

## Merger Enforcement in an Obama Administration [\[top\]](#)

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As they say, “Prediction is very difficult, especially if it’s about the future.”<sup>1</sup> Even so, it is surely no stretch to say that antitrust enforcement will, for the most part, become more aggressive in an Obama administration. After all, Mr. Obama has criticized the Bush administration for “lax enforcement,” and has stated that, as president, he will “direct [his] administration to reinvigorate antitrust enforcement.”<sup>2</sup> To get a sense of what may lie ahead, we first take a brief look at merger enforcement during the Clinton and Bush II administrations.

### Clinton

The Clinton years saw a merger wave that produced an explosion of Hart-Scott-Rodino filings<sup>3</sup> and an enforcement approach that is generally remembered as aggressive. Still, no more than 6% of mergers were subject to Second Request in any given year, and no more than one-half of a percent of proposed mergers were challenged in court.<sup>4</sup> Nevertheless, the Department of Justice and Federal Trade Commission challenged horizontal mergers with relative zeal and, on occasion, intervened in vertical mergers as well. And, at the very least, the dialogue with the business community had a strong pro-enforcement bent.

Notable merger challenges from the Department of Justice included Microsoft/Intuit; Long Island Jewish Hospital/North Shore Health System; Lockheed Martin/Northrop Grumman; WorldCom MCI/Sprint; Alcoa/Reynolds. The DOJ took a close look at telecommunications mergers and required divestitures in the wave of telephone company and radio mergers resulting from the Telecommunications Act of 1996, which loosened ownership restrictions. Some of the cases were not just horizontal; they involved vertical effects as well.

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<sup>1</sup> This quote variously has been attributed to Niels Bohr, Albert Einstein, Mark Twain and Yogi Berra.

<sup>2</sup> Statement of Senator Barack Obama for the American Antitrust Institute, [available at http://www.antitrustinstitute.org/archives/files/aai-%20Presidential%20campaign%20-%20Obama%209-07\\_092720071759.pdf](http://www.antitrustinstitute.org/archives/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf).

<sup>3</sup> Robert Litan & Carl Shapiro, “Antitrust Policy During the Clinton Administration,” 42 n.28 July 2001, [available at http://faculty.haas.berkeley.edu/shapiro/antitrust.pdf](http://faculty.haas.berkeley.edu/shapiro/antitrust.pdf) (“During 1990-1992, an average of 1366 HSR filings were made per year. During 1998-2000, an average of 4584 HSR filings were made.”).

<sup>4</sup> *Id.*

One of the FTC's best known merger challenges involved the attempted combination of Staples and Office Depot, a case that paved the way for other merger challenges based on unilateral effects theory. Other litigated merger cases based on unilateral effects involved Swedish Match/National Tobacco and Cardinal Health/Bergen Brunswig. The FTC also pressed the proposed Heinz/Beech-Nut merger to the D.C. Circuit (after losing in district court), securing an important ruling that "3 to 2" mergers in markets with entry barriers were strongly presumed unlawful. Outside of litigation, the FTC took a hard line with mergers that it ultimately permitted by requiring divestitures or behavioral remedies. The FTC required divestitures in several oil company mergers, such as Exxon/Mobil and BP/Amoco. With respect to vertical mergers, the FTC demanded significant behavioral remedies and divestitures before the Time Warner/AOL Time Warner/Turner Broadcasting mergers were permitted.

On balance, while both agencies reviewed proposed mergers closely, most were permitted to close, including those that were controversial – such as Boeing/McDonnell Douglas and the Exxon/Mobil merger that united the major pieces of the old Standard Oil Trust. As described by former FTC chairman Robert Pitofsky, "the organizing principle of the 1990s – both during the Bush I and Clinton Administrations – was to administer a moderately aggressive antitrust program, but combine it with a sensitivity to the values of preserving efficiencies and encouraging incentives to innovate and a recognition of economic changes resulting from globalization of competition."<sup>5</sup>

## **Bush**

The agencies' approach of focusing on economics and efficiencies accelerated during the Bush years, with outcomes that differ significantly. The New York Times stated that the Bush administration does not "miss an opportunity to miss an opportunity" in antitrust enforcement, and that the administration has "taken the most relaxed and least aggressive approach [to antitrust enforcement] since the last years of the Reagan presidency."<sup>6</sup> This view coincides with a consensus among practitioners that merger enforcement has become much more lenient.<sup>7</sup> Indeed, the Bush administration agencies issued second requests in 16 percent of transactions cleared between 2002 and 2005, whereas the Clinton administration agencies issued second requests in 28.8% of

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<sup>5</sup> Robert Pitofsky, Antitrust at the Turn of the Century: A Matter of Remedies, 91 GEO L.J. 196 (2002).

<sup>6</sup> Stephen Labaton, "New View of Antitrust Law: See No Evil, Hear No Evil," N.Y. Times, May 5, 2006.

<sup>7</sup> See Jonathan Baker & Carl Shapiro, "Reinvigorating Horizontal Merger Enforcement," 12-26 Oct. 2007, available at <http://faculty.haas.berkeley.edu/shapiro/mergerpolicy.pdf> (reporting results from survey of 20 experienced practitioners).

cleared deals.<sup>8</sup> Given the greater merger activity in the Clinton years, these percentage differences in fact meant a big difference in the absolute number of second requests. Nevertheless, the most striking characteristic of merger enforcement in the Bush Administration is the difference in the approaches at the FTC compared to the DOJ.

While HSR filings are down since the size-of-transaction reporting threshold was raised, the FTC has continued to challenge mergers on roughly the same pace as during the Clinton administration. From 2002 to 2006, the FTC challenged eighteen deals, whereas the DOJ challenged ten.<sup>9</sup> The FTC unsuccessfully litigated district court challenges to the mergers of Arch Coal and Triton, Whole Foods and Wild Oats, Equitable Resources and People's Natural Gas, and Western Refining and Giant Industries. But the FTC remained undeterred by defeat and went on to push its challenge to the Whole Foods/Wild Oats merger to the D.C. Circuit, secure a Third Circuit injunction pending appeal in Equitable/People's (after which the parties abandoned the transaction), and achieved litigated victories in the Chicago Bridge & Iron acquisition of Pitt-Des Moines, Libbey's proposed merger with Newell Rubbermaid, and Evanston Northwestern's acquisition of Highland Park Hospital.

The DOJ, in contrast, has been much more permissive. After being handed a significant defeat in its challenge to Oracle's merger with PeopleSoft in 2004, the DOJ did not bring another preliminary injunction challenge to a merger for more than four years.<sup>10</sup> Its overall merger enforcement approach has been marked by an increased receptiveness to merging parties' arguments.<sup>11</sup> And with the exception of one matter that was primary horizontal, DOJ has not even looked at vertical mergers at all.<sup>12</sup> Importantly, claims of efficiencies have been received much more warmly than in prior years, with the Division considering cost savings claims even where there has been little evidence that any part of the savings would be passed along to consumers – an approach much more friendly to the “total welfare” view that prevailed in the late 1980s than to the consumer welfare approach taken in later years and specifically embraced by the 1997 efficiencies amendment to the Horizontal Merger Guidelines.

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<sup>8</sup> Deborah Feinstein, Recent Trends in U.S. Merger Enforcement: Down But Not Out, ANTITRUST, vol. 21 no. 3, 75 (2007).

<sup>9</sup> Id.

<sup>10</sup> See Complaint, United States v. JBS S.A. and National Packing Co., Case No. 08CV5992 (N.D. Ill., filed October 20, 2008) (challenging merger in beef packing industry), available at <http://www.usdoj.gov/atr/cases/f238300/238388.pdf>.

<sup>11</sup> See Jonathan Baker and Carl Shapiro, “Reinvigorating Horizontal Merger Enforcement,” 12-26 Oct. 2007 (reporting results from survey of 20 experienced practitioners).

<sup>12</sup> See Competitive Impact Statement, United States v. Monsanto Co., No. 1:07-cv-00992 (D.D.C., filed May 31, 2007).

Where the DOJ has issued second requests and pursued an investigation, mergers have cleared without curative divestitures that probably never would have ten years ago. For example, the merger between Maytag and Whirlpool resulted in a market share of over 70%, and may well have been restructured or blocked rather than cleared in the Clinton years. And earlier this year, the DOJ permitted the merger of the only two satellite radio companies, XM and Sirius, based on the notion that satellite radio competes with conventional radio and other audio entertainment, despite evidence that the companies competed for long-term contracts with car manufacturers. Thus, overall, the DOJ has been relatively permissive in allowing mergers to close even where they presented significant anticompetitive concerns.

### Looking Ahead

*An Obama administration cannot control courts that readily rebuff agency efforts to challenge mergers.*

Given the instability of recent months, the new administration is in for many challenges, particularly if banks continue to consolidate. The Obama campaign has certainly made clear its intention to increase the vigor of antitrust enforcement. Jason Furman, the Obama campaign's economic policy director, has said that "Four more years of the Bush-McCain approach to antitrust will only lead to higher prices for American consumers and a less competitive environment for smaller business to thrive."<sup>13</sup> But how much can the Obama administration really do?

Installing a new Assistant Attorney General in the Antitrust Division could change the DOJ's enforcement practices significantly. But as far as the FTC goes, a major overhaul is unlikely. First, the FTC has proven to be relatively aggressive in challenging mergers that present competitive concerns, and Commissioners who have proved to be relatively pro-enforcement will be on the Commission for at least a few more years. Second, in the wake of decisions like Whole Foods, in which the Court of Appeals for the D.C. Circuit appeared to lower the FTC's standard for obtaining a preliminary injunction blocking a merger, both agencies' enforcement efforts may be reinvigorated regardless of presidential leadership.

Nevertheless, an Obama administration cannot control courts that readily rebuff agency efforts to challenge mergers. The Supreme Court appears overtly hostile to antitrust enforcement – witness the Billing decision – and the Court could be given an opportunity to rule on federal merger enforcement early in an Obama Administration if Whole Foods is taken up following resolution of the pending rehearing petition in the D.C. Circuit. In the meantime, conservative appointments dominate the lower levels of the courts as well. The hurdle presented by the district courts will continue to check merger enforcement by the agencies. And significant change in the courts will not take shape, if at all, for many years.

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<sup>13</sup> Eric Lichtblau, "Antitrust Document Exposes Rift," N.Y. Times, Sept. 9, 2008.