

# WilmerHale Webinar: Navigating Uncertainty— What the New Administration Means for Antitrust Enforcement

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# Speakers



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# Webinar Guidelines

- Participants are in listen-only mode
- Submit questions via the Q&A box on the bottom right panel
- Questions will be answered as time permits
- Offering 1.0 CLE credit in California and New York\*
- WebEx customer support: +1 888 447 1119, press 2

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# Overview of Present Information

- Scarce information on Trump antitrust agenda, with potentially conflicting data points:
  - Campaign (e.g. populist, anti-big business statements) v.
  - Post-campaign (e.g. traditional Republican picks for antitrust transition)
  
- Potential wildcards:
  - Public reaction by President ahead of agency review or decision (i.e. recent statements on media mergers)
  - More transactional approach that may include non-antitrust considerations
  - Potential for counter-reactions by other governmental actors (U.S. states/international)
  
- Antitrust policy unlikely to be early Administration focus



# Transition Developments (I)

- Joshua Wright leading antitrust transition
  - Former FTC Commissioner with traditional Republican approach to antitrust enforcement; e.g. writings and FTC dissents focus on concern about over-deterrence and demanding fact-based proof of anticompetitive effects
  - Potential DOJ AAG pick
  - Others on transition: David Higbee
  
- Department of Justice
  - Sen. Jeff Sessions nominated for AG; inconclusive antitrust record in 20 year Senate career, e.g.:
    - Criticized Clinton DOJ cooperation with foreign competition investigations against Microsoft
    - Supported efforts to bar generic drug reverse-payment settlements (i.e., supported FTC position)
    - Addressed antitrust at nomination hearing



## Transition Developments (II)

- Department of Justice (cont.)
  - Assistant Attorney General for Antitrust Division - TBD
    - Nomination likely after AG confirmation
    - Brent Snyder will be acting AAG
  
- Federal Trade Commission: In Flux
  - Current 2-1 Democratic majority with 2 seats vacant and additional seat expired (current Chair Ramirez announced she is leaving on February 10); nominations to establish Republican majority
  - Republican Commissioner Ohlhausen potential Chair candidate; would not require Senate approval
    - Will be acting chair on January 21
  - Upcoming Vacancy: Commissioner McSweeney (term expires September 2017)

# Populist GOP Antitrust Revolution? (I)

- What it would look like:
  - “Big is bad”: aggressive Section 2, merger enforcement
  - Focus on industry concentration, both direct and indirect (e.g. joint ownership by institutional investors)
  - Robinson-Patman enforcement; promotion of small “main street” retail over big business
  - Focus on buyer-side market power, especially in sectors like agriculture
  - Consideration of aggregation of economic and political power, not just consumer welfare
  - Precedents: T. Roosevelt, Brandeis

## Populist GOP Antitrust Revolution? (II)

- Is it likely? No
  - Antitrust-related campaign statements likely had more to do with target of the comments (often media) than foreshadowing specific antitrust agenda
  - Transition team inconsistent with robust antitrust populism





# Laissez Faire Antitrust Revolution?

- What it would look like:
  - Substantially reduced merger enforcement and civil conduct investigations
  - New policy statements on Section 2; FTC Act section 5
  - Potential withdrawal of 2013 DOJ/ USPTO Policy Statement on FRAND
  - Intensive divergence from EC on mergers, conduct
  - Frequent amicus briefs supporting defendants in private litigation
  
- Is it likely? Highly unlikely, but not impossible
  - Many regulatory nominees to date conservative, but business-orientated and pragmatic
  - Antitrust transition team along same lines
  - Nominations for AAG or FTC drawn from academia or think tanks, not law firms, might suggest sharper laissez faire shift

# Traditional Republican Antitrust Agenda

- Most likely scenario
- Less dramatic impact on enforcement, but potentially palpable effects in certain areas:
  - Merger enforcement
  - Section 2/FTC Act Sections
  - IP/Antitrust intersection
- Criminal Enforcement unlikely to be reduced; could increase
  - Pharmaceuticals, foreign manufacturing/component, and energy cartels are likely particular focuses
  - Recent emphasis on financial services could be reduced
- Continued focus on limiting state action doctrine
- Wildcard factors inside and outside Administration could also drive effects



# Merger Enforcement

- Possible Impacts
  - On margins, less DOJ “front office” and FTC willingness to challenge mergers
  - Potentially slightly fewer second requests
  - Applying DOJ preliminary injunction standard to FTC (SMARTER Act)
- Recent history has not shown dramatic shifts in challenges based on changes in administration
  - Percentage of deals challenged has not varied materially from Bush I/Clinton/Bush II/Obama
- Parties should expect thorough investigations of controversial deals whether or not ultimately challenged



## Section 2 Enforcement

- Ideology matters
  - Presumptions about potential efficiencies
  - Presumptions about market self-correction
  - Over-deterrence vs. under-deterrence
  - Competency of decision makers
  
- Historical precedent – Obama voided Bush-enacted Section 2 enforcement guidelines
  
- Less willingness to bring certain Section 2 challenges, e.g.
  - Challenges to exclusive dealing, MFNs, conditional discounts, standards-related conduct



# Intellectual Property & Antitrust

- Views regarding application of antitrust laws to IP can vary by enforcer
- Weighing of concerns about hold-up of product suppliers with deference to patentee prerogatives
  - Standard essential patents
  - Patent Assertion Entities
- Rambus, N-Data challenges brought during Bush II FTC



# Wildcards: State and International Enforcement (I)

- Potential U.S. states' reactions
  - Increased state enforcement to compensate for less federal enforcement
  - Historical precedent – early Reagan era
  - Certain states may be particularly aggressive (e.g. CA, NY, PA, MA)
  - Other states may be active also, especially on matters of particular local interest



# Wildcards: State and International Enforcement (II)

- Potential International Reaction
  - Potential for spillover from U.S. trade and foreign policy decisions into international antitrust enforcement against U.S. multinationals
    - E.g. MOFCOM in China
  - Gap-filling by EU and others if U.S. domestic antitrust enforcement wanes in global markets



## Wildcards: Non-antitrust Factors

- Public, White House reaction to conduct or merger ahead of agency review or decision
- More transactional approach to governing or enforcement may include non-antitrust considerations in agency review or decisions
- Broad “mercurial” antitrust enforcement directed at particular industries or companies, or using antitrust to accomplish non-antitrust goals: difficult to accomplish
  - DOJ and FTC enforcement actions subject to judicial review
  - Could have an impact on the margins





# The Federal Judiciary

- One Supreme Court vacancy
  - Scalia replacement unlikely to change status quo
  - Future appointments could be more disruptive
- 13% of lower federal court positions are vacant (111/857)
  - Trump appointments may be less interventionist
  - Effects will be gradual
- Judiciary likely to remain check on radical enforcement changes
  - Review of agency actions
  - Forum for private challenges



## Strategic Takeaways

- Have strategy to address the both the U.S. and non-U.S. political dimensions of transactions, especially ones with an international aspect
  - Be prepared to address potential that antitrust review is used as a lever to address broader policy goals here or abroad
  - Be prepared to engage early with senior political leadership inside and outside the agencies
  - But recognize that DOJ and FTC staff will retain substantial ability to shape investigations/merger reviews; efforts to end-run genuine antitrust concerns can backfire
- Be prepared for continued role of non-U.S. enforcers
- Be prepared for greater engagement with U.S. state enforcers



# Questions?

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