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Antitrust 2017: Trends and Developments to Watch

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1. Transition to a Trump Administration is top of the agenda

President-elect Donald Trump's DOJ and FTC transition team appointments and public short list of candidates to run the agencies indicate that antitrust enforcement in the Trump Administration will most likely mirror recent Republican administrations, which have tended to be less interventionist than Democratic administrations. These appointments and the administration's initial enforcement decisions are certain to lead the headlines in 2017 and set the antitrust agenda for the next few years.

Trump has the opportunity to nominate immediately an Assistant Attorney General to head the Antitrust Division at DOJ. With two current vacancies and the term of current chair, Edith Ramirez, already expired, Trump has an opportunity to remake the FTC in short order. By law, no more than three commissioners can come from any one party, and the Senate leadership typically has some say in the nominations from the other party. Currently, there is one Republican commissioner (Maureen Ohlhausen) and two Democratic commissioners (Edith Ramirez and Terrell McSweeny), leaving Trump with the ability to appoint immediately two more Republican commissioners. As McSweeny's term expires in September 2017, we may be looking at an agency where four of the five commissioners will have been named by Trump.

Trump has the ability, as early as Inauguration Day, to name Maureen Ohlhausen as either acting chair or chair of the Commission. If she is named chair, Ohlhausen can in turn immediately name new directors to head the Bureaus of Competition, Consumer Protection and Economics. If she is named acting chair, and another candidate is nominated, that person will need to be confirmed by the Senate, which will delay appointment of new bureau directors.

Ohlhausen is not the only candidate rumored to be in the running. Others are pointing to former Republican FTC Commissioner, Joshua Wright, to lead either the FTC or the DOJ Antitrust Division. News reports indicate Wright is serving on Trump's FTC transition team, which in the past has led to more permanent appointments.

According to The Wall Street Journal, Wright was considered the FTC's most conservative commissioner during his 2.5-year tenure at the agency. He frequently opposed enforcement efforts proposed by the Commission's Democratic leadership, including his vote last year against blocking the planned merger of the nation's two largest food distributors for restaurants and cafeterias, Sysco and US Foods, which the FTC successfully blocked by arguing it would raise prices for customers and give the merged company control of 75 percent of the sales of full-service food distribution at the national level.

Others serving on the Trump transition team that suggest the Trump Administration will follow a traditional Republican approach to antitrust include David Higbee, Deputy Assistant Attorney General in the Antitrust Division during the Bush Administration, and Tad Lipsky, who worked with Bill Baxter in the Reagan Administration Antitrust Division.

History teaches that we may also see nominees from among Republican staff on House or Senate committees with oversight over the DOJ and FTC, lawyers connected to senior administration officials not well-known by the antitrust community, or business executives with no antitrust expertise.

2. Uncertainty over how vigorous merger enforcement

will be in the Trump Administration

The Obama Administration went out with a bang in 2016 on the merger enforcement front in potential reaction to criticism from the left that previous enforcement had been lax.

In the past year, several courts have issued decisions in merger cases, including two FTC victories at the appellate level in hospital mergers. In those two cases, the Third and Seventh Circuits overturned lower court decisions denying preliminary injunctions.

These court decisions endorse the "hypothetical monopolist" test and price discrimination markets, consistent with the antitrust agencies' 2010 Horizontal Merger Guidelines, solidifying their use as analytical tools in merger reviews and leading to narrow market definitions. Recent court decisions also suggest skepticism of future entrants as competitive constraints, as noted in the district court's decision in *FTC v. Office Depot*, and suggest that claims of efficiencies that offset anticompetitive effects of a merger must be "verifiable" and supported by "clear evidence," as stated by the Third Circuit in *FTC v. Penn State Hershey*.

In the near term, those interested in merger enforcement should keep an eye out for court decisions in the DOJ's current challenges to the Anthem/Cigna and Aetna/Humana health insurance mergers.

Agency leaders have argued that vigorous merger enforcement should continue, with FTC Commissioner McSweeny asserting that there is "a growing consensus that suggests a troubling decrease in competition" and that the agencies must demonstrate a "willingness to accept the occasional false positive."

The Trump Administration is less likely to be as aggressive, as Republicans have traditionally been more concerned with false positives, have had greater faith in the market to prevent the exercise of market power and have been less concerned with potential competition and vertical foreclosure theories.

3. Passage of the SMARTER Act seems more likely in a Trump Administration

Following the results of the 2016 election, there is a higher likelihood that the Standard Merger and Acquisition Reviews Through Equal Rules Act ("SMARTER Act") will become law.

The SMARTER Act passed the House of Representatives in March 2016, but was not considered by the Senate and was generally believed that it would not be signed by President Obama.

Currently, the FTC seeks preliminary injunctions in federal courts to block mergers pending an administrative trial, while the DOJ seeks preliminary and permanent injunctions in federal court. Some believe that the standard the FTC faces for an injunction is lower.

These disparities have led some to argue that the success or failure of a merger may depend on which agency reviews the deal, a decision that is based on which agency has experience in the products at issue.

The SMARTER Act would require the FTC to follow the same process as DOJ and meet the same standard.

With Republican control of the White House and Congress in 2017, antitrust practitioners and those in the business community should watch for the bill to reemerge.

4. Increase in HSR fines in 2016, enforcement expected to continue in 2017

For years, the FTC has focused substantial resources on civil penalty actions against individuals and companies that fail to file for acquisitions under the HSR Act. This past year was no exception: in 2016, the agencies settled three HSR enforcement actions. Penalties imposed ranged from $480,000 for an inadvertent failure to file

notification, to a record-breaking $11 million for the alleged misuse of the HSR Act's "solely for the purpose of investment" exemption.

We are likely to see increased penalties imposed on parties that fail to comply with the premerger notification requirements of the HSR Act, as this past August the maximum civil penalty for noncompliance increased steeply – from $16,000 to $40,000 *per day* – a 150% increase.

The potential of significantly increased penalties will likely bring parties to the negotiating table. As a spokesperson for one defendant in a recent case said in a statement released after entering into a settlement agreement with the government, the "sudden and unanticipated 150 percent increase in the potential penalties" left it "no choice but to resolve the case as quickly as possible."

5. Increased focus on employment practices with potential for criminal sanctions

Employee hiring and compensation practices are in the antitrust crosshairs, as illustrated by high-profile enforcement actions in recent years by both the DOJ and the FTC alleging anticompetitive "no poaching" and "wage-fixing" agreements, particularly in high-tech and healthcare industries.

To educate companies and their HR personnel regarding the types of agreements that potentially violate antitrust law, in October the DOJ and FTC jointly issued a policy statement entitled "Antitrust Guidelines for Human Resources Professionals."

The guidelines indicate that the DOJ will challenge anticompetitive employment violations using its arsenal of criminal sanctions against companies and responsible managers. While the release of the guidelines is indicative of the agencies' present intent to focus on and pursue antitrust violations by employers, it is unknown whether the Trump Administration will continue that focus.

6. Antitrust focus on pharmaceutical industry expected to continue in 2017

Recent court decisions and actions by federal and state antitrust enforcers underscore that conduct by pharmaceutical companies at the expiration of patent life is likely to remain a target for antitrust enforcement.

The Second Circuit's 2015 condemnation in *New York v. Actavis* of so-called "product hopping" – the practice of withdrawing an old version of a drug after introducing a new version to discourage generic substitution – has generated increased attention to this conduct.

In September 2016, the attorneys general of 35 states and the District of Columbia filed suit against Indivior, alleging the firm delayed generic competition by withdrawing a tablet version of Suboxone, used to treat patients addicted to heroin and other drugs, to convert the market to a dissolvable oral strip or film version. More than 40 states have now joined the litigation.

Also in September, the Third Circuit became the second appellate court to weigh in on alleged product hopping. In *Mylan v. Warner Chilcott*, the court rejected plaintiff's antitrust claims on the facts but did not "rule out the possibility" that "insignificant design or formula changes, combined with other coercive conduct" could present "a closer call" and establish liability in future cases.

In the "reverse payment" arena, courts continue to develop the legal framework in the wake of the Supreme Court's landmark decision in *FTC v. Actavis*. In *In re Nexium*, the First Circuit affirmed the first jury verdict in a reverse payment case, agreeing that plaintiffs failed to demonstrate they had suffered an antitrust injury entitling them to damages.

The FTC has also challenged settlements of patent litigation in the pharmaceutical industry in which a pioneer firm has agreed not to market an "authorized generic," alleging that such agreements constitute reverse

payments.

The antitrust agencies are also likely to continue paying attention to pharmaceutical pricing. Late 2016 saw the DOJ, in its ongoing criminal investigation into collusion in the industry, charge several generic pharmaceutical companies with fixing prices, rigging bids and allocating customers.

There has been bipartisan support at the FTC and in Congress for antitrust enforcement in the pharmaceutical industry, suggesting continued attention in 2017.

7. Criminal enforcement for antitrust violations to continue in 2017

There has also long been a bipartisan consensus that price fixing should be condemned, and so the DOJ can be expected to continue pursuing a vigorous criminal enforcement agenda during the Trump Administration. High-tech industries are not exempt from this attention as this past year saw indictments of executives charged with conspiring to fix prices of electrolytic capacitors, in the Northern District of California, and generic pharmaceuticals, in the District Court of Pennsylvania.

Technology is at the base of recent enforcement against criminal coordinated behavior. Specifically, we have seen, and will likely continue to see, an increased focus on the use of sophisticated algorithms to facilitate collusion.

This year the DOJ prosecuted an executive for allegedly using algorithm-based software to fix prices. According to the DOJ, the executive and his co-conspirators discussed the prices of posters sold online in the United States and agreed to adopt specific pricing algorithms for the sale of certain posters, with the goal of offering online shoppers the same price for the same product and coordinating changes to their respective prices.

DOJ officials advised that ecommerce companies may have to consider the antitrust implications of their pricing strategies, stating, "We will not tolerate anticompetitive conduct, whether it occurs in a smoke-filled room or over the Internet using complex pricing algorithms. American consumers have the right to a free and fair marketplace online, as well as in brick and mortar businesses." This suggests that the use of pricing optimization software in the ecommerce sector will continue to draw attention from antitrust authorities.

8. Increased scrutiny of foreign investment in the US

Foreign investment in the US is likely to receive increased scrutiny in 2017 under the Trump Administration. Such investments were already a focus at the end of 2016 with action by the Obama Administration and calls for the Committee on Foreign Investment in the United States ("CFIUS") to scrutinize economic security as well as national security.

Foreign investment has also caught the attention of more than 150 US lawmakers, including House Intelligence Committee Chairman, Devin Nunes, who have called for increased scrutiny by CFIUS.

Although the Trump transition team has not taken an official position, the President-elect's campaign rhetoric suggests he plans to take a harder line on foreign investment.

9. The EU Digital Single Market initiative

May 2017 will mark the two-year anniversary of the European Commission's (EC) Digital Single Market initiative, in which the EC carried out a wide-ranging inquiry into the ecommerce sector. The EC's final report on its inquiry is expected in early 2017 and is likely to confirm its provisional views that certain potentially anticompetitive practices, such as resale price maintenance (RPM) and territorial restrictions, will be an area of focus for the Commission.

As a result, the EC may target and fine companies it knows to have RPM and territorial restriction clauses in their

agreements. A number of EU Member State antitrust authorities (especially in Germany and the UK) have investigated and fined companies for engaging in RPM. The EC, with the wealth of knowledge it has collected through the sector inquiry and under pressure to be seen to be taking action against any anticompetitive practices it has found, could now start its own investigations.

In addition, new legislation may further push to reform copyright law to allow customers in the EU to access digital content in their home country no matter where they are in the EU (for example, a UK Netflix user being able to access the UK Netflix content even if he is in Lithuania), and legislation to prohibit geo-blocking (the practice of blocking access to websites from customers located outside a particular country or of rerouting customers to a different website based on where they are).

10. Big data at the center of global antitrust and consumer protection enforcement

Antitrust authorities are increasingly focusing on the implications of big data on competition and consumer choice in today's marketplace. Most recently, the EC has outlined a new strategy on big data, and the UK national competition authority, the CMA, has published a report on commercial use of consumer data. The French and German competition authorities have announced studies, and the UK Financial Conduct Authority has announced that it will be studying the use of big data in the insurance sector. As regulators assess the implications of big data on competitive dynamics, its interplay with antitrust enforcement is an issue of which businesses will increasingly need to be aware.

To many, concern about big data is more appropriately framed as a privacy or data protection issue rather than one of antitrust. However, there are a number of ways that privacy itself might be considered to be a parameter of competition, and in that sense, privacy issues may become relevant in antitrust cases involving big data. The FTC recently took the position that, in the same way that proposed mergers can be assessed in terms of factors other than the likely impact on price (for example, whether range, quality or service will be adversely impacted as a result of a merger), privacy protection for consumers can also be something that businesses seek to compete on, and which could, at least in theory, be negatively impacted by a merger.

Separately, and more controversially, there have been calls for antitrust to be used to help regulate adherence to privacy rules in relation to big data. Such views may be motivated less by genuine antitrust concerns than by the fact that the toolkit of antitrust authorities is (currently) generally more powerful than that of data protection regulators.

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Key Contacts

Dee Bansal Washington, DC	dbansal@cooley.com +1 202 728 7027

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