

Authored by Mimi D. Hu

JANUARY 2009

ANTITRUST & COMPETITION  
GROUP

DENVER

Bobbee J. Musgrave, Co-Chair  
bobbee.musgrave@hro.com

Tracy L. Ashmore  
tracy.ashmore@hro.com

Michael J. Hofmann  
michael.hofmann@hro.com

Steven J. Perfrement  
steven.perfrement@hro.com

B. Lawrence Theis  
larry.theis@hro.com

SALT LAKE CITY

Jay D. Gurmankin  
jay.gurmankin@hro.com

SAN FRANCISCO

Jesse W. Markham, Jr., Co-Chair  
jesse.markham@hro.com

Adam Brezine  
adam.brezine@hro.com

Meryl L. Macklin  
meryl.macklin@hro.com

Robert L. Stolebarger  
robert.stolebarger@hro.com

## Antitrust Year-End Review – U.S.

### What to Expect From Antitrust Enforcement Under the Obama Administration: Conversion or Reinvigoration?

With the new political reality of President-elect Obama and expansion of the Democratic majorities in the 111th Congress, businesses are gearing up for more rigorous antitrust enforcement. The Wall Street Journal reported that even before the polls closed, the prospect of a Democratic administration rushed several well-publicized mergers and acquisitions to the finish line, most noticeably the speedily wrapped up \$2.6 billion deal between Delta Air Lines and Northwest Airlines.<sup>1</sup>

Obama promised “to take seriously our responsibilities to enforce the antitrust laws so that all Americans benefit from a growing and healthy competitive free-market economy,”<sup>2</sup> yet the burden of stimulating this depressed economy is also high on Obama’s agenda. Balancing consumer protection with the danger of stifling innovation or interfering with the market, how will Obama’s “hard-nosed idealism” approach antitrust regulations? This advisory considers some of the broad implications of the new administration in antitrust, outlines the expected changes in the Department of Justice (DOJ) and the Federal Trade Commission (FTC), and forecasts implications in some specific industries.

#### Antitrust Under the Bush Administration

The Bush Administration has a controversial record of antitrust enforcement activity, which has been regarded in some circles as “the weakest record of antitrust enforcement of any administration in the last half century.”<sup>3</sup> The statistics are mixed. The FTC and the DOJ only challenged 30 mergers in the last 5 years, compared to more than 70 challenges per year between 1994 and 2000.<sup>4</sup> The Bush Justice Department did not bring a single monopolization case in the past seven years.<sup>5</sup> The Antitrust Division clearly skewed its efforts toward hard core criminal enforcement initiatives, which have persisted through several recent administrations.<sup>6</sup> The FTC is politically somewhat insulated, and has been regarded as more aggressive than the Bush Antitrust Division, particularly with regard to its initiatives in the pharmaceutical industry where it continues to do battle with brand name producers’ patent strategies that stifle generic entry.

It is almost a certainty that the Obama Antitrust Division will take a more aggressive stance on mergers and monopoly conduct, while the FTC will not see much in the way of change. It is also likely that the two federal agencies will coordinate more closely and that federal antitrust policy will re-converge into greater consistency than in recent years.

<sup>1</sup> Heidi N. Moore, “Don’t Freak Out” About Mergers Under Obama, Wall St. J., Nov. 10, 2008.

<sup>2</sup> See Barack Obama, “Statement of Senator Barack Obama for the American Antitrust Institute,” (2007) available at [http://www.antitrustinstitute.org/archives/files/aaipresidential%20campaign%20-%20Obama%209-07\\_092720071759.pdf](http://www.antitrustinstitute.org/archives/files/aaipresidential%20campaign%20-%20Obama%209-07_092720071759.pdf)

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Neal R. Stoll and Shepard Goldfein, *President Obama’s Centrist Antitrust Enforcement*, New York Law Journal, Nov. 19, 2008.



Holme Roberts & Owen LLP  
Attorneys at Law

## Obama's Appointments

Obama's most critical antitrust appointment will be the Assistant Attorney General for Antitrust, who will report to the Attorney General, presumptively Eric Holder. As is customary, Bush-appointee Thomas Barnett resigned soon after Obama won the election.<sup>7</sup>

The FTC's five commissioners serve for staggered terms of seven years, and only three commissioners can be from the President's party.<sup>8</sup> Obama will appoint two commissioners by fall of 2009, including a new Chair. Commissioners Pamela Jones Harbour (an independent), Jon Leibowitz (a Democrat), and J. Thomas Rosch (a Republican) will remain. Given their stated commitments to vigorous enforcement, it is quite likely that the overall approach of the FTC will not change very much, although it may be somewhat invigorated by new liberal appointees.

## Single Firm Conduct and Monopolization

Probably the main impact of the new administration will be a reinvigoration of enforcement of monopoly conduct prohibitions under Section 2 of the Sherman Act. The Bush Antitrust Division issued a controversial report on enforcement policy as to single-firm conduct in September 2008.<sup>9</sup> The report emphasized potential harmful effects from antitrust enforcement rather than from business misconduct, sparking considerable controversy. Specifically, the report assessed exclusive-dealing, tying, and unilateral refusals to deal with rivals, traditionally viewed with varying degrees of concern under antitrust law, as potentially (and often) efficient and procompetitive practices. The DOJ report also saw a very limited role for policing predatory pricing and bundling discounts. Taken as a whole, the focus of the report seemed more concerned with enforcement abuses than with business conduct.<sup>10</sup>

The September Report resulted from joint activity by the two federal agencies, and it was long anticipated that both would join in its issuance. Instead, the DOJ issued a separate report and drew unusually sharp criticism from the FTC. The FTC "does not endorse the Department's report," with several commissioners calling it "a blueprint for radically weakened enforcement of Section 2 of the Sherman Act."<sup>11</sup> The FTC concluded its objections by promising that it "stands ready to fill any Sherman Act enforcement void that might be created if the Department actually implements the policy decisions expressed in its report."<sup>12</sup>

While the report may influence some federal judges who already agree with its basic outlines, it is quite possible that the Obama Antitrust Division will retract it or at least distance itself from some of its more anti-enforcement implications. Obama reacted to the DOJ report by stating that the Justice Department's position reflected the need for a more aggressive approach to antitrust enforcement.<sup>13</sup>

Current economic conditions coupled with enhanced enforcement of monopolization prohibitions will combine to create a challenging environment for dominant firms. For example, disappearing profits naturally induce all sorts of aggressive pricing strategies, such as loss leaders, loyalty discounts, and price bundling. These are among the sorts of conduct that will undergo more strenuous review under the new administration.

<sup>7</sup> See Press Release, U.S. Dept. of Justice, *Statement of Attorney General Michael B. Mukasey on the Resignation of Assistant Attorney General Thomas O. Barnett* (Nov. 7, 2008) available at <http://www.usdoj.gov/opa/pr/2008/November/08-ag-987.html>

<sup>8</sup> Moore, *supra* note 1.

<sup>9</sup> Eric Lichtblau, *Antitrust Document Exposes Rift*, N.Y. Times, Sept. 9, 2008.

<sup>10</sup> *Id.*

<sup>11</sup> *Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice*, Sept. 9, 2008 available at <http://www.ftc.gov/os/2008/09/080908section2stmt.pdf>

<sup>12</sup> *Id.*

<sup>13</sup> Lichtblau, *supra* note 9.

## Merger and Acquisition Reviews

Antitrust policy toward mergers may momentarily be of little consequence since the business climate is not conducive to M&A activity. However, as stock prices tumble, bargains will eventually be pursued. Strategic deals that enhance market shares will not receive the same benign attention from the Obama Administration, and the FTC will continue more or less as it has done. (The FTC challenged 22 cases in the past year.)<sup>14</sup> Obama's DOJ will join with the FTC in taking a more active approach to merger review. Merger review in the United States in any case is generally centrist, and recently the agencies have invited merging parties to advocate "efficiencies" defenses that in earlier years would have been rejected out of hand. There are at least some suggestions of a continuation of the U.S. centrist approach going forward. Notably, for example, Obama has promised that his administration will move quickly to clear mergers that do not pose a competitive threat to consumers.<sup>15</sup> Multinational deals will need to clear more robust antitrust hurdles in other jurisdictions, including China, whose 2008 Antimonopoly Law is now seeing enforcement by the Ministry of Commerce (generally known as MOFCOM). MOFCOM just recently cleared the INBev-AnheuserBusch deal under terms requiring significant concessions and divestitures, and has yet to clear the Coca-Cola Company's proposed acquisition of China's Huiyuan Juice Group which was filed for clearance last September.

## Obama's "Key Industries"

Obama has named several key industries that his administration will carefully look at to ensure that the benefits of competition are fully realized by consumers.<sup>16</sup> Obama specifically promised that he would promote competition from generic drug manufacturers by preventing anticompetitive agreements, for example, reverse payment agreements, from artificially retarding the entry of generic pharmaceuticals onto the market.<sup>17</sup> This will align the Justice Department with the FTC for the first time in years on this issue. Further, Obama also identified telecom/Internet providers, media companies, energy companies, health care providers and air delivery services as industries where consolidation under Bush may have harmed consumers.<sup>18</sup> Firms in these industries could expect more oversight.

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<sup>14</sup> *Id.*

<sup>15</sup> Obama, *supra* note 2.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Stoll and Goldfein, *supra* note 6.

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