

Federal Antitrust Authorities Step Up Merger Enforcement - Recent Victories Buoy Enforcers

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Obama Administration antitrust enforcers have faced criticism over the last year for not being sufficiently aggressive, allegedly leading to concentrated industries to the detriment of consumers. The Department of Justice and Federal Trade Commission appear to have responded by stepping up enforcement.

The agencies' efforts are bearing fruit. In just the last month, the FTC secured a win in a rare appellate decision in a merger challenge, and so far in 2016, eight mergers have been blocked or abandoned in the face of DOJ and FTC suits or threats to file suit. And, many of these transactions were abandoned despite the parties offering remedies that they thought would be approved.

This alert (1) explores the recent criticism of antitrust enforcement, enforcers' defenses of their records and promises for increased vigilance, (2) reviews the FTC's recent appellate success in its challenge to the merger of Penn State Hershey Medical Center and Pinnacle Health, and (3) describes the agencies' recent focus on loss of innovation as a harm to competition. Companies considering a merger or acquisition with a competitor should be cognizant of the current environment and have a plan to address antitrust risk so their deals are not also blocked.

Antitrust and merger enforcement enter the political debate

Concern about antitrust has garnered headlines in the mainstream press. Publications like the *Economist* and *Wall Street Journal* have both written articles criticizing concentrated industries, which they claim have resulted in higher prices for consumers, lessened innovation, and weakened startup activity. Price increases on a few drugs and medical devices – like Mylan's EpiPen – have led to Congressional hearings and calls from Presidential candidates for increased antitrust enforcement.

Members of Congress and the President have encouraged the antitrust agencies to be vigilant in their efforts to promote competition. Indeed, President Obama issued an executive order in April 2016 requiring all government agencies, not just the DOJ and FTC, to consider "specific actions" to promote competition.

Senator Elizabeth Warren (D-MA) put these concerns front and center with a speech in June decrying the high concentration of American industries, asserting "concentration threatens our markets, threatens our economy, and threatens our democracy." Citing a report from the Center for American Progress, "Reviving Antitrust: Why our Economy Needs a Progressive Competition Policy," she recommended increased merger enforcement. She advocated skepticism of proposed divestitures and efficiencies arguments, as well as shifting the burden to parties to prove mergers will not harm competition.

More recently, Democratic Presidential candidate Hillary Clinton said she would appoint aggressive antitrust enforcement officials, increase agency resources and staffing, and require post-merger retrospective reviews.

Agency leaders promise vigilant enforcement, defend record

The antitrust agencies have taken heed of the criticism and have responded with promises of vigorous enforcement as well as defenses of their enforcement record.

At an antitrust conference in late September, the Acting Assistant Attorney General for Antitrust and the Chairwoman of the FTC responded to criticism of the agencies' enforcement records and current antitrust policy. While the tone of the DOJ speech made clear that the current chief sees room for increased enforcement, both officials defended the agencies' recent merger enforcement records, touting litigation successes and abandoned deals. A second Democratic FTC Commissioner added her voice to the discussion a few weeks later, echoing the call for increased enforcement.

Nodding to the positions taken by Warren and Clinton, DOJ's chief said that the agencies "have become justifiably more skeptical about the promise of procompetitive benefits of mergers and of the likelihood that remedies solve the competitive concerns." She said that this change in thinking had led to "more and more litigating to challenge mergers," noting "a total of 40 mergers have been blocked by court order or wholly abandoned by the merging companies" during the current administration, "a stark increase from 16 in the prior administration."

The FTC chief defended the Commission's record, arguing the FTC is striking the right balance between intervening "too much" or "too little." She said that the FTC "challenged 44 mergers in the last two years alone, including suing to stop eight transactions outright." She pointed to recent matters in which she said "the parties offered substantial divestitures" but the Commission determined the divestitures "would not fully replicate the competition lost through the merger."

A second Democratic FTC Commissioner revealed a greater openness to increased enforcement. She pointed to "a growing consensus that suggests a troubling decrease in competition" and argued that the agencies must demonstrate a "willingness to accept the occasional false positive" in order to prevent an anticompetitive merger from slipping through. She also argued for an increased reliance on presumptions of anticompetitive harm where the merging parties would hold a high market share post-merger.

The openness to a more interventionist approach to merger enforcement seems to be a response to the mounting criticism of lax antitrust enforcement and is likely to influence merger enforcement in the coming months and potentially the coming years. And recent court victories, like the FTC's rare appellate win in *FTC v. Penn State Hershey*, will likely embolden the agencies in seeking to block mergers.

Recent appellate decision overturned FTC loss at district court in suit to block hospital merger

The Third Circuit, in *FTC v. Penn State Hershey*, recently bolstered the agencies' enforcement efforts, reversing a district court's conclusion that the FTC had failed to meet its burden to prove that the acquisition was substantially likely to lessen competition.

While much of the decision focused on geographic market issues specific to hospital mergers, two aspects of the Third Circuit's decision are instructive for companies considering mergers in any industry. First, the court adopted a preliminary injunction standard deferential to the FTC. Second, the court expressed skepticism toward the parties' efficiencies arguments and to whether an "efficiencies" defense even exists.

The Third Circuit held that the FTC's burden in seeking a preliminary injunction pending an administrative trial is "not the same as the traditional equity standard for injunctive relief." Under the applicable "public interest standard," an injunction may be granted "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest," which stands in contrast to the traditional preliminary injunction standard that the DOJ must meet. The decision may fuel proponents of proposed legislation, [The SMARTER Act](#), which would require the FTC to meet the same standard as the DOJ.

The Third Circuit expressed skepticism toward claimed efficiencies as a justification for permitting the merger to go forward despite the government's showing of likely anticompetitive effects, noting that neither the Supreme Court nor the Third Circuit has ever "formally adopted" an "efficiencies defense" and concluding that the parties could not "clearly show that their claimed efficiencies [would] offset any anticompetitive effects of the merger."

Agencies target decline in innovation as competitive

harm

While *FTC v. Penn State Hershey* involved a traditional focus on price competition, the agencies are increasingly challenging mergers on the theory that they may harm innovation. Most recently, Lam and KLA-Tencor abandoned their proposed \$10.6 billion merger which would have combined a manufacturer of machines used to inspect circuitry on computer chips and the largest maker of machines that etch away materials on silicon wafers used to make computer chips in the face of DOJ pressure.

The DOJ expressed concern that the combined firm would use its position as a manufacturer of inspection equipment to disadvantage competitors that needed access to the inspection equipment to develop etching machines. DOJ said in a press release that the proposed transaction presented “concerns about the ability of the merged firm to foreclose competitors’ development of leading edge fabrication tools and process technology on a timely basis.”

The DOJ also focused on a loss of innovation in its challenge to the \$34 billion Halliburton-Baker Hughes merger, which the companies abandoned after DOJ filed suit. DOJ’s Acting Associate Attorney General explained in a June speech that while the firms together had shares in some markets of over 80%, “the problems with [the] merger are even greater than these share numbers indicate. Halliburton and Baker Hughes ... drive innovation in these markets, often leading the way in developing next-generation technology to solve the most challenging problems facing the oil and gas industry.”

Looking forward

Given the current political climate and increased pressure on antitrust enforcement agencies, parties to mergers and acquisitions should expect continued intense scrutiny of transactions at least through the end of the Obama administration. If Clinton is elected, close antitrust scrutiny is likely to continue.

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