

Increased Antitrust Enforcement Under the Obama Administration: **A Campaign Promise Fulfilled**

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Promises, Promises

- On the campaign trail, Obama promises that if elected, antitrust enforcement will increase
 - "We are going to have an antitrust division in the Justice Department that actually believes in antitrust law. We haven't had that for the last seven, eight years."
 - "As president, Obama and Biden will reinvigorate antitrust enforcement, which is how we ensure that capitalism works for consumers."

Promises, Promises, cont.

- Once in office, appoints aggressive regulators to head FTC and DOJ
- Takes steps to “undo” years of what is perceived as lax antitrust enforcement, policy
 - FTC/DOJ revoke monopolization report
- Still, there was some skepticism in first two years

FTC/DOJ Joint Activity

- Revision of horizontal merger guidelines
 - Moves to more flexible, fact-based approach
 - Deemphasizes market definition
 - Raises thresholds
 - Signaled increased unilateral effects scrutiny of industries with differentiated products, potential for innovation, such as pharma
 - **Net effect is more agency latitude**
- Concentrated activity in certain industries, e.g. health care realm

Numbers Show Incremental Uptick in Enforcement

- Merger filings decreased due to economy; have rebounded by **63%**
 - 1,726 in 2008, 716 in 2009, 1,166 in 2010
 - Further increase expected for 2011
- Chances of getting a second request increased by 50%, **but still only 4.2%**
- Odds of additional enforcement step (e.g., litigation) **remained the same, 77%**
- “Under the radar” enforcement up

New Enforcement Themes: Unilateral Effects

- Unilateral effects is concerned with the ability of post-merger firms to raise prices because of the removal of competitive constraints
 - Can be pronounced when two significant competitors merge in a market with only a few other competitors
 - Heightened concern where good is highly substitutable; the more highly substitutable, the higher the concern

New Enforcement Themes, cont.: Relaxed Standard for Showing Coordinated Effects

- Agency may pursue action where relevant market
 - Shows signs of vulnerability to coordinated conduct and
 - There is a credible basis on which to conclude that merger may enhance that vulnerability.
 - Doesn't have to be express "agreement"

New Enforcement Themes: Exclusionary Conduct

- Theme in merger and non-merger enforcement
- Focus is how a merger may result in enhanced market power
 - That makes it more likely that the merged entity can “profitably and effectively” engage in exclusionary conduct
 - Forcing out existing competitors, discouraging new competitors
- Focus can be on vertical mergers

New Enforcement Themes, cont.: Post-Merger Regulation

- Terms are included in consent decrees
- Can include
 - Licensing requirements
 - “Walling off” divisions, employees to enhance competition
 - Requiring adherence to standards
 - Mandating levels of R&D

No Enforcement Without Courts



- Some victories
- Some defeats
 - In two cases, FTC market definition rejected

Conclusion

- Merger enforcement trends will continue to be closely watched
- Antitrust enforcement as a 2012 campaign issue?