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Antitrust in the Trump Administration: New Landscape, Still Enforcing

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▸ **Merger challenges dominate the headlines. What do they mean?**

A YEAR INTO PRESIDENT DONALD J. TRUMP'S TERM, the administration's antitrust enforcement agenda has begun to take shape, with some moves that suggest more aggressive enforcement than is typically expected in a Republican administration. At the same time, congressional Democrats have pushed for increased enforcement as part of their "Better Deal" platform. And as antitrust enforcement has taken political center stage, even late-night comedian John Oliver has weighed in.

All this rhetoric has set the tone for near-term antitrust enforcement, and 2017 provides a few lessons learned and issues to watch.

Who Is in Charge?

Two government agencies – the Antitrust Division of the Department of Justice and the Federal Trade Commission – have antitrust authority under federal law. The Antitrust Division is led by Assistant Attorney General Makan Delrahim, a former DOJ official from the Bush administration who was appointed by President Trump. The FTC, an independent, bipartisan, five-person commission, currently has only two commissioners: Republican Maureen Ohlhausen, who is the interim acting chair, and Democrat Terrell McSweeny. Republican Joseph Simons has been identified as President Trump's pick for the permanent chair, and another Republican (Noah Phillips) and a Democrat (Rohit Chopra) have also been named. All require Senate confirmation. This means that for now, all FTC actions require a unanimous vote of the two sitting commissioners.

Antitrust enforcement is considered bipartisan, with enforcement decisions made on the basis of market facts, economics and the law. As a result, antitrust enforcement generally does not experience dramatic swings in either direction. Still, it is an area to watch.

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Post-Transaction Merger Challenges

Under the Hart-Scott-Rodino Antitrust Improvements Act, transactions that exceed certain thresholds must be reported to the FTC and the DOJ before they may be consummated. Typically, once that waiting period has expired and parties close their transaction, the antitrust review is over. But not always.

Last September, the DOJ filed a complaint in the U.S. District Court for the District of Delaware challenging Parker Hannifin Corp.'s $4.3 billion acquisition of CLARCOR Inc. The merger had already received HSR clearance and been completed.

In its complaint, the DOJ alleged the transaction would eliminate head-to-head competition between the only two domestic manufacturers of qualified aviation fuel filtration systems and would result in increased prices, longer delivery times and reduced innovation. While the DOJ had passed on its first opportunity to investigate the transaction, a customer complaint caused it to take a closer look. Ultimately, the parties settled with the DOJ and agreed to divest the relevant line of business, but the case is a reminder that consummation does not signal the review's conclusion. This is true even when a transaction does not have to be reported to the agencies because it does not meet the HSR thresholds. The challenge also serves as a reminder that the size of an affected market does not matter. Even where the value of a particular business line is very small, the agencies will seek action to remedy harm to competition and consumers.

Vertical Mergers, Behavioral Conditions, the DOJ's Challenge to AT&T-Time Warner

Among Delrahim's earliest decisions at the DOJ was to file a complaint challenging AT&T's acquisition of Time Warner. This action presents a number of interesting

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questions that set the stage for antitrust enforcement in the Trump administration.

In its challenge, the DOJ alleges that AT&T, a distributor of content, will have the incentive to withhold Time Warner's content from its video distribution competitors. This is considered a "vertical" transaction because it involves companies at different levels of the supply chain. Vertical mergers raise antitrust concerns if a supplier has the incentive and ability to withhold or raise the cost of the acquired input from its downstream competitors.

The DOJ's action launched what is expected to be a landmark case regardless of the outcome. In recent years, concerns about vertical mergers have been resolved through consent decrees, which enable the agencies to resolve the competitive harm while allowing the companies to merge and achieve the benefits of the transaction – and not through a court decision. For example, when Comcast acquired NBCUniversal, the DOJ considered the threat of Comcast's withholding NBCUniversal's content from rival distribution competitors. Both the DOJ and the Federal Communications Commission cleared the deal subject to certain behavioral conditions, including requiring Comcast to submit to binding arbitration if an agreement on pricing could not be reached, as well as providing online distributors, such as Netflix, with "comparable programming" to that offered to non-online distributors.

Delrahim has taken a different approach. In a recent speech, he described antitrust as "inherently deregulatory" and stated that the "goal in remedying unlawful transactions should be to let the competitive process play out."

While the outcome of the AT&T challenge remains uncertain, the DOJ has made clear that there is little room for parties to propose settlements to address competition concerns unless that resolution involves a divestiture of a line of business.

Focus on HR Practices on Antitrust Enforcement

The antitrust agencies also consider anticompetitive conduct, and DOJ leadership and Congress have made it clear that they are focused on anticompetitive conduct in the labor market.

In late 2016, the DOJ and the FTC published guidance for human resources professionals that provides antitrust rules in the employment context and addresses antitrust concerns about "no-poaching" agreements. "No-poach" refers to agreements among competing firms to refuse to solicit or hire the other company's employees. The concerns are not new. In 2010, following lengthy investigations, the DOJ entered into consent decrees with several high-profile companies, including Adobe, Apple, eBay, Google, Intel, Intuit, LucasFilm and Pixar, to resolve claims that senior executives had agreed not to "poach" employees of other tech companies.

Pursuit of violations has not been limited to the technology industry. In 1995, the FTC brought a case against the Council of Fashion Designers of America, a trade association, and 7th on Sixth (now New York Fashion Week), an organization that produces two major fashion shows each year, for entering into an oral and written agreement to reduce modeling fees by demanding that major modeling agencies accept prices mutually agreed to by both organizations. The case concluded with a consent judgment, with the FTC making clear that antitrust laws prohibiting price fixing apply to the fashion industry just as they would to any industry or service area.

In the recent HR guidance, the agencies also made clear that they would prosecute these cases criminally. While wage fixing falls within the scope of the criminal antitrust laws, the agencies had previously challenged no-poach agreements civilly. DOJ officials have said this continues to be an area of focus and that they have a number of ongoing investigations into no-poach agreements.

State Attorneys General

State attorneys general often partner with federal authorities in challenges to mergers and enforcement, but they also have the authority to address their state- or AG-specific competition policy concerns – and, of course, are not immune to calls for increased antitrust enforcement.

The California attorney general's case against Valero Plains is a recent example. Valero Plains, a subsidiary of Valero Energy Corp., sought to acquire petroleum storage terminals in the San Francisco Bay Area that were owned by Plains All American Pipeline LP. Although the FTC had already approved the sale, the California attorney general brought a case attempting to block the transaction, arguing that it would harm competition by allowing Valero to control the "last independently operated gathering line" in California. The district judge declined to grant an injunction that would block the deal, but expressed skepticism surrounding the merger. Ultimately, the parties abandoned the transaction, citing the uncertainty and expense associated with the lengthy trial that would have ensued. ■

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