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Senate Judiciary Committee Considers Antitrust Chief Nomination

Jeffrey May (Wolters Kluwer) · Tuesday, July 31st, 2012

Last week, the Senate Judiciary Committee held a [hearing](#) to consider the nomination of William Baer to serve as Assistant Attorney General in charge of the Department of Justice Antitrust Division. Baer was nominated in February, shortly after then Acting Assistant Attorney General Sharis Pozen announced her intention to resign effective as of April 30.

“Antitrust enforcement is best when it has a sound analytical foundation and when it focuses on behavior that poses serious risk of economic harm to the American people,” said Baer in his opening remarks at the July 26 hearing. He pledged to work with the Antitrust Division’s staff to pursue enforcement policies “that are vigorous, that are effective, and that are fair.” At the hearing, Baer was surrounded by family as well as current and past enforcers, including FTC Chairman Jon Leibowitz, former Assistant Attorney General Jim Rill, and former FTC Chairman Timothy Muris.

Senator Herb Kohl (Wisconsin), who introduced the nominee and who serves as chairman of the Judiciary Committee’s antitrust subcommittee, expressed his confidence in Baer’s ability to represent the interests of the American consumer at the helm of the Antitrust Division. The senator noted Baer’s experience leading Arnold & Porter’s antitrust practice group and serving as a director of the FTC Bureau of Competition between 1995 and 1999.

Kohl [noted](#) some of the transactions currently under review by the Antitrust Division, including the agreements between Verizon and four of the nation’s largest cable TV companies, and in key industries as diverse as the Internet and high tech, media and book publishing, aviation, and agriculture. He also expressed concerns about Justice Department decision to close four of the Antitrust Division’s seven field offices. He asked the nominee about his views on the impact of the closures on the detection and antitrust enforcement directed against local conspiracies.

Baer said that he appreciates the importance of local and regional antitrust enforcement issues and the need for a plan to deal with those issues. He said that having a plan in place would be a top priority for him if confirmed.

“The government has a proper role in ensuring that businesses compete fairly and do not collude,” said Senator Mike Lee (Utah), ranking member of the Judiciary Committee’s antitrust subcommittee, in an [opening statement](#). “Such enforcement can forestall the need for more burdensome regulatory structures that impose greater costs on our economy and society. But it is improper for antitrust enforcers to pick winners and losers in the marketplace or to interfere with

private enterprise where robust market forces are in operation,” he warned. Lee questioned Baer on his views about the role of economic analysis and consumer welfare analysis in antitrust enforcement.

“I think sound economic analysis is fundamental to good antitrust enforcement,” said Baer. “That means being able to articulate a theory of harm that has occurred from past behavior or is likely to occur from future behavior.” Baer also warned against imposing a statutory deadline for non-merger investigations on the antitrust agencies and said that he thought that there were safeguards in place to avoid overzealous enforcement.

Federal Legislation

With respect to antitrust legislation pending in Congress, Baer said that he supported efforts to restore the rule of *per se* illegality for minimum resale price maintenance (RPM). Under the five-to-four decision of the U.S. Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 2007-1 Trade Cases ¶75,753, RPM agreements are to be judged under the rule of reason. Baer expressed his view that the *Leegin* decision created an unfortunate dichotomy between federal law and state law on the legality of RPM agreements. “I would have kept *Dr. Miles*,” said Baer.

Baer did not take a position on two other pieces of legislation championed by Kohl. The nominee said that he would need to study the issue of repealing the antitrust exemption enjoyed by freight railroads and better understand the administration’s position on the measure.

Baer also would not commit to support the senator’s NOPEC bill. That proposal would permit the Department of Justice to bring actions against members of the Organization of Petroleum Exporting Countries (OPEC) for collusive practices in setting the price or limiting the production of oil. Baer was not sure what the right solution for high gas prices was, but said that he would need to work closely with the administration to find that solution.

Despite Baer’s reluctance to offer his complete support for Kohl’s antitrust legislative agenda, the antitrust subcommittee chairman said that he had “very high hopes for [Baer’s] ability to perform at the highest level as head of the Antitrust Division.”

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