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ANTITRUST ENFORCEMENT UNDER THE OBAMA ADMINISTRATION: CHANGE? REALLY?

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INTRODUCTION*

During the 2008 presidential campaign, then-Senator Barack Obama made an issue of the lax antitrust enforcement during the Bush Administration, noting, for example, that "in seven years, the Bush Justice Department has not brought a single monopolization case."[1] Promising to "reinvigorate antitrust enforcement," Senator Obama described five specific antitrust policy aspirations for his administration: (1) increased focus on merger reviews; (2) taking aggressive action against international cartels; (3) prohibiting so-called "reverse payment" patent settlements; (4) repealing the exemption from the antitrust laws for the insurance industry; and (5) strengthening advocacy on competition issues domestically and internationally."[2]

Once elected, President Obama elevated Commissioner Jon Leibowitz to Chairman of the Federal Trade Commission (FTC) and appointed Christine Varney to be Assistant Attorney General in charge of the Antitrust Division at the Department of Justice (DOJ). In light of Obama's campaign promises, as well as these officials' own public speeches and congressional testimony, both officials were expected to be more aggressive on antitrust enforcement than their predecessors.[3] Indeed, in Ms. Varney's first speech as AAG, she expressed the view that "inadequate antitrust oversight" might have contributed to the financial crisis.[4] As the Obama Administration's antitrust enforcers took office, therefore, many believed that dramatic changes in antitrust enforcement levels were imminent.[5]

Now, in October 2010, almost two years into the Administration, we can look back, review the record, and assess those predictions. The verdict, we would suggest, is that while there certainly is some evidence of increased enforcement efforts since Obama's antitrust team took charge, the changes have been relatively limited. Specifically:

- In the mergers area, the agencies have investigated and challenged some mergers, but not materially more than the prior Administration (although

* *The following article was written in October 2010 in anticipation of The Sedona Conference® on Antitrust Law. Due to the timing of publication, an Epilogue has been added at the end of the article that comments on developments between October 2010 and May 2011.*

1 Senator Barack Obama, Statement for the American Antitrust Institute (Sept. 27, 2007), *available at* http://www.antitrustinstitute.org/files/aai- Presidential campaign - Obama 9-07_092720071759.pdf [hereinafter Obama AAI Statement].

2 John D. Harkrider, *Obama: The First Year*, 24 ANTITRUST 8 (2010).

3 Avram Davis, *A Matter of Antitrust*, 75 INV. DEALERS' DIGEST 22 (2009).

4 Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Vigorous Antitrust Enforcement in This Challenging Era, Remarks as Prepared for the Center for American Progress* 5 (May 11, 2009), *available at* http://www.usdoj.gov/atr/public/speeches/245711.pdf.

5 Andrea Agathoklis, *In Their Own Words: Predicting Enforcement Under Varney and Leibowitz*, 23 ANTITRUST 5 (2009).

given the decline of HSR filings, the frequency of challenges has increased). Additionally, under President Obama, as under President Bush, the antitrust agencies generally have preferred pragmatic settlements (allowing the deals to go forward) to risky lawsuits seeking to enjoin transactions. The agencies did make significant revisions to the Horizontal Merger Guidelines, but these changes largely constituted an effort to ensure that the current guidelines properly reflected the evolution in agency enforcement practices that had occurred since the issuance of the 1992 Guidelines.

- The agencies have pursued an aggressive agenda against alleged anticompetitive agreements between competitors, but so did the prior Administration. Moreover, the Obama Administration has not achieved its desired results in several areas they have designated as particularly important, such as pharmaceutical patent settlements and repeal of the antitrust exemption for insurance.

- With respect to challenges to unilateral conduct, there has not yet been any significant increase in agency enforcement against alleged monopolists. As of October 2010, the DOJ has not yet brought any cases under Section 2 of the Sherman Act. Instead, in what may be the primary evidence of a novel enforcement outlook, the new enforcers have generally elected to pursue unilateral conduct cases based on a broad interpretation of Section 5 of the Federal Trade Commission Act (e.g., Intel[6]), or even under Section 1 of the Sherman Act (credit card companies, Blue Cross Blue Shield of Michigan).[7]

While it certainly is too soon to reach a final judgment regarding the Obama Administration's approach to antitrust enforcement, it is not too soon to say that the Administration appears to be moving relatively cautiously, with only modest changes in the level and character of antitrust enforcement from the prior Administration.[8]

PART I: MERGERS

I. Examples of Enforcement

A. Dean Foods

The DOJ's civil action against Dean Foods Company represents the sole litigated merger challenge undertaken by the DOJ since the Obama Administration took office. Dean Foods is a dairy processor that pasteurizes and packages milk purchased from dairy farms, and then sells this milk to school districts and supermarkets.[9] In April 2009, Dean

6 *In the Matter of Intel Corp.*, FTC Docket No. 9341 (Dec. 16, 2009) (complaint), *available at* http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf [hereinafter Intel Complaint].

7 Press Release, U.S. Dep't of Justice, *Justice Department Sues American Express, MasterCard and Visa to Eliminate Rules Restricting Price Competition; Reaches Settlement with Visa and MasterCard* (Oct. 4, 2010), http://www.justice.gov/atr/public/press_releases/2010/262867.htm.

8 A possible exception is the recently-filed DOJ case against credit card companies.

9 *United States v. Dean Foods Co.*, Case No. 10-C-0059 (Jan. 22, 2010) (complaint), *available at* http://www.justice.gov/atr/cases/f254400/254455.htm [hereinafter Dean Foods Complaint]; Press Release, U.S. Dep't of Justice, *Justice Department Files Antitrust Lawsuit Against Dean Foods Company* (Jan. 22, 2010), http://www.justice.gov/atr/public/press_releases/2010/254435.htm.

Foods acquired two of Foremost Farms' dairy processing plants, allegedly providing Dean Foods with approximately 57% of the "market" for processed milk in northeastern Illinois, the Upper Peninsula of Michigan, and Wisconsin.[10]

In this case the Department is seeking to undo the already consummated transaction, due to the allegedly high level of concentration in the market. The complaint asserts that a substantial amount of competition was eliminated by the acquisition, particularly with respect to the sale of milk to school districts in Michigan and Wisconsin.[11] The anticompetitive effects of the merger are alleged to be significant, with one senator noting that "the profit margins . . . have gone from per diem from some $30 million in 2008 to $72 million-plus in 2009, a time period when farmers experienced record low prices for raw milk and consumers saw little or no decline in retail prices."[12] The case currently is pending in the Eastern District of Wisconsin.[13]

B. BCBSM/Physicians Health Plan of Mid-Michigan

The threat of a lawsuit halted the acquisition by Blue Cross Blue Shield of Michigan (BCBSM) of a large health insurer, Physicians Health Plan of Mid-Michigan.[14] In early 2010, the DOJ announced it would challenge the planned deal, which allegedly would have resulted in BCBSM having a 90% market share in the health insurance "market" in Lansing, MI. The government contended that the merger "would have resulted in higher prices, fewer choices, and a reduction in the quality of commercial health insurance plans[.]"[15] Additionally, the DOJ contended that the merger would provide BCBSM with monopsony power, more specifically "the ability to control physician reimbursement rates in a manner that could harm the quality of health care delivered to consumers."[16] After the DOJ announced its intention to file a lawsuit to block the acquisition, the parties abandoned the deal.[17]

C. Sapa

In July 2009, the DOJ filed a merger complaint against Sapa Holding AB, challenging the acquisition of Indalex Holdings Finance, Inc.[18] The two companies allegedly were the only two in the United States to manufacture aluminum sheathing, and the complaint alleged that the transaction would substantially impact the competition for "manufacture and sale of coiled extruded aluminum tubing used in the formation of high frequency communications cables."[19] A consent decree was filed with the court at the same time as the complaint, and was approved in January 2010.[20] The settlement required divestitures of key assets from the merged entity that would alleviate the anticompetitive concerns.[21]

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10 Press Release, *supra* note 9.
11 *Id.*; *see also Oversight of the Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Antitrust, Competition Policy, & Consumer Rights of the Senate Judiciary Comm.*, 111th Cong. (June 9, 2010), *available at* hhttp://www.justice.gov/atr/public/testimony/259522.pdf [hereinafter June 9 Hearing] ("The acquisition created an anti-competitive effect because there was too much concentration.").
12 June 9 Hearing, *supra* note 11.
13 *See* "U.S. and Plaintiff States v. Dean Foods Company," http://www.justice.gov/atr/cases/deanfoods.htm.
14 Press Release, U.S. Dep't of Justice, *Blue Cross Blue Shield of Michigan and Physicians Health Plan of Mid-Michigan Abandon Merger Plans* (Mar. 8, 2010), http://www.justice.gov/atr/public/press_releases/2010/256259.htm.
15 *Id.*
16 *Id.*
17 *Id.*
18 *United States v. Sapa Holding AB*, Case No. 11:09-cv-01424 (July 30, 2009) (complaint), *available at* http://www.justice.gov/atr/cases/f248500/248522.htm [hereinafter Sapa Complaint].
19 *Id.*
20 *See* U.S. Dep't of Justice & FTC, Hart-Scott-Rodino Annual Report, Fiscal Year 2009, at 10 (2010), *available at* http://www.ftc.gov/os/2010/10/101001hsrreport.pdf [hereinafter HSR Report].
21 *Id.*

D. Election Systems & Software

In March 2010, the DOJ filed a complaint against Election Systems & Software (ES&S) regarding the September 2009 acquisition of Premier Election Solutions Inc.[22] The DOJ alleged that the combination of the "two largest providers of systems used to tally votes in federal, state and local elections" resulted in a company that provided "more than 70 percent of the voting equipment systems in the United States."[23] According to the DOJ, this resulted in "higher prices, lower quality and reduced incentive to innovate."[24] The parties entered into a consent agreement when the complaint was filed, requiring the new company to divest the intellectual property associated with Premier Election Solutions' voting equipment systems, as well as the related tangible assets and inventories.[25] Additionally, ES&S was required to grant a perpetual license for a ballot marking device designed "to better serve disabled voters."[26] The consent agreement was approved by the court in June 2010.[27] This enforcement action is notable, in particular, because the DOJ was willing to challenge a very small transaction – the purchase price was $5 million – based on the competitive issues raised (although the political importance of the industry involved likely contributed to this result).

E. Oracle/Sun

In one congressional hearing, Chairman Leibowitz stated that, just as it was important to be aggressive when mergers are anticompetitive, it was equally important to not hesitate "to hold off when we think a major deal is not going to cause consumer harm."[28] The DOJ came to just this conclusion with respect to the merger of Oracle and Sun Microsystems.[29] The merger was intended in part to provide Oracle with access to a computer hardware business, including servers and storage.[30] After investigating the $7 billion proposed merger thoroughly, the Department ultimately concluded that the anticompetitive effects of the merger were likely to be minimal.[31]

The primary horizontal overlap in the deal was between Oracle's leading proprietary database software and Sun's MySQL open source database software. Even though Oracle had a leading position in the database market, and MySQL was arguably a "maverick" competitor, the DOJ concluded that Oracle's acquisition of MySQL would not harm competition[32] because, among other things, the fact that MySQL's source code was publicly available meant that another entity could take over the code if MySQL customers were dissatisfied with Oracle's stewardship of the product.[33] Accordingly, DOJ concluded that even after the proposed merger "customers would continue to have choices from a

22 Press Release, U.S. Dep't of Justice, *Justice Department Requires Key Divestiture in Election Systems & Software/Premier Election Solutions Merger* (Mar. 8, 2010), http://www.justice.gov/atr/public/press_releases/2010/256267.htm.
23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.*
27 *United States v. Election Systems and Software, Inc.*, Case No. 1:10-cv-00380 (June 30, 2010) (final judgment), *available at* http://www.justice.gov/atr/cases/f260100/260183.htm.
28 *Hearing on the Federal Trade Commission's Bureau of Competition and the U.S. Department of Justice's Antitrust Division Before the Courts and Competition Policy Subcomm. of the House Judiciary Comm.*, 111th Cong. (July 27, 2010), 2010 WL 2936979 [hereinafter July 27 Hearing].
29 *Id.*
30 Stephen Shankland, *Oracle Buys Sun, becomes hardware company*, Jan. 27, 2010, http://news.cnet.com/8301-30685_3-20000019-264.html.
31 Press Release, U.S. Dep't of Justice, *Department of Justice Antitrust Division Issues Statement on the European Commission's Decision Regarding the Proposed Transaction Between Oracle and Sun* (Nov. 9, 2009), http://www.justice.gov/atr/public/press_releases/2009/251782.htm.
32 *Id.*; *see also* W. David Gardner, *Justice Dept. Supports Oracle in EU Dispute*, INFORMATION WEEK, Nov. 10, 2009, *available at* http://www.informationweek.com/news/software/database/showArticle.jhtml?articleID=221601079.
33 Gardner, *supra* note 32.

variety of well-established and widely accepted database products."[34] The DOJ even went so far as to affirmatively support the merger with EU authorities,[35] which investigated for substantially longer than DOJ, but eventually accepted the deal as well.[36]

F. Ticketmaster/LiveNation

Perhaps the most competitively significant transaction investigated by the Obama DOJ was the merger of Ticketmaster Entertainment and Live Nation. Ticketmaster, the world's largest ticketing company, and Live Nation, the world's largest promoter of live concerts, competed directly in ticket sales.[37] The DOJ argued that Live Nation was a significant competitive threat to Ticketmaster in ticket sales, contending that "the merger, as originally proposed, would have substantially lessened competition for primary ticketing in the United States," resulting in "higher prices and less innovation for consumers."[38] The transaction also raised vertical issues given the complementary nature of the businesses – i.e., Ticketmaster would now have preferred access to provide ticketing services for the concerts or venues controlled by LiveNation.

The DOJ entered into a consent decree,[39] which required Ticketmaster to divest some ticketing assets, and to license its ticketing software to third parties. Perhaps more surprisingly, it also contained behavioral remedies that appeared geared to address the vertical issues – for example, prohibiting retaliatory and anticompetitive bundling practices after the transaction was complete.[40] More specifically, the consent decree forbids the new company from "retaliating against any venue owner that chooses to use another company's ticketing services or another company's promotional services."[41]

Some critics took the Administration to task for approving the deal,[42] contending that the consent decree was inadequate to remedy the competitive problems, particularly the vertical issues.[43] For example, critics state that it will be difficult to prove whether actions taken by the new company are "retaliatory" or simply based on competition.[44] On the other hand, the behavioral remedies aimed at vertical issues appear to go beyond what the Bush DOJ would likely have sought in this type of merger.

The DOJ has made it clear that it is prepared to litigate when necessary to do so,[45] and has stood by the settlement with Ticketmaster, arguing that lawsuits may not necessarily achieve better results for consumers than a well-reasoned agreement.[46] Still,

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34 Press Release, *supra* note 31.
35 *Id.*; *see also* Gardner, *supra* note 32.
36 John Miller & Peppi Kiviniemi, *EU Clears Oracle to Buy Sun Microsystems*, WALL ST. J., Jan. 21, 2010, *available at* http://online.wsj.com/article/SB10001424052748703699204575016561637563060.html.
37 Press Release, U.S. Dep't of Justice, *Justice Department Requires Ticketmaster Entertainment Inc. to Make Significant Changes to its Merger with Live Nation Inc.* (Jan. 25, 2010), http://www.justice.gov/atr/public/press_releases/2010/254540.htm.; Ethan Smith, *High-Decibel Criticism Greets Completion of Live Nation Merger*, WALL ST. J., Jan 27, 2010, *available at* http://online.wsj.com/article/SB10001424052748704905604575027531997592958.html.
38 Press Release, *supra* Note 37.
39 *Id.*
40 *Consumers, Competition, & Consolidation in the Video& Broadband Market: Hearing Before Sen. Commerce, Science, & Transp. Comm.*, 111th Cong. (Mar. 11, 2010), 2010 WL 830491 (statement of Christine Varney, Ass't Atty Gen., Antitrust Div.) [hereinafter March 11 Hearing]; *see also* July 27 Hearing, *supra* note28.
41 Press Release, *supra* note 37.
42 Smith, *supra* note 37.
43 *Id.*
44 *Id.*
45 June 9 Hearing, *supra* note 11; *see also* Jia Lynn Yang, *To consumer advocates, Obama's antitrust enforcement looks like more of the same*, WASH. POST, Sept. 7, 2010, *available at* http://www.washingtonpost.com/wp-'dyn/content/article/2010/09/07/AR2010090707245.html ("'I'm happy to litigate. I think everyone knows that,' Varney said in a recent interview.").
46 June 9 Hearing, *supra* note 11; Yang, *supra* note 45.

critics of the Administration argue that the DOJ turned down a major opportunity to be aggressive with the Ticketmaster – Live Nation merger.[47]

G. Thoratec/HeartWare

The FTC has challenged several mergers since the Obama administration took office, including Thoratec Corporation's proposed acquisition of competing medical device manufacturer Heartware International.[48] Thoratec was the leading supplier of left ventricular devices (LVADs), a treatment for patients with advanced heart failure. The FTC alleged that Thoratec's LVAD was the only LVAD approved by the FDA, that HeartWare's LVAD was set to be the next device approved, and that other competitors were significantly behind. In the face of the FTC's challenge, the acquisition was abandoned in August of 2009, less than two weeks after the FTC filed the complaint.

H. CSL Limited/Talecris Biotherapeutics

The FTC also challenged CSL Limited's proposed acquisition of rival biotherapeutics firm Talecris Biotherapeutics.[49] The FTC alleged that the transaction would substantially reduce competition in the markets for certain plasma-based proteins. The FTC alleged that the transaction threatened to reduce the "markets" for two proteins from 5 to 4 sellers (dominated by 2 sellers), and the markets for two other proteins from 3 to 2. The FTC also alleged that further increasing market concentration in these markets would enhance the likelihood of coordinated effects by the remaining players. The parties later abandoned the transaction. [50]

I. Google/AdMob

In November 2009, Google announced that it was acquiring AdMob, a mobile-device advertising technology provider, for $750 million in stock.[51] AdMob acts as an intermediary between advertisers and developers of software applications for mobile devices, selling advertising space to developers with a focus (since 2008) on the iPhone.[52] AdMob's function as a "monetizer" of mobile-device content played "a vital role in fueling the rapid expansion of mobile applications and Internet content."[53] In acquiring AdMob, Google was seeking to enhance its "existing expertise and technology in mobile advertising, while also giving advertisers and publishers more choice in this growing new area."[54] Concerns about the transaction arose because Google's existing advertising network, AdSense, directly

47 Smith, *supra* note 37.
48 Press Release, FTC, *FTC Challenges Thoratec's Proposed Acquisition of HeartWare International* (July 30, 2009), http://www.ftc.gov/opa/2009/07/thoratec.shtm; *In the Matter of Thoratec Corporation*, Docket No. 9339 (Aug. 11, 2009) (order dismissing complaint), *available at* http://www.ftc.gov/os/adjpro/d9339/090811thoatecorder.pdf.
49 Press Release, FTC, *FTC Authorizes Suit to Stop CSL's Proposed $3.1 Billion Acquisition of Talecris Biotherapeutics* (May 27, 2009), http://www.ftc.gov/opa/2009/05/talecris.shtm. Talecris abandoned the acquisition in June 2009. *In the Matter of CSL Limited*, Docket No. 9337 (June 22, 2009) (order dismissing complaint), *available at* http://www.ftc.gov/os/adjpro/d9337/090622commorderdismisscomplaint.pdf.
50 Other notable FTC challenges include an action against Dun & Bradstreet Corporation, which resulted in divestitures, and an action against Carilion Clinic, which was required two divest two outpatient clinics in Virginia that it had acquired in 2008. Press Release, FTC, *Dun & Bradstreet Settles FTC Charges that 2009 Acquisition was Anticompetitive* (Sept. 10, 2010), http://www.ftc.gov/opa/2010/09/mdr.shtm.; Press Release, FTC, *Commission Order Restores Competition Eliminated by Carilion Clinic's Acquisition of Two Outpatient Clinics* (Oct. 7, 2009), http://www.ftc.gov/opa/2009/10/carilion.shtm; Press Release, FTC, *FTC Challenges Carilion's Acquisitions of Outpatient Medical Clinics* (July 24, 2009), http://www.ftc.gov/opa/2009/07/carilion.shtm.
51 Press Release, *Google To Acquire AdMob* (Nov. 9, 2009), http://www.google.com/press/pressrel/20091109_admob.html.
52 Press Release, FTC, *FTC Closes its Investigation of Google AdMob Deal* (May 21, 2010), http://www.ftc.gov/opa/2010/05/ggladmob.shtm; *see also* Hogan Lovells LLP, *FTC Approves Google/AdMob Transaction*, http://ehoganlovells.com/ve/t8100F82S62K82L85/VT=1.
53 Press Release, *supra* note 52.
54 Press Release, *supra* note 51.

competed with AdMob in the mobile-device advertising market.[55] Since Google and AdMob were alleged to be the "two leading mobile advertising networks" at the time, "serious antitrust issues" were raised for the FTC.[56]

However, a short time after Google initiated the deal, Apple acquired Quattro, the third largest mobile ad network.[57] Apple quickly became a "strong competitor" in the mobile-device advertising market, via its "close relationships with application developers and users, its access to a large amount of proprietary user data, and its ownership of iPhone software development tools and control over the iPhone developers' license agreement."[58] So despite the fact that Google and AdMob allegedly generated the most revenue among mobile advertising networks, Apple's entrance to the market mitigated the anticompetitive concerns originally advanced by the FTC.[59] In analyzing both the iPhone and non-Apple related devices, the FTC determined that Apple would be able to discipline the market for ad networks on the iPhone, and that Google would still have a "strong incentive" not to exercise market power over its own proprietary market, the Android.[60] As such, the FTC decided not to challenge the transaction.[61]

J. Ovation Pharmaceuticals

The FTC brought a monopolization case against Ovation Pharmaceuticals (now H. Lundbeck A/S) in December 2008 over the acquisition of the drug NeoProfen, which is a treatment for a potentially fatal congenital heart defect that affects premature babies.[62] Ovation owned another drug, called Indocin I.V., which was the only other treatment for this type of disease.[63] Once Ovation's acquisition of NeoProfen was complete, the price of Indocin I.V. skyrocketed nearly 1,300 percent, from $36 per vial to close to $500 per vial.[64] The FTC alleged that Ovation illegally acquired the rights to NeoProfen and willfully maintained a monopoly in the market, keeping prices at artificially inflated levels.[65] These claims rested on Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

The Ovation case is relevant for the Obama Administration because in late September 2010, the FTC lost the case in Minnesota District Court.[66] The court found that the FTC failed to prove that the two drugs were in the same product market, based on extensive testimony from the healthcare community.[67] As this threshold issue prevented the FTC from proving harm to competition in a relevant market, the case was dismissed with prejudice.[68] The FTC has until November 1, 2010, to file a notice of appeal.[69]

55 Hogan Lovells, *supra* note 52.
56 Press Release, *supra* note 52.
57 Statement of the Commission Concerning Google/AdMob, FTC File No. 101-0031 (May 21, 2010), http://www.ftc.gov/os/closings/100521google-admobstmt.pdf.
58 Press Release, *supra* note 52.
59 Hogan Lovells, *supra* note 52.
60 Hogan Lovells, *supra* note 52.
61 *Id.*
62 Press Release, FTC, *FTC Sues Ovation Pharmaceuticals for Illegally Acquiring Drug Used to Treat Premature Babies with Life-Threatening Heart Condition* (Dec. 16, 2008), http://www.ftc.gov/opa/2008/12/ovation.shtm.
63 *Id.*
64 *Id.*
65 *FTC v. Lundbeck*, 2010 U.S. Dist. LEXIS 95365 (D. Minn. Aug. 31, 2010).
66 *Lundbeck*, *supra* note 52.
67 *Id.*
68 *Id.*
69 HSR Report, *supra* note 20, at 13.

II. Horizontal Merger Guidelines

On August 19, 2010, the FTC and DOJ issued a revised set of guidelines governing how the agencies analyze horizontal mergers.[70] The revised guidelines were released after an extensive comment and question period, with the DOJ hosting numerous workshops with the public.[71] The new guidelines were intended to better reflect current agency practice by loosening the mechanical approach of the previous guidelines towards horizontal mergers.[72] Breaking away from the traditional practice in merger analysis of defining the relevant market first, the new guidelines place less emphasis on market definition and the calculation of market shares, and recognize that market definition is an "imprecise inquiry."[73]

Instead, the new guidelines focus on the economic tools that should be employed in determining whether anticompetitive harm exists and whether relevant price or non-price effects may occur as a result of a merger or acquisition.[74] Commentators note that the "reduced emphasis on markets and shares may meet with some judicial resistance," but that litigation time can be significantly cut down by avoiding arguing over the technical definitions and values of these terms.[75]

The revised guidelines also raise the "HHI" thresholds at which a merger is viewed to raise competitive issues,[76] and provide for increased emphasis on unilateral effects as opposed to potentially coordinated effects.[77] Among other things, the new Guidelines also appear to indicate greater scrutiny of high tech mergers, as a result of the emphasis on factors such as margins and price discrimination as indicators of market power and/or potential competitive issues.[78]

Overall, the new Guidelines do not appear to evidence an intention to make radical changes in merger analysis."[79] Instead, the new Guidelines simply reflect, more accurately, current agency practice as it has evolved since the release of the 1992 Guidelines.

III. Statistics

The DOJ challenged or threatened to challenge 12 mergers in fiscal year 2009, filing complaints in U.S. district court seven times that resulted in consent decrees or abandonment of the transaction.[80] In the remaining five merger challenges, the parties either restructured or abandoned the proposed transaction before a lawsuit was filed.[81] In 2008, the DOJ challenged 16 mergers,[82] and filed 15 complaints.[83] These numbers are

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70 U.S. Dep't of Justice & FTC, *Horizontal Merger Guidelines* (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html.
71 Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Merger Guidelines Workshops, Remarks as Prepared for the Third Annual Georgetown Law Global Antitrust Enforcement Symposium* (Sept. 22, 2009), *available at* http://www.justice.gov/atr/public/speeches/250238.htm [hereinafter Varney, Workshops]; Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *An Update on the Review of the Horizontal Merger Guidelines, Remarks as Prepared for the Horizontal Guidelines Review Project's Final Workshop* (Jan. 26, 2010), *available at* http://www.justice.gov/atr/public/speeches/254577.htm [hereinafter Varney, Update].
72 Varney, Workshops, *supra* note 71; Varney, Update, *supra* note 71.
73 Janet McDavid & Thomas B. Leary, *New Merger Guidelines Emphasize Flexibility* (Apr. 2010), http://www.hoganlovells.com/new-merger-guidelines-emphasize-flexibility-04-20-2010/.
74 Varney, Workshops, *supra* note 71; Varney, Update, *supra* note 71.
75 McDavid & Leary, *supra* note 73.
76 *Id.*
77 *Id.*; *see also* McDavid & Leary, *supra* note 73.
78 *Horizontal Merger Guidelines*, *supra* note 70.
79 McDavid & Leary, *supra* note 73.
80 HSR Report, *supra* note 20. The fiscal year for the DOJ and FTC ends on September 30.
81 *Id.* at 7.
82 *Id.* at 3.
83 *Id.*

similar to those from the prior Administration – on average, between 2001 and 2008 there were 6.8 transactions that were restructured or abandoned after a DOJ challenge.[84]

The FTC challenged 19 transactions in fiscal year 2009, obtaining consent decrees in ten, with the remaining eight restructuring or abandoning the deal and one case still pending.[85] The FTC challenged 21 merger transactions in 2008.[86] This resulted in 13 consent orders and two administrative complaints, with the remaining six abandoning or restructuring the proposed transaction.[87] Another measure – the number of investigations into merger transactions for potential antitrust violations – declined from 106 in 2008 to 83 in 2009.[88] During the Bush Administration, there was an average of 126 investigations each year.[89]

These statistics must, however, be viewed in context. A distressed economy resulted in far fewer mergers to review. HSR filings were down more than 50% in 2009 as compared to 2008.[90] One writer notes in a recent article that the DOJ challenged a substantially higher percentage of Second Requests (75%) in 2009 than the Bush DOJ challenged from 2001–2008 (59%).[91] He also calculated that the DOJ filed a higher percentage of complaints from these Second Requests in district court in 2009 (44%) than in 2001–2008 (30%).[92]

IV. Conclusion

President Obama stated during his address to the American Antitrust Institute (AAI) that he would "step up review of merger activity and take effective action to stop or restructure those mergers that are likely to harm consumer welfare, while quickly clearing those that do not."[93] Before she was sworn in, Christine Varney was expected to be more critical of mergers than her predecessors, due in part to her previous tenure as a commissioner at the FTC.[94] Taking a less mechanical approach to the analysis of a proposed merger, Ms. Varney stated that she would be more cautious of supposedly "competitive justifications" for mergers that result in large market shares, and would instead focus on the broader anticompetitive effects that such mergers could cause.[95]

The record of the Obama Administration on merger enforcement is difficult to judge at this stage. While the number of challenges is not especially high, that is at least in part due to the effect of the financial crisis on the number of merger filings. Moreover, the absence of a significant number of court challenges does not necessarily indicate decreased enforcement in any event, especially if parties are willing to enter into remedies that resolve the antitrust issues of their transactions. The agencies have explained that lawsuits are not the only (or necessarily even the best) avenue for success in protecting against anticompetitive mergers, and that settlements with appropriate remedies still protect

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84 *Id.*
85 *Id.* at 1.
86 U.S. Dep't of Justice & FTC, *Hart-Scott-Rodino Annual Report, Fiscal Year 2008*, at 1 (2009), *available at* http://www.ftc.gov/os/2009/07/hsrreport.pdf.
87 *Id.*
88 U.S. Dep't of Justice, *Antitrust Division Workload Statistics FY 2000–2009*, at 6, *available at* http://www.justice.gov/atr/public/workstats.pdf [hereinafter DOJ Work Statistics].
89 *Id.*
90 Only 716 transactions falling under the Hart-Scott-Rodino Act reporting provisions were reported in 2009, against 1,729 in 2008, a 59% decrease. HSR REPORT, *supra* note 20, at 1.
91 *Id.*; *see also* DOJ Work Statistics, *supra* note 88.
92 Harkrider, *supra* note 2; DOJ Work Statistics, *supra* note 88.
93 Obama AAI Statement, *supra* note 1.
94 Christine Varney was a Commissioner of the FTC from October 14, 1995 until August 5, 1997.
95 Varney, *supra* note 4; Leslie Overton, *United States: Antitrust Enforcement in the Obama Administration*, Mondaq Bus. Briefing (May 1, 2009).

competition and consumers.[96] The agencies argue that they seek to exact "tough concessions that resolved the division's concerns, getting better terms than lawyers might have achieved had they gone to court."[97] That seems at least arguably true for the Ticketmaster – LiveNation merger, where the parties were willing to accept significant divestitures and unusual behavioral remedies, and where a court challenge would have been risky.

But overall, the Obama Administration's record on merger enforcement still strikes us as measured and cautious, rather than daring or radical. The agencies have had opportunities to seek to enjoin significant mergers, such as the Ticketmaster – Live Nation merger, Oracle's acquisition of Sun, and Google's acquisition of Admob.[98] They have largely declined these opportunities. Seeking to block these transactions would have been difficult and risky and, given the significant number of recent court losses for the agencies, perhaps unwise. Nonetheless, bringing such a challenge would have represented real substantive change in the level and character of antitrust enforcement as compared to the Bush Administration. For better or worse, the agencies have chosen, so far, not to pursue such a path.

PART II: AGREEMENTS AMONG COMPETITORS

I. Enforcement Actions

A. Cartels

The Obama antitrust enforcers have continued the Bush Administration's aggressive pursuit of cartel violators. Sixteen corporations were fined in 2009, against only 12 in 2008, for total fines of almost $974 million.[99] While that was an unusually strong year for fines, it does not represent a change in enforcement priorities. Indeed, it generally is acknowledged that the Bush Administration antitrust enforcers were very aggressive in pursing cartel cases.[100] Rather, the significant fines in 2009 were largely the result of continued aggressive pursuit of major investigations (primarily of the air cargo and LCD industries) that were begun during the Bush Administration.

The Obama Administration also successfully pushed through a renewal of the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) on June 9, 2009, which President Obama signed ten days later.[101] This law was originally passed in 2004 by the Bush Administration, and increases prison time and criminal fines for antitrust violations.[102] In addition, the law also provides leniency to cartel members that self-report violations to the government, reducing prison time and criminal fines as well as detrebling civil damages, to the extent they occur.[103] Assistant Attorney General Varney acknowledged that her efforts to "uncover and prosecute a number of cartels that inflicted significant

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96 Yang, *supra* note 45; *see also* July 27 Hearing, *supra* note 28; March 11 Hearing, *supra* note 40.

97 Yang, *supra* note 45; Harkrider, *supra* note 2. *See also* HSR Report, *supra* note 20, at 4 ("The percentage of transactions resulting in second requests increased, from 2.5% in fiscal year 2008 to 4.5% in fiscal year 2009.").

98 *Id.*; Josh Kosman, *Obama's Antitrust Policy is Toothless*, N.Y. POST, Feb. 2, 2010, at 26, *available at* http://www.nypost.com/p/news/business/obama_antitrust_policy_is_toothless_TXDe9M2hxeXMIm1j77OJDJ ("The deals that have come under review haven't undergone major changes in order to get the Justice Department's OK."); March 11 Hearing, *supra* note 40; Ronan P. Harty, *Federal Antitrust Enforcement Priorities Under the Obama Administration*, 1 J. EUR. COMPETITION L. & PRACTICE 52 (2010).

99 DOJ Work Statistics, *supra* note 88, at 14.

100 Neal R. Stoll & Shepard Goldfein, *President Obama's Centrist Antitrust Enforcement*, N.Y. L.J., Nov. 19, 2008, http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202426120827 ("During the Bush administration, the DOJ favored aggressive criminal and cartel enforcement over merger and monopolization oversight.").

101 Antitrust Criminal Penalty Enhancement and Reform Act of 2004 Extension Act, H.R. 2675, 111th Cong. (2009) (enacted).

102 Antitrust Criminal Penalty Enhancement and Reform Act of 2004, H.R. 1086, 108th Cong. (2004) (enacted).

103 ACPERA Extension Act, *supra* note 101.

competitive harm" were "significantly enhanced" by ACPERA provisions.[104] Another senior antitrust official cited the leniency programs as the "single most significant development in cartel enforcement."[105]

B. "Reverse Payment" Settlements

So-called "reverse payment" patent settlements occur when a brand name drug company settles patent litigation with a generic drug company pursuant to an agreement that provides for an agreed upon entry date for the generic product, plus some type of payment from the brand name company to the generic.[106] Senator Obama took aim at these settlements in his initial statement to the AAI on antitrust enforcement issues,[107] and FTC Chairman Leibowitz has called eliminating these deals – which he called "pay for delay" agreements – "the top competition priority at the commission."[108] The FTC estimated that these settlements cost consumers between $3.5 billion and $7.5 billion per year.[109]

The FTC believes that these patent settlements with "reverse payments" are presumptive antitrust violations because they amount to "pay for delay" – i.e., the compensation paid to the generic company is in return for acceptance of a later entry date (the term "reverse payment" is sometimes used because more typically one would expect a settlement of an IP case to result in a payment from the alleged infringer to the IP holder). Under the FTC's reasoning, such settlements are unlawful regardless of who ultimately would have won the patent litigation because, absent the payment, the generic would have insisted that the settlement have an earlier entry date. Most courts, however, have rejected this reasoning, finding that patent settlements cannot harm competition absent proof that the settlement impacted competition outside the scope of a valid patent.[110] These courts typically have required those challenging such settlements to show that the underlying patent infringement case was baseless or likely to fail.

The Obama Administration has taken up the fight against these settlements in two distinct ways. First, it has advocated for a legislative solution.[111] Yet passing this type of legislation has proven to be difficult, despite President Obama's vigorous endorsement.[112] Second, the Administration has taken the fight to the courts, seeking to overturn the unfavorable precedent. This effort has not been successful either, however. Motions to dismiss recently were decided in two cases brought by the FTC challenging patent settlements that were alleged to include reverse payments. Only one court allowed the FTC challenge to proceed, and both decisions expressly rejected the FTC's theory of liability.

In February 2010, a federal court in Georgia dismissed an antitrust challenge brought by the FTC and others to a patent settlement relating to the drug Androgel.[113] The

104 *Oversight of the Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Antitrust, Competition Policy, & Consumer Rights of the Senate Judiciary Comm.*, 111th Cong. (June 9, 2010), 2010 WL 2318099 (written testimony of Christine Varney, Assistant Atty. Gen., Antitrust Div., U.S. Dep't of Justice).
105 Scott Hammond, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades* (Feb. 25, 2010), *available at* http://www.justice.gov/atr/public/speeches/255515.htm.
106 FTC, *Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions: An FTC Staff Study* (2010) [hereinafter FTC Report].
107 Obama AAI Statement, *supra* note 1; *see also* Jon Leibowitz, Chairman, FTC, *"Pay for Delay" Settlements in the Pharmaceutical Industry, Remarks as Prepared for the Center for American Progress* (June 23, 2009), *available at* http://www.ftc.gov/speeches/leibowitz/090623payfordelayspeech.pdf.
108 June 9 Hearing, *supra* note11.
109 FTC Report, *supra* note 106; *see also* Gregg Blesch, *Trust Issues*, 39 MODERN HEALTHCARE 30 (2009).
110 *See, e.g., Schering-Plough Corp. v. FTC,* 402 F.3d 1056 (11th Cir. 2005); *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d187 (2d Cir. 2006); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323 (Fed. Cir. 2008), *cert. denied*, 129 S. Ct. 2828 (2009).
111 July 27 Hearing, *supra* note 31.
112 *Id.*
113 *In re Androgel Antitrust Litig.*, MDL Docket No. 2084 (N.D. Ga. 2010).

suit challenged a patent settlement between Solvay and two generic firms pursuant to which (i) the generics agreed to enter the market in 2015 (five years before patent expiration), and (ii) the parties agreed to several side agreements involving payments to the generics in return for providing certain services. The FTC contended that the side arrangements were ways to compensate the generics for a delayed entry date. The court, however, following the reasoning of the prior cases, dismissed the antitrust challenge due to the lack of adequate allegations that the settlement impacted competition outside of a valid patent. The FTC appealed the district court's dismissal of the case to the 11th Circuit on June 10, 2010.[114]

In the second case, decided in March 2010, a federal court in Pennsylvania allowed an antitrust challenge to proceed against a patent settlement relating to the drug Provigil – but based on a theory that the settlement impacted competition outside the scope of a valid patent.[115] According to the court, the settlement agreements included licensing and services provisions, in addition to an agreement on early entry by the settling generics. The court expressly rejected the FTC's theory of liability, stating that "a reflexive conclusion that the agreements in question are per se antitrust violations, as urged by Plaintiffs, and in particular the FTC, ignores the 'exclusionary' patent rights afforded to [the branded manufacturer]."[116] But the court allowed the case to proceed based on allegations of fraud before the Patent and Trademark Office, that the agreements restricted the generics from selling products not subject to the patent case, and that the agreements created a bottleneck on entry by other generics. The court, which had to take these allegations as true for the purposes of the motion, held that the plaintiffs had pled facts that, if proven, might indicate that competition was impacted outside the scope of the patent.[117] This case currently is in the discovery phase.[118]

C. Interlocking Directorates

In May of 2009, Chairman Leibowitz and the FTC initiated an investigation into the relationship between the boards of directors of Google and Apple.[119] Two board members, Eric Schmidt and Arthur Levinson, were on both boards at the time, and the FTC's investigation centered on whether this violated the Section 8 prohibition precluding a person from serving as a director on two corporations when competition would be harmed as a result.[120] In August 2009, while the investigation was on-going, Mr. Schmidt resigned from Apple's board of directors, and Mr. Levinson resigned from Google's board in October of the same year.[121] The FTC did not publicly drop the investigation, but the Chairman commended the parties involved, citing "their willingness to resolve our concerns without the need for litigation."[122]

D. Agreements Regarding Employment Practices of Technology Firms

The DOJ also investigated the conduct of Google, Apple and other Silicon Valley companies that had entered into agreements not to compete for employees from one

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114 *See* FTC, *In re Androgel Antitrust Litig.*, http://www.ftc.gov/os/caselist/0710060/index.shtm.
115 *King Drug Co. of Florence, Inc. v. Cephalon*, 06 Civ. 1797 (E.D. Pa. Mar. 29, 2010).
116 *Id.* at 20.
117 *King Drug Co. of Florence, Inc. v. Cephalon*, 06 Civ. 1797 (opinion) (E.D. Pa. Mar. 29, 2010), *available at* http://www.ftc.gov/os/caselist/0610182/100329cephalondecision.pdf.
118 Evenlyn Pringle, *The Rise and Fall of Provigil – Part II*, SALIENT NEWS, Sept. 21, 2010, http://www.salient-news.com/2010/09/provogil-cephalon/.
119 Miguel Helft & Brad Stone, *Board Ties at Apple and Google Are Scrutinized*, N.Y. TIMES, May 5, 2009, *available at* http://www.nytimes.com/2009/05/05/technology/companies/05apple.html?_r=1.
120 15 U.S.C. Section 19 (2006). *See also* Helft & Stone, *supra* note 119.
121 Miguel Helft, *Google and Apple Eliminate Another Link Tie*, N.Y. TIMES, Oct. 12, 2009, *available at* http://www.nytimes.com/2009/10/13/technology/companies/13google.html.
122 *Id.*

another.[123] Specifically, the DOJ alleged "that senior executives at the companies agreed not to cold-call each other's workers," reducing the opportunity for competition among the firms for highly skilled employees.[124] After bringing civil charges against the companies, which included Google, Apple, Pixar Animation, Intel, Intuit, and Adobe Systems, the DOJ reached a settlement agreement in September 2010.[125] The agreement simply required that the no-solicitation agreements cease.[126]

II. Other Actions

A. Credit Derivatives Market

The DOJ also has been active in the financial sector, looking into credit derivatives and related markets.[127] In July 2009, Markit Group Holdings and several other banks were requested to provide information to the DOJ concerning an investigation into whether the banks had unfair access to pricing information.[128] Some evidence also pointed to allegations of price manipulation, but no charges have been brought thus far.[129]

B. The Insurance Exemption

A renewed focus on the healthcare industry has been enhanced by the Administration's vigorous efforts to repeal the McCarran-Ferguson Act's exemption for health insurance providers. This repeal is considered by some to be long overdue, considering that the exemption for health insurance providers was enacted in 1945, when the argument was that insurance companies were not engaged in interstate commerce.[130] The Antitrust Modernization Committee reported that "insurance companies would bear no greater risk than companies in other industries engaged in data sharing and . . . like all other potentially beneficial competitor collaborations, such data sharing would be assessed by antitrust enforcers and the courts under a rule of reason."[131]

Repealing the exemption would end the "special treatment for the insurance industry that allows them to fix prices, collude with each other and set their own markets without fear of being investigated[.]"[132] President Obama has become closely involved on the subject, encouraging Congress to repeal the exemption on numerous occasions and emphasizing the inevitable anticompetitive effects that occur in not applying the antitrust laws to health insurance providers.[133] In February 2010, the exemption was repealed by an overwhelming margin in the House, leaving the issue up to the Senate to decide.[134]

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123 *See e.g.*, Brent Kendall, *Six Tech Firms Settle Federal Hiring Probe*, WALL ST. J., Sept. 25, 2010, *available at* http://online.wsj.com/article/SB10001424052748703499604575512291550098672.html.
124 *Id.*
125 *Id.*
126 *Id.*
127 Eric Dash, *Derivatives are Focus of Antitrust Investigators*, N.Y. TIMES, July 14, 2009, *available at* http://www.nytimes.com/2009/07/15/business/15cds.html.
128 *Id.*
129 *Id.*
130 *Hearing on Prohibiting Price Fixing and Other Anti-Competitive Conduct in the Health Insurance Industry Before the Senate Judiciary Comm.*, 111th Cong. (Oct. 14, 2009), 2009 WLNR 20279766 [hereinafter Oct. 14 Hearing].
131 *Id.*
132 Matthew DoBias, *Time for Plan B*, 40 MODERN HEALTHCARE 8 (2010) (quoting Rep. Tom Perriello, D-Va.).
133 Anna Fifield, *Obama Urges Action on Health Insurers*, FIN. TIMES, Feb. 23, 2010.
134 Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Antitrust and Healthcare, Remarks as Prepared for the Am. Bar Assoc. / Am. Health Lawyers Assoc. Antitrust in Healthcare Conference* (May 24, 2010), *available at* http://www.justice.gov/atr/public/speeches/258898.htm.

C. Agricultural Industry

Another industry that has been a particular focus for antitrust enforcement under the Obama Administration has been the agricultural industry. Just four months after being sworn in as AAG, Ms. Varney announced that the Antitrust Division would hold a series of public workshops to "explore competition issues affecting the agriculture industry in the 21st century and the appropriate role for antitrust and regulatory enforcement in that industry."[135] The DOJ solicited comments on the scope of the antitrust laws and their application to the agricultural sector, focusing on the seed industry and the markets for dairy and beef.[136] These workshops were planned to examine the "dynamics of competition in agriculture markets,"[137] including "evaluating the state and nature of competition in a range of agricultural markets; the impact of vertical integration; concerns about 'buyer power'; relevant regulatory regimes; and questions about the nature of transparency in the marketplace."[138]

The Administration touted these workshops as an essential task to effectively enforce the antitrust laws in an industry that has become increasingly concentrated and particularly vulnerable to market manipulation.[139] Putting the agriculture companies "on notice," Ms. Varney created a task force of lawyers to determine the overlap in jurisdiction between the DOJ and the USDA, with whom the workshops were organized.[140] Additionally, she is working to create a centralized office for the two agencies to jointly work from and reached out to the FTC for advice and assistance.[141] To emphasize the novelty of these workshops and the approach taken by the Administration, she stated that "we're trying to gather as much evidence as we can in the field. To my knowledge, that hasn't been done before."[142] This particular focus on the agricultural industry led to a major lawsuit by the Obama Administration under Section 1 of the Sherman Act, against Dean Foods.[143]

III. Conclusion

In the area of anticompetitive agreements, the Administration has certainly sought to enforce the antitrust laws in an aggressive fashion. It has pursued alleged cartel violators, allegedly anticompetitive links between technology companies, and has worked as hard as possible to curb the use of so-called reverse payment patent settlements. But again, overall, we do not view its record on these issues as materially different from that of the Bush Administration enforcers, who worked just as aggressively in these areas. After all, it was the Bush Administration that began the investigation into the air cargo cartel, which has netted over $1 billion in fines. And it is hard to see how the FTC under the Bush Administration could have fought harder than it did against so-called reverse payment patent settlements.

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135 Press Release, U.S. Dep't of Justice, *Justice Department and USDA to Hold Public Workshops to Explore Competition Issues in the Agriculture Industry* (Aug. 5, 2009), http://www.justice.gov/atr/public/press_releases/2009/248797.htm.
136 *Id.*; Philip J. Weiser, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't. of Justice, *Remarks as Prepared for the Organization for Competitive Markets 11th Annual Conference* (Aug. 7, 2009), *available at* http://www.justice.gov/atr/public/speeches/248858.htm.
137 Press Release, *supra* note 135.
138 Weiser, *supra* note 136.
139 *Id.*
140 June 9 Hearing, *supra* note 11.
141 *Id.*
142 *Id.*
143 Dean Foods Complaint, *supra* note 10.

PART III: ACTIONS AGAINST ALLEGEDLY DOMINANT FIRMS

I. Monopolization Under Section 2 of the Sherman Act

A. Withdrawal of Section 2 Report

On May 11, 2009, in her first official act, AAG Varney withdrew a 2008 DOJ report entitled "Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act," (the "Section 2 Report") which she viewed to raise too "many hurdles to government antitrust enforcement" of Section 2.[144] In her view, the Section 2 Report had wrongly recommended significant limitations on the government's enforcement of Section 2 by overstating the "importance of preserving possible efficiencies and understates the importance of redressing exclusionary and predatory acts that result in harm to competition, distort markets, and increase barriers to entry."[145] More importantly, the Section 2 Report was skeptical of the ability of antitrust enforcers "to distinguish between anticompetitive acts and lawful conduct," a concern that Varney did not share.[146]

The Section 2 Report had originally adopted a "disproportionality" test for analyzing potential monopolization, reasoning that a merger should be allowed to proceed unless the harm to competition is disproportionate to the consumer and economic benefits created.[147] This "preference for an overly lenient approach to enforcement" did not sit well with AAG Varney, who promised to reinvigorate antitrust enforcement under Section 2.[148] In withdrawing the Report, she advocated a more "balanced approach," stating that she wanted the Antitrust Division to go "back to the basics and evaluate single-firm conduct against these tried and true standards [of historic Supreme Court case law] that set forth clear limitations on how monopoly firms are permitted to behave. There can be no better charter for our return to fundamental principles of antitrust enforcement."[149]

B. Telecommunications Industry

In July of 2009, the Wall Street Journal reported that the DOJ had begun an investigation into monopoly conduct by large United States telecommunications companies, such as Verizon and AT&T.[150] While no charges have yet been filed in this industry, the DOJ apparently is looking at whether these companies are abusing allegedly recently-acquired market power.[151] One area of concern is whether competition is being harmed by larger wireless carriers in "locking up" certain phones through exclusive agreements, such as the iPhone.[152] Another area reportedly under review is whether undue restrictions are being placed on the types of services offered on a particular network.[153] Commentators have suggested that charges are unlikely to be filed against the parties in this industry, as no single firm has a dominant position in the market.[154]

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144 Varney, *supra* note 4.
145 *Id.*
146 *Id.*
147 *Id.*
148 *Id.*
149 *Id.*
150 Amol Sharma, *Telecoms Face Antitrust Threat*, WALL ST. J., July 7, 2009, *available at* http://online.wsj.com/article/SB124689740762401297.html.
151 *Id.*
152 *Id.*
153 *Id.*
154 *Id.*

II. Section 5 of the Federal Trade Commission Act

A. Background

One aspect of the Obama Administration's antitrust enforcement against unilateral conduct is an increased reliance upon Section 5 of the Federal Trade Commission Act to prosecute unilateral conduct.[155] Section 5 prohibits "unfair methods of competition . . . and unfair or deceptive [trade] practices," which some have contended is broader than the sweep of the Sherman Act.[156] The FTC has interpreted this enforcement power broadly in the past, by challenging conduct that "might facilitate [] poor performance" in markets that were not performing well.[157] In the 1970's and early 1980's, the FTC suffered a string of defeats in the courts under this reasoning, and subsequently did not actively seek to challenge anticompetitive conduct as "unfair methods of competition" that might be unlawful even without a violation of the Sherman Act.[158]

This lack of use persisted over the next twenty years, as the executive branch found enforcement under conventional Sherman Act theories and the other antitrust laws sufficient to cover most anticompetitive conduct.[159] Recently, however, courts have become more conservative in finding liability under the antitrust laws, due to "concern over class actions, treble damages awards, and costly jury trials."[160] As a result, Chairman Leibowitz has argued that enforcement against anticompetitive conduct has lagged "out of a fear that the harm might be outweighed by the collateral consequences created by private enforcement."[161]

As more and more conduct has fallen out of the purview of the antitrust laws, Chairman Leibowitz believes that the FTC must turn to Section 5's broad mandate against unfair methods of competition to fill in the gaps.[162] Today, the FTC is seeking to reinvigorate enforcement under this aspect of Section 5, utilizing it "to bolster enforcement and provide protection for competition and consumers beyond the parameters of the Sherman Act."[163] Two recent cases highlight the increased emphasis on Section 5 as an enforcement tool against unilateral conduct.[164]

B. Intel

In December of 2009, after a multi-year investigation, the FTC brought an action against Intel, alleging monopolistic conduct in the market for central processing and graphics processing units.[165] Intel was alleged to have forced its customers into exclusive dealing arrangements by threatening to charge these customers higher prices if they purchased products from Intel competitors (specifically, AMD).[166] The Administrative

155 Leibowitz, *supra* note 107.
156 15 U.S.C. Section 45 (2006).
157 Jon Leibowitz, Chairman, FTC, *Remarks as Prepared for the 36th Annual Conference on International Antitrust Law & Policy* (Sept. 24, 2009), *available at* http://www.ftc.gov/speeches/leibowitz/090924fordhamspeech.pdf [hereinafter Leibowitz, Fordham Speech]. *See also* Jon Leibowitz, Chairman, FTC, *Making the Grade? A Year at the FTC, Remarks as Prepared for the 4th Annual Global Antitrust Enforcement Symposium* (Sept. 21, 2010), *available at* http://www.ftc.gov/speeches/leibowitz/100921makingthegradespeech.pdf [hereinafter Leibowitz, Georgetown Speech].
158 Leibowitz, Georgetown Speech, *supra* note 157; Leibowitz, Fordham Speech, *supra* note 157.
159 Statement of Chairman Leibowitz & Comm'r Rosch, *In the Matter of Intel Corp.*, No. 9341 (F.T.C. Aug. 10, 2010), http://www.ftc.gov/os/adjpro/d9341/091216intelchairstatement.pdf.
160 *Id.*
161 *Id.*
162 *Id.*
163 *Id.*
164 The FTC also included a Section 5 claim against Ovation Pharmaceuticals, which it lost in late August 2010. *See FTC v. Lundbeck*, 2010 U.S. Dist. LEXIS 95365 (D. Minn. Aug. 31, 2010).
165 Intel Complaint, *supra* note 6, at 2.
166 *Id.*

Complaint filed by the FTC against Intel challenged Intel's conduct as monopolization, but also challenged certain practices as unfair methods of competition.[167] For example, the FTC alleged that Intel acted deceptively when it "failed to disclose [certain] material information about the effects of its redesigned compiler on the performance of non-Intel CPUs," and "falsely misrepresented that industry benchmarks reflected the performance of its CPUs relative to its competitors' products."[168] The FTC successfully secured a consent order against Intel after just eight months of litigation, and hailed Section 5 as a "highly effective way of getting relief for consumers quickly[.]"[169]

C. U-Haul

The second case points out a specific type of anticompetitive conduct that is perhaps considered uniquely Section 5 territory: "invitations to collude." In *In the Matter of U-Haul International, Inc.*, the FTC alleged that U-Haul's corporate executives made a unilateral offer to a competitor (during an earnings call) to raise prices in the market for one-way truck rentals.[170] This type of conduct is not unlawful under Section 1 of the Sherman Act (which requires an actual agreement), or Section 2 of the Sherman Act (in the absence of market power). Chairman Leibowitz therefore concludes that this type of case is "precisely why Section 5 authority is necessary."[171] In settling the case just one month after the complaint was filed, he emphasized that Section 5 allowed the FTC to put a halt to this particular genre of anticompetitive conduct while still limiting follow-on private actions that would occur if the Sherman Act were used, which could expose a company to treble damages.[172] This distinctive characteristic of Section 5 remedies (relative to those available under the Sherman Act) underscores the Chairman's reasoning for seeking to reinvigorate Section 5 enforcement.

D. Transitions Optical

A third case brought by the FTC under Section 5 appears to represent a more traditional case based on alleged monopolistic practices. Transitions Optical manufactures photochromic treatments, which are applied to eyeglass lenses in order to darken the lenses when they are exposed to ultraviolet light.[173] These treatments are sold to lens manufacturers (or "lens casters"), who then sell the treated lenses to wholesalers and retailers.[174] On March 3, 2010, the FTC alleged that Transitions illegally maintained a monopoly in this market by refusing to deal with lens manufacturers who sold competing photochromic lenses.[175] Transitions allegedly leveraged its monopoly power further down the supply chain as well, entering into exclusive arrangements with distributors of the treated lenses to foreclose competition.[176] These practices "locked out rivals from approximately 85 percent of the lens caster market, and partially or completely locked out rivals from up to 40 percent or more of the retailer and wholesale lab market."[177]

167 *Id.*
168 *Id.* at 3 Paragraph 10.
169 *Analysis of Proposed Consent Order to Aid Public Comment, In the Matter of Intel Corporation*, No. 9341 (F.T.C. Aug. 10, 2010), http://www.ftc.gov/os/adjpro/d9341/index.shtm; Leibowitz, Georgetown Speech, *supra* note 157.
170 U-Haul Int'l, Inc., FTC File No. 0810157 (July 20, 2010) (complaint), *available at* http://www.ftc.gov/os/caselist/0810157/100720uhaulcmpt.pdf.
171 Leibowitz, Georgetown Speech, *supra* note 157.
172 Statement of Chairman Leibowitz, Comm'r Kovacic, & Comm'r Rosch, I*n the Matter of U-Haul Int'l, Inc. & AMERCO*, FTC File No. 081-0157 (F.T.C. June 9, 2010), http://www.ftc.gov/os/caselist/0810157/100609uhaulstatement.pdf.
173 Press Release, FTC, *FTC Bars Transitions Optical, Inc. from Using Anticompetitive Tactics to Maintain its Monopoly in Darkening Treatments for Eyeglass Lenses* (Mar. 3, 2010), http://www.ftc.gov/opa/2010/03/optical.shtm.
174 *Id.*
175 *Id.*
176 *Id.*
177 *Id.*

The FTC and Transitions Optical settled the case without litigation. The consent agreement eliminated all exclusive contracts by Transitions and prevents the company from "limiting the information that its customers give to consumers about competing photochromic treatments."[178] Further, the agreement prohibits Transitions from giving discounts to customers based on the percentage of the customer's sales represented by Transitions products and prohibits retroactively applying such discounts once certain sales thresholds are reached.[179] Finally, Transitions is forbidden to retaliate against customers that do not exclusively sell Transitions Optical lenses.[180] The settlement agreement was approved by the FTC on April 27, 2010.[181]

E. Criticisms of FTC's Approach to Section 5

Numerous criticisms of the FTC's strategy of broadening the use of Section 5 have been advanced. Most obviously, there is discomfort with the notion that the FTC has the right to challenge conduct that private parties – and even the DOJ – do not. These critics argue that it is difficult to see why the standards that govern the DOJ's pursuit of a Section 2 case should not similarly apply to an FTC case based on the same conduct.

There also is a concern that the standards of Section 5 are only vaguely defined by case-law, as compared to the decades of precedent on the applicable standards under Sections 1 and 2 of the Sherman Act.[182] Senator Orrin Hatch, in congressional hearings on the subject, argued that such uncertainty is "harmful to growth and innovation."[183] The Senator continued:

> Should we not be concerned that the uncertainty inherent in the FTC's use of Section 5 will prevent businesses from competing aggressively? Also, in your opinion, does the FTC have the authority under Section 5 to unilaterally establish new competitive norms? And what are the outer limits of Section 5, and who ultimately decides what those limits are?[184]

Chairman Leibowitz responded to these concerns by emphasizing that the FTC would only take action when "it is proven that the conduct at issue has not only been unfair to rivals in the market but, more important, is likely to harm consumers, taking into account any efficiency justifications for the conduct in question."[185] Additionally, the FTC believes that it can affirmatively mitigate the concerns surrounding uncertainty by using "rigorous economic analysis" that would provide a framework for companies by which to operate.[186] However, the undefined nature of Section 5 still presents a problem for businesses, as a business that believes itself to have complied with the standards of the Sherman Act will be left to wonder if it still may be sued by the FTC.

Another concern with the FTC's efforts to promote Section 5 is that the assumption that follow-on actions will not occur may be faulty. Section 5 claims can be followed by lawsuits under state consumer-protection laws (i.e., "little FTC Acts"). While a finding of

178 *Id.*
179 *Id.*
180 *Id.*
181 *Id.*
182 June 9 Hearing, *supra* note 11; Leibowitz, Fordham Speech, *supra* note 157.
183 June 9 Hearing, *supra* note 11 (statement of Sen. Orrin Hatch).
184 June 9 Hearing, *supra* note 11.
185 Intel Complaint, *supra* note 6.
186 Thomas A. Miller & Ryan W. Marth, *Promoting Greater Consistency in Single Party Conduct Policy* (Draft Paper Presented to the AAI's 10th Annual Conference, June 18, 2009), *available at* http://www.antitrustinstitute.org/files/Marth Miller Convergence Article_071420091600.pdf.

liability under Section 5 would not automatically result in a consumer-protection law claim, there is concern that some of these state laws might incorporate relevant FTC case-law against anticompetitive behavior on an ad hoc basis.[187] Some of these state laws even allow for class actions and treble damages, potentially exposing the defendant companies to the very type of staggering monetary liability that the FTC is seeking to avoid.[188]

III. Other Actions

A. Google Books

The DOJ has investigated and commented on the settlement between Google and a class of book publishers who were challenging Google's right to publish books online.[189] The settlement, which allows Google Books to publish numerous works online and provides a procedure for compensating publishers, was entered into in 2008 after three years of litigation. Google agreed to pay the publishers $125 million and to establish a registry for writers to obtain compensation for their works.[190] The DOJ began investigating when critics of the settlement alleged that the proposed settlement would provide Google with "broad copyright immunity" and would "make it difficult for competitors to enter the market for digital titles."[191] Certain of the objections focused on the provisions of the settlement that applied to those who owned the copyrights of so-called "orphan works" (works for which the copyright-holders could not be identified), which critics thought established Google as the only viable competitor in the space.[192]

In February 2010, after the parties submitted a revised settlement agreement, the DOJ recognized that the parties had "made substantial progress" on a variety of issues that concerned the DOJ, but it still concluded that "the changes do not fully resolve the United States' concerns."[193] The DOJ stated that Google still potentially had a dominant position in the digital marketplace, and that a better settlement could be achieved.[194] The matter is still under review in the District Court.

B. Credit Cards

On October 4, 2010, the DOJ filed a civil antitrust lawsuit against American Express, MasterCard, and Visa, alleging violations of Section 1 of the Sherman Act.[195] The challenge was regarding the fees that the credit card companies charge merchants each time a credit card is used for purchases.[196] Each company has rules in place that block merchants from raising these fees with consumers, as well as preventing the merchants from offering discounts or rewards to consumers in an attempt to "steer" them towards certain (usually lowest-cost) methods of payment.[197] The DOJ alleges that these practices essentially "distort the competitive process" and make consumers pay more overall when purchasing goods or services.[198]

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187 Dissenting Statement of Comm'r William E. Kovacic, *In the Matter of Negotiated Data Solutions, LLC*, No. 051-0094 (F.T.C. Jan. 23, 2008) *available at* http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf.
188 *Id.*; *see also* Statement, *supra* note 159.
189 Elizabeth Williamson, Jeffrey A. Trachtenberg & Jessica E. Vascellaro, *Probe of Google Book Deal Heats Up*, WALL. ST. J., June 10, 2009 *available at* http://online.wsj.com/article/SB124458396782799555.html.
190 *Id.*
191 *Id.*
192 *Id.*
193 Press Release, U.S. Dep't of Justice, *Justice Department Submits Views on Amended Google Book Search Settlement* (Feb. 4, 2010), http://www.justice.gov/atr/public/press_releases/2010/255014.htm.
194 *Id.*
195 Press Release, *supra* note 7.
196 *Id.*
197 *Id.*
198 *Id.*

MasterCard and Visa were included in the lawsuit, but have reached a settlement agreement with the government.[199] American Express, however, has chosen to fight. In a statement, the chief executive of American Express argued that lifting these rules would cause merchants to pressure consumers to use credit cards that are not consumers' first choice, and without any real economic savings to consumers.[200] American Express contends that the relief sought by DOJ would actually reduce competition in the field, and favor the already dominant players, Visa and MasterCard.

In taking on the three largest credit card companies in the United States, Attorney General Eric Holder stated that the Obama Administration would "not tolerate anti-competitive policies and practices."[201] This lawsuit could be the first indication that the Obama Administration is moving towards a qualitatively different type of enforcement against what essentially is unilateral (although parallel) conduct by firms alleged by DOJ to have "market power."

C. Blue Cross Blue Shield of Michigan

This trend of enforcing the antitrust laws against unilateral conduct through Section 1 is further supported by the DOJ's recent lawsuit against Blue Cross Blue Shield of Michigan (BCBSM). On October 18, 2010, the DOJ alleged that BCBSM entered into arrangements with hospitals to secure "most favored nation (MFN) clauses" in violation of Section 1 of the Sherman Act.[202] These clauses allegedly guarantee that BCBSM receives the best rate possible by requiring "a hospital either to charge BCBSM no more than it charges BCBSM's competitors, or to charge the competitors a specified percentage more than it charges BCBSM, in some cases between 30 and 40 percent."[203] According to the DOJ, the provisions "raise hospital prices, prevent other insurers from entering the marketplace and discourage discounts."[204] The DOJ Complaint does not allege a violation of Section 2 of the Sherman Act.

IV. Statistics

The statistics are easy: No pure Section 2 monopolization case has been filed by the DOJ.[205] The DOJ has brought what essentially is a unilateral conduct case against the credit card companies for vertical restraints, and an arguably similar claim against Blue Cross Blue Shield of Michigan for alleged anticompetitive MFNs, but each of those cases will be judged under the standards of Section 1 of the Sherman Act.

The FTC has done a bit more. It challenged an alleged monopolist in its case against Intel but, as noted, that case relied at least to some extent upon a broad reading of the prohibition of "unfair" practices under Section 5 of the FTC Act.[206] The FTC also brought a more conventional exclusive dealing monopolization-type case in its complaint against Transitions Optical.

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199 *Id.*
200 Press Release, American Express, *Justice Department's Lawsuit is a Bad Deal for Consumers*, http://about.americanexpress.com/news/pr/2010/wp-op-ed.aspx (Oct. 8, 2010).
201 Ylan Q. Mui, *U.S. Hits Amex with Antitrust Suit*, WASH. POST, Oct. 5, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/10/04/AR2010100407062.html.
202 Press Release, U.S. Dep't of Justice, *Justice Department Files Antitrust Lawsuit Against Blue Cross Blue Shield of Michigan* (Oct. 18, 2010), http://www.justice.gov/atr/public/press_releases/2010/263227.htm.
203 *Id.*
204 *Id.*
205 DOJ Work Statistics, *supra* note 88, at 6.
206 Intel Complaint, *supra* note 6. *See* Part III.II.B for further information on the Intel case. The FTC has one other Section 2 action pending, against Cephalon, Inc., which was filed before the Obama administration took office, on February 13, 2008. FTC File No. 061-0182 (complaint), *available at* http://www.ftc.gov/os/caselist/0610182/080213complaint.pdf.

The DOJ began seven new monopolization investigations in 2009,[207] which is approximately the average number of monopolization investigations begun by the Bush Administration each year between 2001 and 2008.[208] The Bush Administration did not wind up prosecuting any of these cases in court,[209] and whether the Obama Administration follows suit (and successfully) is something that remains to be seen.

V. Conclusion

The Obama Administration's record on challenging unilateral conduct cases is somewhat curious. On the one hand, as of October 2010, the DOJ has still not brought any pure Section 2 cases against an alleged monopolist (and the FTC has not done much more). While such cases undoubtedly take years to investigate and prepare, the fact remains that we cannot yet say that the Administration has increased enforcement in this area.

On the other hand, the cases that the Administration has brought against unilateral conduct seek to stretch antitrust law in a way that a conventional Section 2 case would not. The FTC challenges under Section 5 of the FTC Act against Intel and U-Haul, for example, rely on the notion that the FTC can use Section 5 to challenge conduct that private parties and the DOJ could not challenge under Section 2 of the Sherman Act. The DOJ case against the credit card companies relies on the questionable notion that each of the first, second, and third largest companies in the market have "market power," as that term is understood under the antitrust law precedent.

Each of these challenges (as well as the recent case filed against BCBSM) appears intended to challenge dominant firm conduct without meeting the strict requirements for a Section 2 case. Rather than seeking to increase antitrust enforcement under Section 2 and meet its strict requirements, the DOJ has thus far generally shied away from such a challenge, and instead chosen to pursue novel, but potentially questionable, theories of anticompetitive dominant firm conduct instead.

Overall Conclusion

While the antitrust agencies under Obama plainly are intent on enforcing the antitrust laws more aggressively than the prior Administration, the increase has, to date, been modest. Several factors certainly have worked to limit this movement, including a decrease in merger filings, the time it takes to investigate and file an antitrust action (especially a Section 2 case), and the need to convince the courts to go along with any challenge. But overall, the Obama Administration generally has certainly not dramatically altered the landscape of antitrust enforcement. That, however, is not a bad thing. While some change in enforcement may well be desirable, the pace must be cautious.

In the merger area, the Obama agencies have investigated aggressively, and sought some unusual remedies. But when push came to shove, the agencies generally have proceeded with caution, likely passing up opportunities to bring risky cases that would have marked a real departure from the prior administration's merger policies.

With respect to anticompetitive agreements, neither the Administration's enforcement policies, nor its results, appear to have moved the dial much thus far. While it

207 DOJ Work Statistics, *supra* note 88, at 1; *see also* Harkrider, *supra* note 2.
208 DOJ Work Statistics, *supra* note 88, at 1; *see also* Harkrider, *supra* note 2.
209 DOJ Work Statistics, *supra* note 88, at 6.

has investigated certain types of conduct aggressively – especially so-called reverse payment settlements – the prior administration did so as well, and the Obama team has not yet been able to achieve the results it seeks in key areas.

Finally, with respect to unilateral conduct, the Obama Administration's record in challenging unilateral conduct is at once curiously conservative, as well as radical. The business community continues to wait for the DOJ's first true monopolization case. On the other hand, the FTC and DOJ have both brought actions against companies accused of having abused their market power under different provisions of the antitrust laws. If the principal innovation of the Obama antitrust agencies is to challenge unilateral conduct without seeking to meet the legal requirements of Section 2 of the Sherman Act, that would concern us – and also likely face a difficult time before the courts.

Epilogue

This article was written in October 2010 in anticipation of The Sedona Conference® on Antitrust Law. Seven months later, as the article goes to publication, we can reflect on whether the pace of change noted in the article has changed much. In short, it has not. The gradual trend towards increased antitrust enforcement at the DOJ and FTC that we noted in our original article has continued to accelerate, but there has still not been what we would consider a dramatic shift in antitrust enforcement policy under the Obama Administration. With that said, several developments from the past seven months confirm some of the enforcement trends that first appeared last year.

One trend that has continued at the DOJ is its willingness to resolve mergers raising "vertical" issues with consent decrees, including behavioral remedies. Working with the Federal Communications Commission, the Antitrust Division obtained concessions from the parties to the Comcast Corporation/NBC transaction that are reminiscent of the Ticketmaster/LiveNation transaction.[210] Among other provisions contained in the settlement agreement was a so-called "anti-retaliation" provision, whereby Comcast cannot retaliate against other broadcast networks or cable programmers for licensing content to a Comcast competitor.[211] Additionally, Comcast was required to remove itself from the board of directors of Hulu, an online video distributor (OVD), in order to foreclose any possible interference with new product development that could compete with Comcast's video services.[212] Comcast was also "prohibited from unreasonably discriminating in the transmission of an OVD's lawful network traffic to a Comcast broadband customer."[213]

Additionally, a consent decree was reached in the Google/ITA transaction, which also involved vertical issues. After Google Inc. sought to acquire ITA Software, Inc., which produces software that searches for air travel fares and schedules, the DOJ alleged that the combination would "substantially lessen[] competition among providers of comparative flight search websites in the United States, resulting in reduced choice and less innovation for customers."[214] The settlement agreement filed by the DOJ required Google "to develop and license travel software, to establish internal firewall procedures and to continue software

210 Press Release, U.S. Dep't of Justice, *Justice Department Allows Comcast-NBCU Joint Venture to Proceed With Conditions* (Jan. 18, 2011), http://www.justice.gov/atr/public/press_releases/2011/266149.htm.
211 *Id.*
212 *Id.*
213 *Id.*
214 Press Release, U.S. Dep't of Justice, *Justice Department Requires Google Inc. to Develop and License Travel Software in Order to Proceed With its Acquisition of ITA Software Inc.* (Apr. 8, 2011), http://www.justice.gov/atr/public/press_releases/2011/269589.htm.

research and development."[215] Google was forced to license ITA's existing software on "commercially reasonable terms," as well as "fund research and development of that product at least at similar levels to what ITA has invested in recent years."[216]

The DOJ has now brought (and settled) its first Section 2 case – although it hardly represents the "new Microsoft." The target was United Regional Health Care System, a hospital that allegedly dominates the Wichita Falls area of Texas.[217] The DOJ alleged that United Regional "systematically required most commercial health insurers to enter into contracts that effectively prohibited them from contracting with United Regional's competitors."[218] As the largest hospital in the area, United Regional's contracts allegedly forced insurers to pay "significantly higher prices if they contracted with a nearby competing facility," which allegedly led most insurers to enter into exclusive relationships with United Regional.[219] The settlement agreement prohibited United Regional "from conditioning the prices or discounts that it offers to commercial health insurers based on whether those insurers contract with other health-care providers and from inhibiting insurers from entering into agreements with United Regional's rivals."[220]

In the past few months we have seen both the DOJ and the FTC demonstrate a willingness to go to court to challenge horizontal mergers. But, again, none of the targets chosen appears to indicate a dramatic shift in antitrust enforcement policy. Perhaps the most significant development (in economic terms) was the DOJ's threat to challenge the acquisition of NYSE Euronext by NASDAQ OMX Group Inc. and IntercontinentalExchange Inc., which caused the parties to abandon the deal.[221] NYSE Euronext owns and operates the New York Stock Exchange, while NASDAQ operates the NASDAQ Stock Market, the two major stock exchanges in the United States.[222] The DOJ moved to block the deal because it allegedly "would have substantially eliminated competition for corporate stock listing services, opening and closing stock auction services, off-exchange stock trade reporting services and real-time proprietary equity data products."[223] It is hard to say that the Bush Administration would not also have challenged this deal.

The antitrust agencies have also recently brought some challenges to relatively small transactions, some which involved local geographic markets. DOJ filed suit challenging the acquisition of a chicken processing complex for $3 million by George's Inc., the 15th largest processor of chickens in the United States.[224] The acquisition of the Tyson Foods complex would allegedly have eliminated "substantial competition between the two companies for the procurement of services of chicken growers in the Shenandoah Valley area."[225] The FTC also sought and obtained an injunction against the proposed acquisition of St. Luke's Hospital by ProMedica Health System Inc., a competing hospital in Dayton,

215 *Id.*
216 *Id.*
217 Press Release, U.S. Dep't of Justice, *Justice Department Reaches Settlement With Texas Hospital Prohibiting Anticompetitive Contracts With Health Insurers* (Feb. 25, 2011), http://www.justice.gov/atr/public/press_releases/2011/267648.htm.
218 *Id.*
219 *Id.*
220 *Id.*
221 Press Release, U.S. Dep't of Justice, *NASDAQ OMX Group Inc. and IntercontinentalExchange Inc. Abandon Their Proposed Acquisition of NYSE Euronext After Justice Department Threatens Lawsuit* (May 16, 2011), http://www.justice.gov/atr/public/press_releases/2011/271214.htm.
222 *Id.*
223 *Id.*
224 Press Release, U.S. Dep't of Justice, *Justice Department Files Antitrust Lawsuit Challenging George's Inc.'s Acquisition of Tyson Foods Inc.'s Harrisonburg, VA., Poultry Processing Complex* (May 10, 2011), http://www.justice.gov/atr/public/press_releases/2011/270975.htm; Melissa Lipman, *DOJ Sues to Undo $3M Chicken Processing Sale*, Law360.com, May 10, 2011, *available at* http://www.law360.com/topnews/articles/244362/doj-sues-to-undo-3m-chicken-processing-sale.
225 *Id.*

Ohio.[226] St. Luke's generated $156 million in revenues in 2009.[227] The FTC also challenged LabCorp's acquisition of Westcliff Medical Laboratories, Inc., claiming that the $57.5 million acquisition was anticompetitive and "would lead to higher prices and lower quality in the Southern California market for the sale of clinical laboratory testing services to physician groups."[228] The FTC, however, lost the motion for a preliminary injunction, and thereafter dismissed the case.[229] More recently, as this article goes to press, the DOJ has challenged the acquisition of TaxACT, a tax-preparation software provider, for $287.5 million by H&R Block Inc., alleging that it is a 3-2 deal and that the acquired company is a "maverick."[230]

All in all, it is clear that there has been an uptick in enforcement from the antitrust agencies. They are bringing cases, and bringing them in some areas – such as vertical mergers or regional markets – where the Bush Administration may have been more reluctant. But major change? Not yet.[231]

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226 Press Release, FTC, *Statement by FTC Bureau of Competition Director Richard Feinstein on the Court Ruling Granting a Preliminary Injunction in the ProMedica/St. Luke's Hospital Matter* (Mar. 29, 2011), http://www.ftc.gov/opa/2011/03/promedica.shtm.

227 *In the Matter of ProMedica Health Sys., Inc.*, FTC Docket No. 9346 (Jan. 6, 2011) (complaint), *available at* http://www.ftc.gov/os/adjpro/d9346/110106promedicacmpt.pdf.

228 Press Release, FTC, *FTC Withdraws Appeal Seeking a Preliminary Injunction to Stop LabCorp's Integration With Westcliff Medical Laboratories* (Mar. 24, 2011), http://www.ftc.gov/opa/2011/03/labcorp.shtm; Press Release, FTC, *FTC Challenges LabCorp's Acquisition of Rival Clinical Laboratory Testing Company* (Dec. 1, 2010), http://www.ftc.gov/opa/2010/12/labcorp.shtm.

229 *Id.*; Press Release, FTC, *FTC Dismisses Complaint in LabCorp* (Apr. 22, 2011), http://www.ftc.gov/opa/2011/04/labcorp.shtm.

230 Press Release, U.S. Dep't of Justice, *Justice Department Files Antitrust Lawsuit to Stop H&R Block Inc. from Buying TaxACT* (May 23, 2011), http://www.justice.gov/atr/public/press_releases/2011/271570.htm.

231 The authors' law firm (including, in some cases, one or more of the authors) has represented parties involved in many of the investigations and enforcement actions described above.