening at the Antitrust Division and in the world of antitrust. ●

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[5] Competitive Impact Statement, United States v. United Regional Health Care System, Civ. No. 7:11-cv-00030 (N.D. Tex. Feb. 25, 2011), *available at* http://www.justice.gov/atr/cases/f267600/267653.pdf.

[6] United States v. American Express Co., No. 10-CV-4496 NGG RE, 2011 WL 2974094 (E.D.N.Y. Jul. 20, 2011).