

Antitrust Enforcement in the Trump Administration

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There has been a lot of speculation about what impact the election of Donald J. Trump will have on antitrust enforcement over the next four to eight years. Some commenters have suggested that Trump's rhetoric on the campaign trail signals dramatic changes. Candidate Trump spoke of blocking AT&T Inc.'s proposed acquisition of Time Warner Inc. He also suggested that online retailer Amazon, Inc. had a "huge antitrust problem." As a result, it has been argued that Trump, the populist, will increase antitrust enforcement. Others suggest that, in light of his Republican-party affiliation and pro-business stance, Trump may be inclined to let the market decide and not have government interfere in the competitive process. It would be unwise to assume tougher antitrust enforcement based on comments during the campaign or more lenient antitrust enforcement based on the conservative make-up of the cabinet or transition team members.

When then-Senator Barack Obama was starting his run for president, he pledged to reinvigorate antitrust enforcement. Eight years later, some ponder whether there was such a dramatic shift from the prior Administration of President George W. Bush. It can be argued that most of the enforcement actions brought by the Obama Administration also would have been brought by the antitrust agencies under Bush 43.

The challenge for antitrust practitioners now and in the coming days is to identify which deals and which conduct will get a pass from a new administration and which will be challenged. But it is still important to remember that, while some

change is inevitable, there will be significant continuity.

Continuity. When new leadership arrives at the antitrust agencies, these enforcers often speak of continuity. Not long after taking the helm of the FTC in 2009, FTC Chairman Jon Leibowitz spoke of continuity at the Commission after a change in Administration. He identified continuity in the staff and continuity in the bi-partisan approach taken by the Commission. He would later note, “although our priorities may change from time to time, there is a powerful continuity in what we do.”

At the Department of Justice, Bill Baer, former head of the Antitrust Division and current Principal Deputy Associate Attorney General, also noted the “important continuity between the efforts of our predecessors, both Republican and Democratic, and the Antitrust Division’s current enforcement efforts and policies.” He added, “Political affiliation means little in this job.”

There is real evidence of continuity at play, particularly at the FTC. FTC Commissioner Maureen K. Ohlhausen attributed the FTC’s success before the U.S. Supreme Court in the *North Carolina Dental* decision regarding state action immunity to continuity. Another example is the long-running and ongoing push at the FTC to eliminate so-called “pay-for-delay” settlement tactics used in the pharmaceutical industry.

So what areas of antitrust enforcement are likely to see continuity in the Trump Administration? There are some tea leaves that we can read.

Monopolization. Continuity is likely with respect to federal monopolization cases. Enforcement of Section 2 of the Sherman Act has remained steady over the past two administrations, particularly at the Justice Department based on workload statistics. While high-profile unilateral conduct cases, such as the Microsoft case of the 1990s, are well-known, they are few and far between.

Although the Department of Justice under George W. Bush did not bring any monopolization cases, the Obama Administration brought only a couple. Also, the Bush Administration continued pursuing—for the better part of a decade—a case brought during President Clinton’s second term against Dentsply International over its restrictive dealing arrangements.

When Christine Varney arrived at the Antitrust Division in April 2009, she soon made news by withdrawing the agency's September 2008 report, entitled "Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act," which examined how specific types of single-firm conduct violate Section 2 of the Sherman Act. The move was said to signal a shift in philosophy on Section 2 enforcement. However, it did not open the floodgates for monopolization suits. It wasn't until 2011 that the administration announced its first traditional Section 2 case against United Regional Health Care System of Wichita Falls—a dominant health care provider. In November 2015, a Section 2 theory was used to block a proposed transaction between United Continental Holdings Inc. and Delta Air Lines Inc. to acquire takeoff and landing slots at Newark Airport where United already had a dominant position.

Despite the reversal of the Section 2 report, the Justice Department was and still is faced with Section 2 precedent, which is not favorable to an expansive reading of the statute. Thus, resources have been devoted elsewhere.

On the campaign trail, Trump created quite a stir when he suggested that Amazon and Jeff Bezos, the company's founder and owner of the *Washington Post*—had a "huge antitrust problem." Apparently, Trump was concerned with the online retailer's power, as well as the tactics of the *Post*.

Some commenters have interpreted this to mean that the Trump Administration will go after Amazon or take a big-is-bad approach to antitrust enforcement. In other words, they suggest that the antitrust agencies will reinvigorate Sherman Act, Section 2 enforcement.

While Amazon is apparently the dominant Internet retailer, most antitrust practitioners would agree that it is very unlikely that the company will face a federal monopolization action. Trump did not provide any examples of anticompetitive or exclusionary conduct to support a monopolization case. Moreover, with the agencies' attention focused on other types of conduct, a reinvigoration of monopolization enforcement under a Trump Administration is unlikely.

The FTC has been somewhat more active in challenging monopolization in recent years, but these cases still reflect a small proportion of the enforcement efforts. Of course, it remains to be seen whether the right case will present itself in the

coming years.

Criminal enforcement. Another area where there has been substantial continuity is criminal enforcement. Criminal antitrust enforcement is relatively non-partisan. Bid rigging and price fixing are universally scorned by Democrats and Republicans. Moreover, multi-year investigations cut across administrations. In addition, crackdowns on some of the particularly local cartel conduct, such as the foreclosure auction bid rigging, have popular appeal and seem to align with Trump's populist persona.

There could be a slight wrinkle for some global cartel enforcement efforts, which generate the largest fines, resulting from the new administration. For instance, the antitrust investigation in the auto parts industry is said to have generated criminal fines of nearly \$2.9 billion—the largest fines in the Antitrust Division's history.

The current acting antitrust chief, Renata B. Hesse, called increased international cooperation in antitrust investigations a priority of the Obama Administration. Trump's nationalist rhetoric, on the other hand, could signal a resistance to sharing information with foreign counterparts and working with multinational organizations.

Many of the largest investigations involve international cooperation between the Justice Department and foreign counterparts. This is true for merger investigations, as well. An isolationist approach in the administration could hinder the necessary international cooperation for criminal and merger enforcement.

Acquisitions and mergers. The future of merger enforcement also has been questioned in light of Trump's comments on AT&T's pending acquisition of Time Warner. Trump pledged not to approve this vertical merger combining one of the nation's largest phone and Internet providers with a media entertainment giant, saying it involves putting "too much concentration of power in the hands of too few."

But it might not be worth reading too much into Trump's comments. There have been press reports that Trump's transition team has already backed away from these assertions.

Currently, the world is in the midst of a significant merger wave, and if the trend continues, the antitrust agencies under Trump will likely be faced with a number of

high-profile mergers and acquisitions that raise concerns.

In June 2016, former Antitrust Chief Bill Baer commented on the size and complexity of the transactions and the Justice Department's active enforcement record. "In the seven-plus years of the Obama Administration, we successfully challenged or secured the abandonment of 39 mergers—a dramatic increase from the 16 successful challenges or abandonments during the eight years of the previous administration," Baer added.

While the increase in enforcement could be explained to a certain extent by the boldness of merger parties in recent years, the willingness of the FTC and Antitrust Division to go to court to challenge mergers and acquisitions is apparent. Generally, most deals are dropped in the face of a serious challenge or are restructured to reach a settlement with the agencies. But in recent years, court battles over mergers have become more common. As 2016 came to a close, the Justice Department was in the middle of challenging two mergers that would have reduced the country's "big five" health insurers to three.

The FTC also has been actively fighting mergers in court. In addition to recent challenges to hospital mergers in Illinois and Pennsylvania, among others, the agency successfully blocked the proposed merger between Sysco and US Foods, the two largest broadline foodservice distributors in the United State and Staples Inc.'s \$6.3 billion merger with Office Depot, Inc.

The future of merger enforcement at the FTC and Antitrust Division in the Trump Administration might be evident from how the new leadership will handle the AT&T-Time Warner deal and the pending merger challenges involving health insurers if they are not resolved before the transition. Decisions on these deals could signal continuity or a change in priorities.

Agency personnel. The most obvious change at the agency in the coming months will be new leadership. There are only three members currently sitting on the five-member Commission, and only one—Maureen K. Ohlhausen—is a Republican. As a result, two new Trump appointments could tip the balance at the Commission. Moreover, it is likely that President Trump would replace Edith Ramirez, the current chairwoman. He could name Ohlhausen as chair. In February 2009, President Obama named Jon D. Leibowitz—the sole Democrat on the

Commission at the time—to serve as chairman of the agency. Leibowitz replaced William E. Kovacic who continued as a commissioner for another two years.

Changes at the agency will not happen overnight, however. As was the case eight years ago, the agency's head could be changed with little interference from Congress. However, nominations for new commissioners could face delays in the Senate confirmation process. Recess appointments were utilized during the President George W. Bush administration to add commissioners. For instance, Deborah Platt Majoras was a recess appointment, who served as chair of the agency and was eventually confirmed by the Senate.

Who Trump will nominate to the FTC is an open question. Former Commissioner Joshua Wright has been named to Trump's transition team. Wright served a little over two years on the Commission. During that time, he recused himself from matters pertaining to Google because some of his research had been funded indirectly by Google while in academia. If Wright, a lawyer and economist, were to be renamed to the Commission, he would likely push the agency towards less intervention.

Trump's announcement that he intends to nominate Senator Jeff Sessions (R-Ala.) to serve as CAPS attorney general does not shed much light on antitrust enforcement at the Department of Justice. Although Sessions is a senior member of the Senate's Judiciary Committee, which oversees antitrust, he does not have a detailed record on its enforcement. Details of an assistant attorney general for antitrust will likely come after the inauguration. While there is no reason to expect that Trump will follow Obama's schedule for staffing the agencies, Trump may move as quickly as Obama did. Just two days after his inauguration, Obama announced his intention to nominate Christine Varney, a former FTC commissioner, to serve as assistant attorney general for antitrust.

In any event, the agency staff members who will be reviewing deals and working with practitioners to work out settlements or negotiate plea agreements will likely remain the same. There will be new top-level leadership; however, the career staff at both agencies will stay on. This will bring a certain level of continuity.

Agency procedure. Lastly, there is a chance that agency procedures could change under a Trump Administration. There has been a push among Republican lawmakers to bring "reform" to the FTC, and the legislation will likely be

reintroduced in the 115th Congress.

One measure that could significantly impact merger enforcement at the FTC is the proposed “Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015” or “SMARTER Act” ([H.R. 2745](#)). The legislation, which passed the House in March 2016, seeks to eliminate differences in the procedures used by the FTC and the Department of Justice Antitrust Division in challenging unconsummated acquisitions and mergers. The measure stalled in the Senate and was opposed by the Obama Administration. With a Republican majority in the House of Representatives and the Senate, the measure could make its way to the desk of President Trump, who may be more open to changing FTC merger procedures that businesses claim are harmful.

Many who made predictions about Donald Trump have been proven wrong. One could argue that all bets are off. The best approach may be to keep a close eye on his picks to fill vacancies at the FTC and Antitrust Division. Then, practitioners should carefully monitor the speeches and actions of these leaders to determine the direction of antitrust enforcement under the Trump Administration. There likely will be continuity, just don’t bet on it.

A new white paper produced by WK editorial staff considers the significant legal and regulatory changes in antitrust and other practice areas in light of the November 8 election.