

## MERGER DEVELOPMENTS

# Recent Trends in U.S. Merger Enforcement: Down But Not Out

BY DEBORAH L. FEINSTEIN

**T**HE FEDERAL GOVERNMENT HAS nearly stepped out of the antitrust enforcement business, leaving companies to mate as they wish.” That’s what *The Wall Street Journal* said in January 2007.<sup>1</sup> What accounts for that perception?

Certainly, the closing of the Whirlpool/Maytag transaction over the objections of staff who had recommended an enforcement proceeding caught many by surprise. The Antitrust Division explained its decision by pointing to strong rivals who could expand sales and to efficiencies arising from the transaction,<sup>2</sup> but skepticism remained. And, for several years, the agencies had not brought any litigation challenges. That recently changed with the FTC seeking to enjoin two energy transactions in quick succession, followed by a challenge to Whole Foods’ attempted acquisition of Wild Oats. In *Equitable Resources/Dominion*, the FTC challenged a merger to monopoly in the distribution of natural gas in western Pennsylvania.<sup>3</sup> In *Western Refining/Giant Industries*, the FTC challenged a combination of two of the five significant suppliers of light petroleum products to northern New Mexico.<sup>4</sup> The FTC was handed defeats in both actions. The challenge to the combination of Whole Foods and Wild Oats, which are, according to the FTC, the two largest operators of “premium natural and organic supermarkets,” is pending.<sup>5</sup> The Antitrust Division also went to court to block Cemex from acquiring Rinker Group, a transaction the Antitrust Division alleged would substantially lessen competition in the market for ready mix concrete and concrete block in Arizona and Florida.<sup>6</sup>

The Antitrust Division has been investigating several high-profile transactions, including XM/Sirius, which would combine the only two satellite radio providers and CME/

Chicago Board of Trade, which would combine the only two futures exchanges. The DOJ recently closed its investigation of the latter.<sup>7</sup> Those investigations are being watched closely to determine whether the pendulum is swinging toward increased enforcement or whether the recent merger challenges were isolated instances.

## Investigative Activity

Each year the agencies publicly release data on investigative activity through a joint report to Congress, speeches by staff members and Commissioners, and other public documents. An analysis of these statistics reveals trends in merger enforcement—the frequency of investigative activity, including clearances to investigate, second requests and enforcement actions, including merger remedies.

Poor economic conditions, the proliferation of corporate scandals, and a statutory increase in the size-of-transaction reporting threshold contributed to a rapid and sharp decrease in the number of premerger notifications filed with the agencies from a record high of 4,926 in 2000 to only 1,014 in 2003.<sup>8</sup> However, the past several years have seen both a rebound in the economy and an accompanying wave of merger activity, which have resulted in premerger notification filings increasing from 1,454 in 2004, to 1,695 in 2005, to 1,860 in 2006. This represents a 43 percent increase in the number of premerger filings in 2004, a 16 percent increase in 2005, and a 10 percent increase in 2006, yet filings remain well below their peak levels.<sup>9</sup>

Predictably, as the total number of premerger filings has increased over the past several years, so too has the number of clearances to investigate by the agencies. The Antitrust Division and the FTC issued 209 clearances to investigate in 2002, 231 in 2003, 236 in 2004, and 303 in 2005. When expressed as a percentage of second request-eligible transactions,<sup>10</sup> the Bush administration agencies have granted a higher percentage of clearances to investigate than did their Clinton administration predecessors.<sup>11</sup> Under the Clinton administration the agencies granted a clearance to investigate 16.5 percent of second request eligible transactions while the Bush agencies have granted clearances to investigate 19.6 percent of such transactions between 2002 and 2005. It is important to remember, however, that the filing threshold was increased from \$15 million to \$50 million in 2001, cutting merger filings to nearly 25 percent of what they had been. The change in the merger filings threshold may thus explain the higher percentage of transactions investigated. If larger transactions have a higher average likelihood of being problematic (or at least being more complex), then the pool of filings may be more skewed towards mergers that likely require at least some investigation. Of course, the dramatic decrease in filings also means that if investigations dropped by 50 percent, the percentage investigated under Bush would still be much higher than during the Clinton era. Thus, the lower percentage of investigations may *understate* the decline in investigations.

Deborah L. Feinstein is a Partner at Arnold & Porter LLP and an Associate Editor of *ANTITRUST*. Jon Nathan and Matthew Turnell, associates at Arnold & Porter, and Dominic Vote, a law clerk at Arnold & Porter, assisted in the preparation of this article.

Throughout both the Clinton and Bush administrations, the FTC has received more clearances to investigate than the Antitrust Division. Between 2002 and 2005, the FTC received clearances to investigate 597 deals compared to the Antitrust Division's 382. The FTC received clearance to scrutinize, on average, 53 more transactions per year than the Antitrust Division during the same time period.

Although the number of premerger notifications filed and the number of clearances to investigate have both ticked steadily upward over the past four years, second request activity has fluctuated considerably. The Antitrust Division and the FTC issued a total of 49 second requests in 2002. That number fell to only 35 in both 2003 and 2004, and then leapt to 50 in 2005, before declining back to 45 in 2006. While the Bush administration agencies may have been more liberal in granting clearances to investigate, the Clinton administration agencies were far more aggressive in requiring additional information from merging parties, when the relative number of filings is considered. The Clinton antitrust agencies issued second requests in 4.7 percent of all eligible transactions while their Bush administration counterparts issued second requests in 3.6 percent of eligible transactions between 2002 and 2006.

When the numbers are broken down by agency, additional trends emerge. First, under the Bush administration, the FTC has issued second requests at a far more consistent rate than has the Antitrust Division. In 2002, the FTC issued a second request in 2.4 percent of all eligible transactions. That number fell to 1.5 percent in 2003 and 2004, inched up to 1.6 percent in 2005, and then returned to 1.5 percent in 2006. In contrast, the Antitrust Division's second request rate declined sharply from 1.9 percent and 2.1 percent in 2002 and 2003, respectively, to only 1.1 percent in 2004, then jumped back up to 1.6 percent in 2005, before dropping to its lowest level in five years—1 percent, in 2006.

The Clinton administration agencies also have proven to be more active than their Bush counterparts as measured by the proportion of investigated mergers that receive second requests. Whereas the Clinton era agencies issued second requests in 28.8 percent of cleared deals, the Bush administration agencies issued a second request in only 16 percent of transactions cleared between 2002 and 2005. Breaking down the data by agency, an additional trend appears across both the Clinton and Bush administrations—transactions investigated by the Antitrust Division have been more likely to receive a second request than deals investigated by the FTC. During the Clinton years the Antitrust Division issued second requests in 37.6 percent of transactions cleared to the Division compared to only 22.4 percent at the FTC. Although less pronounced, the trend has continued throughout the Bush administration. From 2002 to 2005, the Antitrust Division issued second requests in 20.9 percent of transactions cleared to the Division compared to only 14.4 percent at the FTC. The FTC's smaller percentage of second requests issued may reflect their desire to issue second requests only where enforce-

ment action is a virtual certainty. In the FTC's strategic plan issued in late 2006, the FTC set a goal of 90 percent for the percentage of second request transactions that result in a positive enforcement outcome (challenge, consent, or deal abandonment).<sup>12</sup> This is significantly higher than the 60–80 percent goal that has been more typical for the FTC.

Trends can also be discerned when observing the frequency with which mergers are challenged by the agencies. Most notably, the Bush agencies have challenged far fewer deals than the Clinton agencies. The Clinton Antitrust Division and FTC challenged eighty transactions in 2000 and fifty-five in 2001. By contrast, the Bush agencies challenged only thirty-four transactions in 2002 and thirty-six in 2003. Even as the number of premerger notifications, clearances granted to investigate, and second requests all significantly increased from 2004 to 2005, merger challenges under the Bush agencies continued to decline to only twenty-four in 2004 and a mere eighteen in 2005. This downward trend ended abruptly in 2006, when the Antitrust Division and the FTC challenged twenty-six transactions.<sup>13</sup> This increase in enforcement could be a result of the perception that the agencies have become more lax. Companies may be attempting transactions that are increasingly problematic, leading more of them to be challenged. If true, the observed decline in Bush era merger challenges tends to understate the degree to which enforcement postures have become more conservative.

The FTC has emerged as a more aggressive enforcer than the Antitrust Division over the past several years. From 2002 to 2006, the FTC challenged an average of eighteen deals per year compared to the Antitrust Division's ten. Furthermore, from 2002 to 2005, the FTC challenged 1.6 percent of second request eligible transactions while the Antitrust Division challenged only 0.8 percent of such transactions. This disparity may be partially explained by the ongoing trend of clearing more investigations to the FTC than the Antitrust Division. However, that explanation cannot fully account for why the FTC challenged more than twice as many deals as the Antitrust Division in 2002 and more than three times as many deals in 2005, when the Antitrust Division challenged a miniscule four transactions.

Out of fifteen challenges in 2004, the FTC litigated one case, obtained ten consent orders, filed one administrative complaint and three transactions were abandoned. In 2005, the FTC challenged fourteen deals, obtained nine consent orders, sought injunctive relief in one transaction that was eventually restructured, and four transactions were abandoned. In 2006, the FTC challenged sixteen transactions, obtained nine consent orders, and seven transactions were abandoned.

Of the nine transactions the Antitrust Division challenged in 2004, one case was litigated, five consent decrees were obtained, one transaction was restructured, and two others were abandoned. In 2005, the Antitrust Division challenged only four deals, obtaining three consent decrees, while a sin-

gle other transaction was restructured. In 2006, the Division challenged ten transactions (most settled by consent) and, an additional six transactions were restructured in response to the Division's concerns.

To summarize:

- Both the number of reportable transactions and the level of enforcement activity, including clearances granted to investigate, second requests, and enforcement actions, have numerically declined during the Bush administration.
- In percentage terms, the Bush agencies were more likely to grant a clearance to investigate, while the Clinton agencies were more likely to grant a second request.
- Throughout both the Clinton and Bush administrations, the FTC obtained more clearances to investigate transactions while the Antitrust Division issued a higher percentage of second requests.
- Merger challenges declined substantially at both agencies in 2004 and 2005, before rebounding in 2006 due to a substantial increase in enforcement activity at the Antitrust Division.

### Determinants of FTC Enforcement Actions

The frequency of investigative activity is only one of many important variables which help to explain the FTC's actions. In order to fully understand the regulatory climate, other variables, such as the structure of the industries in which challenges are brought and the types of evidence on which the agencies rely, must also be examined. The FTC has recently released enforcement data for years 1996–2005 that provide some insight.<sup>14</sup>

Unsurprisingly, the number of significant competitors in the relevant market continues to shed light on whether a transaction will be challenged. The FTC data show that outside the grocery, oil, chemical, and pharmaceutical industries, 97 percent of transactions that would leave only one significant competitor have been challenged over the past nine years. Furthermore, 86 percent of “three to two” transactions, 72 percent of “four to three” transactions, and 61 percent of “five to four” transactions also were challenged. However, deals that left five significant competitors were more likely to close unencumbered, with only 38 percent of such transactions being challenged. In markets outside the industries noted above, the FTC challenged only one out of thirteen transactions where five or more competitors remained in the relevant market.

The FTC data also show that the presence or lack of certain types of evidence may affect agency decision making. For example, the identification of “hot” documents is associated with a high likelihood of enforcement action. The FTC defines “hot” documents as those that predict that the merger will produce an adverse price or nonprice effect on competition. Out of twenty-five investigations where such documents were identified, twenty-three challenges resulted. However, the failure to obtain “hot” documents certainly

has not prevented the FTC from challenging transactions. Out of 149 cases studied where no “hot” documents materialized, the FTC still brought ninety-five challenges.

Additionally, strong customer complaints regarding a transaction will nearly always result in a challenge.<sup>15</sup> In cases where strong customer complaints were present, seventy-two out of seventy-three transactions elicited a challenge by the FTC. Although the presence of strong customer complaints usually is a sufficient indicator as to whether a deal will be challenged, it is not a necessary condition. Of eighty-five transactions studied by the FTC, thirty-six were challenged *despite* the absence of strong customer complaints.

Finally, the data suggest that the FTC's view on the ease or difficulty of entry has been a reliable predictor of whether or not a transaction will be challenged. In the thirty investigations where entry was determined to be easy, the FTC did not challenge a single transaction. By contrast, the data show that the FTC challenged 117 out of 144 transactions, or 81 percent, where entry was deemed to be difficult.

### Litigation Outcomes

A commonly suggested explanation for the significant decline in litigation activity in 2005 is that the agencies lost their nerve after being handed high-profile defeats the previous year in *Oracle* and *Arch Coal*.

**Oracle.** In February of 2004, the DOJ and several states brought suit to enjoin a Oracle's acquisition of PeopleSoft, Inc.<sup>16</sup> Plaintiffs asserted that Oracle and PeopleSoft, along with SAP, were the only providers of high function enterprise resource planning (ERP) system software in the United States and that the merger would substantially lessen competition in an already concentrated market. The court disagreed with the plaintiffs on almost every point, rejecting DOJ's proposed market definitions, its identification of competitors, and the proposed theories of harm. Additionally, the court found that the plaintiffs' customer witnesses offered mere conclusory statements that they would be forced to accept an Oracle price increase. The court stated that “unsubstantiated customer apprehensions do not substitute for hard evidence.”<sup>17</sup>

**Arch Coal.** The court also rejected the FTC's challenge to Arch Coal, Inc.'s proposed acquisition of Vulcan's Triton Coal Company, LLC's two mines in the Southern Powder River Basin (SPRB) region of Wyoming.<sup>18</sup> By the time of the suit, Arch Coal had determined to divest one of the two acquired mines. As a result, the court found that the merger would increase market concentration in the SPRB coal market by only 49 points on the Herfindahl-Hirschman Index. The court found the market competitive and viewed the characteristics of the market as making tacit coordination difficult because of the lack of any effective mechanisms for detecting and punishing defection. The court also concluded that Kiewit, the acquiror of the divested mine, was more likely to play the role of a maverick competitor in the SPRB market than Triton, which was in poor financial condition. Taking into account all of these factors, the court concluded that

“defendants have successfully rebutted plaintiffs’ fairly weak prima facie case of a Section 7 violation.”<sup>19</sup>

**Equitable Resources.** More recently, the FTC has lost two challenges in quick succession at the district court level. In *FTC v. Equitable Resources, Inc.*,<sup>20</sup> a federal district judge in the Western District of Pennsylvania dismissed the FTC’s request for a preliminary injunction blocking Equitable Resources, Inc.’s proposed \$970 million acquisition of The Peoples Natural Gas Co. from Dominion Resources, Inc. Both Equitable and Peoples operate local natural gas distribution services that combined would serve a total of approximately 650,000 customers in and around Pittsburgh. The FTC’s concern focused exclusively on a small distribution overlap between the natural gas distribution network of Equitable and Peoples that resulted in anomalous and limited competition between the two companies and discounts to approximately 500 commercial and industrial customers who could use either line.

The defendants filed a motion to dismiss the FTC’s request for a preliminary injunction, challenging the applicability of the federal antitrust laws to the transaction under the state action doctrine. Because the Pennsylvania Public Utility Commission (PUC) had approved the proposed transaction after an elaborate review process and had continued supervision over rates of the combined company, the court accepted defendants’ arguments regarding state action doctrine, holding that “the FTC must defer to the Pennsylvania General Assembly and the PUC which is implementing the Public Utility Code in this case, since the state action immunity doctrine insulates the PUC’s approval of the merger between Equitable Gas and Peoples Gas from federal antitrust scrutiny.”<sup>21</sup>

Although the court’s decision on the motion to dismiss did not address the substantive merits of the FTC’s competition claim, when the FTC sought an injunction from the court pending resolution of the appeal, the court tipped its hat regarding its thoughts on the merits of the FTC’s case. It stated that “the FTC continually and inaccurately labels the merger as ‘anti-competitive,’ which it is not. . . . The merger benefits 600,000 plus customers and may disadvantage approximately 500 customers—that is not an anti-competitive merger. The FTC is incorrectly stating that this merger would cause ‘likely and actual consumer harm.’”<sup>22</sup> Given the court’s statements, even if the FTC is successful in its appeal and the case is remanded, it appears the agency will face an uphill battle securing a preliminary injunction to prevent the parties from consummating the transaction pending resolution of the administrative proceeding.

**Western Refining.** In *FTC v. Western Refining, Inc.*,<sup>23</sup> the FTC attempt to block Western Refining Inc.’s proposed \$1.4 billion acquisition of Giant Industries, Inc. was rejected by the court. The FTC was concerned that the transaction would lead to higher prices for consumers of light petroleum products in northern New Mexico. The FTC contended that Giant would likely increase the supply of gasoline to north-

ern New Mexico and the transaction would combine two of the five significant bulk suppliers of light petroleum products and two of the six bulk suppliers of gasoline to the relevant geographic market.

The court found no reasonable probability of anticompetitive effects. First, the court determined that Western and Giant do not often compete directly or aggressively with each other. Second, the court found that although the market was concentrated, it was competitive and included a number of suppliers and potential suppliers. Therefore, the court did not believe that the small increase in market concentration would lead to a significant loss of competition. Finally, the court determined that the FTC’s geographic market was overly narrow and did not include all current bulk suppliers so that the market appeared more concentrated than it was in reality. The court wrote that the FTC’s geographic market did not “recognize[] the economic reality of current suppliers reacting to any anticompetitive move by Western and of currently marginal suppliers increasing their roles in the northern New Mexico market.”<sup>24</sup> The court also noted that only a single customer expressed any concerns about the merger. In concluding, the court stated that although the FTC may have shown “that substantial impairment of competition was a possibility, it has not shown that the impairment is a reasonable probability” and, therefore, had not demonstrated a likelihood of succeeding on the merits in an administrative proceeding.<sup>25</sup>

## Remedies

The government continues to challenge transactions in court but—as evidenced by the much lower rate of litigated mergers in recent years—has generally resolved these challenges through consent decrees. Much of the recent discussion has focused on what constitutes an effective remedy. Divestitures continue to be a common form of relief. Unlike the Antitrust Division, the FTC continues to require the use of up-front buyers, but only in some situations. In *Linde AG/BOC Group*, a combination that would have reduced the number of participants in the relevant markets from five to four, the FTC required divestiture of both Linde AG’s liquid oxygen and nitrogen business in identified geographic markets and its bulk refined helium assets. For the former, it required merely that Linde AG divest within six months. For the latter, it required an up-front buyer because the helium assets to be divested did not constitute a standalone business and, therefore, the FTC required key third-party consents for the asset transfer under the consent order.<sup>26</sup>

An increasing trend at the FTC is the use of alternatives to traditional divestitures in order to alleviate agency concerns. Examples of such arrangements abound. In *Johnson & Johnson’s* attempt to acquire Guidant, the FTC expressed concerns over maintaining competition in the market for drug eluting stents, which are used to treat coronary artery disease. The FTC alleged that the deal would cause significant harm by eliminating Guidant as a potential third com-



petitor with the ability to offer drug eluting stents on a rapid exchange system. Guidant was the only potential market entrant with access to the rapid exchange patents in the United States. Although the FTC concluded that the addition of a third rapid exchange competitor would likely increase competition and reduce prices, no divestiture was required. Instead, the consent order mandated that Johnson & Johnson grant a fully paid, nonexclusive, irrevocable license allowing Abbott, another company that was developing drug eluting stents, access to the rapid exchange technology, thereby maintaining the potential for three significant competitors in the market.<sup>27</sup>

The Commission used a similar remedy in requiring that a third party be granted a license to sell a generic version of the breakthrough cancer pain drug Actiq, when Cephalon acquired Cima Labs in 2004.<sup>28</sup>

When Boston Scientific acquired Guidant in 2006, the FTC again made use of a novel remedy. Divestiture of the key overlapping assets to an up-front buyer was the primary purpose of the consent. An additional concern was that Boston Scientific owned a substantial minority interest in another company, Cameron, which is currently developing products that the FTC believed may compete in the future with products already offered by the newly combined Boston Scientific/Guidant entity. Rather than forcing a divestiture, the consent mandated that Boston Scientific relinquish its rights to receive information from or exercise control over Cameron and appoint an independent proxy to exercise any such rights in the best interests of the company as an investor and not as a competitor.<sup>29</sup>

Despite various competitive concerns, the FTC declined to demand divestitures in the creation of United Launch Alliance (ULA), a joint venture between Boeing and Lockheed Martin. The FTC's apprehension over the deal was rooted in both the significant difficulties in entering the market for launch services and the potential loss of competition between Boeing and Lockheed for future launches. Moreover, the Department of Defense raised additional concerns, including the possibility that ULA would favor its parents' space vehicle businesses, that Boeing and Lockheed might attempt to raise additional barriers to entry in the launch services market, and that competitively sensitive information from third parties would be shared among ULA, Boeing, and Lockheed to the detriment of competition in related markets, such as the market for space vehicles. Taking into account the national security implications of the transaction, the Commission drafted a narrowly tailored consent order that addressed industry-specific concerns and sought to maintain competition in the markets for launch services and space vehicles by requiring that (1) ULA cooperate on equivalent terms with all providers of government space vehicles, (2) Boeing and Lockheed Martin provide equal consideration to support to all launch services providers, and (3) that all three entities safeguard competitively sensitive information obtained from other space vehicle and launch service providers.<sup>30</sup>

In 2005, the FTC challenged Aloha Petroleum's purchase of the gasoline assets of Trustee Properties, a transaction that would have reduced the number of gasoline marketers with access to a refinery or import terminal in Hawaii from five to four. However, the FTC subsequently agreed to approve the transaction without a divestiture when Aloha Petroleum announced it would enter into a twenty-year throughput agreement allowing a third party substantial rights to use Hawaii's only import terminal.<sup>31</sup>

In contrast to the use of more novel remedies at the FTC, the Antitrust Division has typically required divestitures, although it does not require up-front buyers. However, there have been occasions where DOJ has utilized licensing agreements in lieu of divestitures. For example, the agency required Moneyline Telerate to license two of its software platforms to a third party before being acquired by Reuters in 2005.<sup>32</sup>

In the Antitrust Division Policy Guide to Merger Remedies issued in October 2004,<sup>33</sup> the Department of Justice noted key principles in fashioning the remedy: (1) Structural remedies are preferred; (2) a divestiture must include all assets necessary for the purchaser to be an effective long-term competitor; (3) divestiture of an existing business entity is preferred, unless a remedy can be or must be structured in other ways to ensure the buyer has the appropriate assets to be successful; (4) the merged firm must divest rights to critical intangible assets; (5) conduct relief is appropriate only in limited circumstances, e.g., as an adjunct to a structural remedy, or where structural relief is infeasible.<sup>34</sup>

The Antitrust Division may be adhering to traditional remedies because of the specter of judicial review. During the lengthy and extensive Tunney Act review of the settlements in the SBC/AT&T and Verizon/MCI mergers, amici curiae argued that the 2004 amendments to the Act expanded the court's scope of review, resulting in concern by some that unfettered judicial review would result in increased uncertainty with regard to DOJ settlement proceedings. However, the court read the amendments to effect minimal changes in the review process, finding that courts still cannot review the adequacy of the complaint, nor can they reject a proposed decree for failure to address harms not alleged by the government.<sup>35</sup> That is, the pre-amendment standard for Tunney Act review, which simply required that the government provide a reasonable explanation and that the settlement fall within the public interest, appears to remain substantially intact.

### Merger Process Reforms

In February and December of 2006, the Federal Trade Commission and Department of Justice respectively announced merger process reforms. The agencies diverged as to the substance of the reforms. The crux of the FTC reform is the presumption that only thirty-five custodians will need to be searched, provided the parties give the FTC adequate information to identify the right individuals to be searched, give the FTC an additional thirty days to consider the transaction, and agree to a sixty-day discovery period if the matter goes to

litigation. Only the Director of the Bureau of Competition can overcome this presumption. The presumptive “relevant time period” for which documents must be produced has been reduced from a three-year period to a two-year period, but staff can enlarge this time period when they view it necessary. There is no time limit presumption on data.

The FTC’s new Second Request instructions also allow a party to produce only a partial privilege log with the name of the custodian from whom responsive documents are withheld and the total number of documents being withheld for all of the custodians in the party’s search group. The staff can later request a privilege log for certain individuals, but the log not need be prepared up-front and may never need to be prepared. Other reforms designed to reduce the burden include a process by which the parties can discuss with staff the use of de-duplication software or services when producing materials in response to a second request and a requirement that only two particular days of back-up tapes need be saved.

The Antitrust Division reforms, in contrast, differ in material respects. There is a thirty-custodian presumption for searching documents, which can be overridden by the Section Chief. And instead of providing an additional thirty days, the DOJ reforms require *at the time of the second request negotiations* that the parties enter into a timing agreement covering every aspect of the investigation, including dates for depositions of executives and dates by which the parties will submit their white papers. There is no boundary on how much time staff can require that the parties give to take advantage of the custodian presumption.

The DOJ reforms have a two-year presumption for documents and a three-year presumption for data. They provide for a discussion about back-up tapes, but no requirement that only two be saved. As to privilege logs, documents solely between counsel (including in-house counsel) may be omitted but a log must still be prepared.

The extent to which these reforms will work is unclear. In theory, the FTC reforms are simple for staff and the parties to follow and would substantially reduce the burden. However, if the presumptions can be overcome easily, the reforms will turn out to be much ado about nothing. My personal experiences so far have been quite mixed. In the first transaction I handled after the reforms, the second request process was a model for how the new reforms can work. We agreed promptly on thirty-five individuals to be searched and the back-up tapes to be saved. No privilege log was ever required, and the second request asked for two years worth of documents and a reasonable amount of data. In retrospect, I wonder if the success of the reforms in that transaction had to do with the fact that we had offered to divest certain problematic assets from the beginning.

In another transaction involving an overlap of only one product, where the acquired party has made only minimal sales to date, staff, with approval of the Director’s office, has required at least fifty-five people to be searched and has required that we search some individuals for ten years-worth

of documents relating to competition. These are dramatic variances from the process reforms for a simple transaction. One can only wonder what would be required in a complicated transaction.

It is even less clear just how well the new Antitrust Division procedure will work. Entering into a timing agreement of the type required by the Antitrust Division can be complicated and time-consuming. If parties cannot quickly enter into an agreement that gives them the certainty of the thirty file-owner presumption, they may be forced into full compliance simply because they cannot enter into a suitable Process & Timing Agreement. Whether it makes sense for parties to avail themselves of the Antitrust Division’s Merger Review Process Initiative will depend on the facts of the merger and how the Antitrust Division staff implements the Initiative in practice. If the company is small and not more than thirty individuals would likely be searched in any event, it may not be worth entering into a Process & Timing Agreement for a minor reduction in the scope of search. If the parties attempt to enter into a Process & Timing Agreement but make little progress towards something they view as reasonable, they may not want to take advantage of the reforms. But the DOJ often insists on some sort of timing agreement even today before it will entertain substantive discussions, so such an agreement may be inevitable. In that case, the parties may as well attempt to get the benefit of reducing the burden of the second request. At the time of the writing of this article, DOJ officials said they had not yet negotiated a full Timing & Process Agreement under the reforms but were in the process of doing so.

The agencies announced their reforms with considerable fanfare. It is now incumbent on them to track how well they are working. They should report statistics on how many parties took advantage of the second requests reforms and provide statistics on such issues as the number of individuals searched, the time periods covered by the second requests, and the length of time covered in the Division’s timing agreements.

### Increased Transparency

One of the process changes the Bush agencies introduced was far greater transparency through the use of closing statements, which had been used only extremely rarely during the Clinton era.<sup>36</sup> According to the Antitrust Division, such statements will be issued only when the investigation has already been publicly confirmed and after taking into account the level of publicity the matter has received as well as the value of the analyses to other enforcers, businesses and consumers.<sup>37</sup>

The *Merger Commentary* represented another huge burst of transparency at the agencies.<sup>38</sup> But while the DOJ has continued this openness, and has issued guidelines on the use of closing statements, the FTC, in contrast, has not released closing statements in quite some time, including in mergers that observers thought raised antitrust issues, such as Brocade/McData, which reduced the number of players in high-end switches from three to two.

### Cooperation Between the Agencies

Proving that the more things change the more they stay the same, clearance continues to be an issue that has stymied the Bush antitrust agencies. Any lawyer who routinely does HSR work has a horror story of clearances going down to the wire on deals that may or may not pose any meaningful substantive concerns. But the lack of coordination does not end there. FTC Commissioner William Kovacic has said there is far too little cooperation between the agencies. “We develop more effort internationally with our counterparts to cooperate in the competition area than we do domestically with our counterparts.”<sup>39</sup> This may explain why the agencies continue to go their own way on policy statements, with the DOJ separately announcing guidelines on negotiating consent decrees and the FTC and the DOJ separately announcing merger process reforms.

### Antitrust Modernization Commission

Unsurprisingly, the Antitrust Modernization Commission did not recommend any significant substantive changes to the laws governing merger analysis. It concluded that Section 7 was adequate to the task of considering a range of mergers and concluded that dual enforcement by the FTC and the DOJ should continue.

The Commission did recommend various substantive and procedural changes. As to substance, it recommended that merger law be refined to accord greater weight to arguments that a merger would enhance efficiency or enable the companies to increase innovation. The AMC suggested that the agencies update the Merger Guidelines to include discussions of nonhorizontal mergers and the analysis of the effect of mergers on innovation. The Commission also believed the Guidelines should “ensure that innovation that will change competitive conditions more than two years in the future receives proper credit.”<sup>40</sup>

Several of the *Report's* recommendations would alter the procedures and legal standards applicable to merger challenges, mostly geared toward aligning FTC and DOJ processes. First, the FTC should be required to seek a permanent injunction rather than preliminary injunction in district court. Second, the FTC Act should be amended to eliminate the possibility that the FTC may pursue administrative litigation in merger cases after a federal court has denied an injunction against a transaction. Third, the FTC Act should be amended to provide the FTC with the same legal standard for grant of a preliminary injunction in HSR cases as the DOJ. It is noteworthy that none of these recommendations was unanimous.

Finally, the AMC echoed the sentiment of many practitioners by recommending various procedural changes. The Commission unanimously recommended that the clearance process by which the agencies decide which of them will investigate a transaction be fixed. The AMC suggested both a revised clearance agreement and a timetable by which disputes would be resolved. One Commissioner went so far as

to suggest financial penalties for delay, believing that was the only way the agencies would be forced to stick to the timeline. The Commission also recommended that more be done to reduce the scope and burden of second requests, calling for regular reporting on the subject. Finally, the Commission recommended additional transparency on decisions through the use of closing statements and provision of statistical data regarding enforcement activity.

### Conclusion

At this year's ABA Section of Antitrust Law Spring Meeting, both Chairman Deborah P. Majoras and Assistant Attorney General Thomas O. Barnett promised vigorous merger enforcement and a willingness to litigate the tough cases. The data suggest they may have been less aggressive than their predecessors—and may have more difficulty persuading judges of the merits of the cases they do bring. Yet many mergers continue to be resolved only after concessions by the parties, and investigative levels remain high. Whatever one's views about the relative enforcement policies of the Clinton or Bush administrations, reports of the complete demise of federal merger enforcement have surely been exaggerated. ■

<sup>1</sup> Dennis Berman, *The Game: Handicapping Deal Hype and Hubris*, WALL ST. J., Jan. 16, 2007, at C1. A recent paper by two former antitrust agency economists paints a similar picture. Jonathan Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement* (June 2007), available at <http://faculty.haas.berkeley.edu/shapiro/mergerpolicy.pdf>.

<sup>2</sup> See Press Release, U.S. Dep't of Justice, Department of Justice Antitrust Division Statement on the Closing of Its Investigation of Whirlpool's Acquisition of Maytag (Mar. 29, 2006), available at [http://www.usdoj.gov/opa/pr/2006/March/06\\_at\\_187.html](http://www.usdoj.gov/opa/pr/2006/March/06_at_187.html).

<sup>3</sup> See Press Release, Federal Trade Comm'n, FTC Sues to Block Acquisition of The Peoples Natural Gas Company From Dominion Resources (Mar. 15, 2007), available at [http://www.ftc.gov/opa/2007/03/equitable\\_resources.shtm](http://www.ftc.gov/opa/2007/03/equitable_resources.shtm); FTC v. Equitable Resources, Inc., No. 07cv0490, 2007 WL 1437447 (W.D. Pa. May 14, 2007).

<sup>4</sup> See Press Release, Federal Trade Comm'n, FTC Files Complaint in Federal District Court Seeking to Block Western Refining's Acquisition of Rival Energy Company Giant Industries, Inc. (Apr. 12, 2007), available at [http://www.ftc.gov/opa/2007/04/westerngiant\\_tro.shtm](http://www.ftc.gov/opa/2007/04/westerngiant_tro.shtm); FTC v. Western Ref., Inc., No. 1:07cv0352 (D.N.M. May 28, 2007).

<sup>5</sup> Whole Foods Market, Inc., FTC Docket No. 9324 (June 28, 2007), available at <http://www.ftc.gov/os/adjpro/d9324/index.shtm>.

<sup>6</sup> See Press Release, U.S. Dep't of Justice, Department of Justice Files Amended Complaint in Antitrust Case Following Rinker Board of Directors' Approval of Cemex Takeover Bid (May 2, 2007), available at [http://www.usdoj.gov/atr/public/press\\_releases/2007/223034.htm](http://www.usdoj.gov/atr/public/press_releases/2007/223034.htm).

<sup>7</sup> Press Release, U.S. Dep't of Justice, Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of Chicago Mercantile Exchange Holdings Inc.'s Acquisition of CBOT Holdings Inc., [http://www.usdoj.gov/opa/pr/2007/june/07\\_at\\_422.html](http://www.usdoj.gov/opa/pr/2007/june/07_at_422.html).

<sup>8</sup> All data, unless otherwise indicated, comes from the FTC/DOJ Joint Annual Reports to Congress, Antitrust Division Workload Statistics FY1997–2006 or the FTC's Performance & Accountability Report for FY2006.

<sup>9</sup> This significant change in merger filings makes it difficult to compare enforcement trends.

<sup>10</sup> This number excludes the transactions in which the government could not issue a second request. A relatively small number of notification filings are

either statutorily exempt from second requests or found to be nonreportable transactions after filing.

<sup>11</sup> I have used FY2002 (October 2001–September 2002) as the first full year under the Bush administration, on the theory that much of FY2001 reflects matters begun under the Clinton administration.

<sup>12</sup> See FEDERAL TRADE COMMISSION STRATEGIC PLAN, FISCAL YEARS 2006–2011 (Sept. 30, 2006), available at <http://www.ftc.gov/opp/gpra/spfy06fy11.pdf>.

<sup>13</sup> This number does not include challenges announced by the DOJ but subsequently never filed.

<sup>14</sup> The statistics in this section come from the FTC's HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996–2005, issued on January 25, 2007.

<sup>15</sup> It is possible that the presence of hot documents may be correlated with strong customer complaints. Thus, the very similarly high challenge rates for cases with hot documents or customer complaints may be referring to the same transactions.

<sup>16</sup> *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

<sup>17</sup> *Id.* at 1131.

<sup>18</sup> *FTC v. Arch Coal Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004).

<sup>19</sup> *Id.* at 159.

<sup>20</sup> No. I: 07cv0490, 2007 WL 1437447 (W.D. Pa. May 14, 2007).

<sup>21</sup> *Id.* at \*9.

<sup>22</sup> *Id.* at \*12. The FTC did obtain an injunction pending appeal to the circuit court. *Federal Trade Commission v. Equitable Res., Inc.*, No. 07-2499, Order Granting Appellant's Inj. Pending Appeal (3d Cir. June 1, 2007).

<sup>23</sup> No. 1:07cv0352 (D.N.M. May 28, 2007).

<sup>24</sup> *Id.* Conclusions of Law ¶ 23.

<sup>25</sup> *Id.* ¶¶ 38–39.

<sup>26</sup> See *Linde AG*, FTC Docket No. C-4163 (Aug. 29, 2006).

<sup>27</sup> See *Johnson & Johnson*, FTC Docket No. C-4154 (Dec. 21, 2005).

<sup>28</sup> See *Cephalon Inc.*, FTC Docket No. C-4121 (Sept. 20, 2004).

<sup>29</sup> See *Boston Scientific Corp.*, FTC Docket No. C-4164 (July 21, 2006).

<sup>30</sup> See *Boeing Co.*, FTC File No. 051-0165 (Oct. 3, 2006).

<sup>31</sup> See Press Release, Federal Trade Comm'n, FTC Resolves Aloha Petroleum Litigation (Sept. 6, 2005), available at <http://www.ftc.gov/opa/2005/09/alohapetrol.shtm>.

<sup>32</sup> See Press Release, U.S. Dep't of Justice, Reuters Ltd. and Moneyline Telerate Restructure Proposed Deal to Alleviate Justice Department's Antitrust Concerns (May 24, 2005), available at [http://www.usdoj.gov/atr/public/press\\_release/2005/209146.htm](http://www.usdoj.gov/atr/public/press_release/2005/209146.htm).

<sup>33</sup> ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES, available at <http://www.usdoj.gov/atr/public/guidelines/205108.htm>.

<sup>34</sup> The Guide also has helpful information on implementing the remedy and consent decree compliance and enforcement.

<sup>35</sup> See *United States v. SBC Commc'ns*, No. 05-2102, 2007 WL 1020746 at \*9–\*17 (D.D.C. Mar. 29, 2007).

<sup>36</sup> See, e.g., Press Release, U.S. Dep't of Justice, Statement by Assistant Attorney General Thomas O. Barnett Regarding the Closing of the Investigation of AT&T's Acquisition of Bellsouth (Oct. 11, 2006); see also *Whirlpool/Maytag Closing Statement*, *supra* note 2.

<sup>37</sup> See Antitrust Division, U.S. Dep't of Justice, Issuance of Public Statements Upon Closing of Investigations, available at <http://www.usdoj.gov/atr/public/guidelines/201888.htm>.

<sup>38</sup> For an interesting piece on the commentary, see Paul Denis, *The Give and Take of the Commentary on the Horizontal Merger Guidelines*, ANTITRUST, Summer 2006, at 51.

<sup>39</sup> Corey Boles, *Interview: FTC Commissioner Criticizes Relations with DOJ*, DOW JONES NEWS SERV., Jan. 29, 2007.

<sup>40</sup> ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 60 (2007), available at <http://www.amc.gov>.

## International Cartel Workshop Conference

JANUARY 30 – FEBRUARY 1, 2008

RITZ-CARLTON, SAN FRANCISCO, CA

► The Section of Antitrust Law of the American Bar Association is pleased to invite you to the **International Cartel Workshop** on January 30–February 1, 2008, in San Francisco, CA. The experienced faculty will take you inside a hypothetical international cartel matter, from detection by government enforcers to the settlement of private purchaser litigation. The sessions are conducted as demonstrations by the enforcers and practitioners who handle these matters in real life every day. Workshop sessions will touch on all of the new issues and cutting-edge developments in the international cartel arena.

You will witness the planning of the internal investigation and sit inside the boardroom as the Board analyzes the options, from seeking leniency to going to trial. You will see a meeting of joint defense counsel, the decision of the enforcers to bring an action, the negotiation of pleas in the United States and Canada, and the discussion of a matter by the European Commission. Further, this program will also illustrate the perspective of the victims, as plaintiffs in private litigation develop a strategy to seek damages in several jurisdictions.

**You don't want to miss the return of the International Cartel Workshop** to U.S. shores after its successful run in London last year. For more information and to register for the conference, please go to: <http://www.abanet.org/antitrust/at-programs/icc-08.html>