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# Editor's Note

## The New Merger Guidelines: Using Statistical Analysis to Assess Their Impact

BY DEBORAH L. FEINSTEIN

**B**EFORE THE ANTITRUST OFFICIALS appointed by President Obama were fully established in their positions, the buzz among antitrust practitioners was that the Agencies would issue new merger guidelines. Much discussion ensued about what the new guidelines would say, what they should say, and whether new guidelines were necessary. Now that the 2010 Horizontal Merger Guidelines are out, the discussion is focused on how they came about, how they will be implemented, and what they will mean in practice.

This issue of *ANTITRUST* presents articles on a number of topics relating to the new Merger Guidelines: the extent to which they were foreshadowed by the 2006 Commentary on the Horizontal Merger Guidelines; their relationship to international antitrust; what they mean for potential competition issues; and how specific revisions will affect merger analysis. There is also considerable discussion in the articles about how to apply the new Guidelines, including pieces by economists explaining how to apply the upward pricing pressure test and the economic implications of a company having a high margin.

Yet the most relevant question for most clients is what impact the 2010 Merger Guidelines will have on enforcement, namely, will more transactions be challenged? One perspective is that the Guidelines inevitably will lead to more challenges. Many believe that the principal purposes of the Guidelines were to give Agency staff a toolkit to recommend more challenges and a roadmap to guide courts towards blocking more transactions. Others believe that the revised Guidelines reflect what the Agencies have already been doing,

and that we will not see a sharp up-tick in merger challenges because much of the increased enforcement activity began some years ago, particularly at the FTC.

***The Challenges of Comparing Merger Enforcement Activity Across Administrations.*** The debate about whether the Guidelines will generate more enforcement activity ought to be one that can be readily addressed by comparing enforcement activity before and after their issuance. However, numerous questions arise in trying to make these comparisons. A few examples:

- Should the starting point for measuring the impact of the 2010 Guidelines be when the current antitrust officials took their positions? Or when the revised Guidelines were issued in draft form, or when they were issued in final? Should a merger be counted as “post-2010 Guidelines” if it was cleared or challenged after they were issued or only if the Hart-Scott-Rodino filing or investigation began after they were issued?
- How long a period should be measured to assess the impact of the new Guidelines compared to the old? How much time will it take Agency staff fully to implement changes in the Guidelines? Is their true impact discernable only after a court embraces—or rejects—the new Guidelines?
- How does one control for changes in the economy, in the nature and complexity of transactions that are before the Agencies, and in the types of cases parties choose to litigate?
- Is the impact of the Guidelines best measured by data on cases overall or by its impact on specific high-profile cases?
- Instead of looking only at total numbers of enforcement actions, should we instead examine Agency decisions where the number of key competitors is reduced from four to three or from five to four (recognizing the potential difficulty in determining whether a merger truly is a “four to three”)?

Over the years, a number of articles in *ANTITRUST* and elsewhere have attempted to answer similar questions in comparing enforcement activities in different administrations.<sup>1</sup> In the Summer issue of *ANTITRUST*, John Harkrider assessed the activities of the Agencies in the Obama Administration.<sup>2</sup> He considered anecdotal perceptions and what President Obama said as a candidate, and compared data for DOJ and FTC for FY 2008 and 2009. Fiscal years for the Agencies, and the reporting that goes along with that, run from October 1 through September 30. Harkrider noted that the date could be skewed because of that timing. Thus, the first “year” of the Obama administration actually included 3.5 months of the Bush administration.<sup>3</sup>

Harkrider’s comparison of the 2008 and 2009 data showed a *decline* in the number of merger challenges in the Obama administration. He compared the Division’s merger record in 2009 to the entire eight years of the Division in the Bush administration, and found that the 2009 Division challenged a substantially higher percentage of matters in which Second Requests were issued. As to the FTC, he found that the per-

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centage of filings that resulted in Second Requests in the first year of the Obama administration had increased, that a greater percentage of Second Request matters resulted in enforcement action, and that as many federal injunctions were obtained in 2009 as from 2004–2008. Based on this analysis, he concluded that the Obama administration had largely made good on candidate Obama's promise to rein-vigorate antitrust enforcement.

One of our readers had a different perspective on these comparisons, asserting that using the fiscal-year time periods was inappropriate. He noted that Jon Leibowitz did not become FTC Chairman until March 2009 and Christine Varney did not become head of the Antitrust Division until April 2009—halfway through FY 2009. Our reader further pointed out that with respect to enforcement actions, the timing of when the challenges were initiated—not when they were decided—bears on the administration to which those actions should be credited. Looked at this way, the reader noted that one can draw a different conclusion from the data. The data show, for instance, that the FTC initiated more of the FY 2009 injunction actions while President Bush was still in office than it did after President Obama's term began.<sup>4</sup>

Given these measurement issues, what conclusions can be drawn from this data? Perhaps none. Or perhaps—as a Washington Post headline recently read—“Obama antitrust enforcement looking like more of the same.”<sup>5</sup> It may well be too early to assess the administration's record in challenging transactions, no matter the time period for comparing the data.

***The Benefits of Comparing Merger Enforcement Activity.*** Given the difficulties of determining the correct timeframes to compare and what conclusions to draw from the data, one could be forgiven for thinking that it is a fruitless exercise to try to compare administration enforcement records—or, looking forward, to assess the impact of the new Merger Guidelines. The Agencies are not presented with a static number of mergers to assess each year. Nor are those cases alike. Each case presents a unique set of facts, making comparisons difficult. And merger enforcement itself may affect the types of mergers that appear before the Agencies. In an era of relatively aggressive enforcement, parties may not attempt transactions they would have attempted at other times.<sup>6</sup> These basic issues, moreover, do not even begin to address the question of whether statistics bear on whether the “right” cases are being brought.<sup>7</sup>

Despite these inherent difficulties, the exercise of measuring the impact of new merger guidelines or changes in enforcement activity in a new administration can be useful. The antitrust bar's interest in the data may persuade the Agencies to publish more and better data, which, in turn, could illuminate how the Agencies consider the mergers they investigate. For some years, the Agencies (in particular the FTC) have issued data on their horizontal merger enforcement activities. These statistics go beyond the basic

numbers reported to Congress each year and are interesting not only for their comparisons, but also for how they are presented.

First, as might be expected given the Merger Guidelines' focus on HHIs as providing some threshold presumptions, the FTC provides data as to the challenges brought, depending on the level of HHI and change in HHI for the mergers they investigate. The data also examine merger challenges based on the number of competitors in a market. While the focus on the number of competitors does not appear in the Guidelines, based on my experience in private practice, this factor is more important to Agency staff than the HHIs.

Second, the FTC reports statistics separately for four industries—grocery, oil, chemical, and pharmaceutical. This practice highlights not only the importance of these industries to the FTC but also that challenges to deals in these sectors may occur at lower HHI levels or with a higher number of competitors than in other industries.

Third, the data examine whether enforcement actions were brought in matters involving customer complaints, the existence of “hot documents,” and where entry was easy. Of course, there is significant subjectivity in categorizing a merger based on these factors. Nevertheless, the focus on these facts demonstrates that they are important issues to the Agencies. Demand for such data may impel the Agencies to provide more detail in their enforcement data, which may provide greater illumination on the types of cases they are bringing and the factors on which they are basing their decisions.

Publication and analysis of enforcement statistics can also provide context for a particular enforcement decision. Much of the criticism of lax merger enforcement under the Bush administration stemmed from the Antitrust Division's decision not to challenge the Whirlpool/Maytag merger. Although the parties had a large combined market share, the DOJ did not oppose the transaction, citing the ability of entrants to expand, the ability of large customers to protect themselves, and the presence of significant synergies.<sup>8</sup> Yet, if the Antitrust Division had brought numerous other challenges, would this one case have been seen as evidence of insufficient scrutiny or that the DOJ was particularly thoughtful in its approach?

Ultimately, vigorous attention to the data might influence the Merger Guidelines themselves. The fact that the data over the years showed that the HHI thresholds in the 1992 Merger Guidelines did not match what the Agencies were in fact doing certainly had some impact on the change in HHI presumptions in the 2010 Merger Guidelines. While an assessment of comparative merger enforcement activity is difficult and imprecise, the Agencies should continue to examine and refine the merger data they issue, practitioners and academics should analyze the data and offer their interpretations, and we can all consider the meaning of the 2010 Merger Guidelines on merger enforcement. Let the debate begin. ■

<sup>1</sup> See, e.g., William Baer, Deborah L. Feinstein & Randal M. Shaheen, *Taking Stock: Recent Trends in U.S. Merger Enforcement*, ANTITRUST, Spring 2004, at 15; Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement* (Oct. 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=991588](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=991588); Jonathan B. Baker & Carl Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement*, ANTITRUST, Summer 2008, at 29; Deborah L. Feinstein, *Recent Trends in U.S. Merger Enforcement: Down but Not Out*, ANTITRUST, Summer 2007, at 74. Cf. Timothy J. Muris, *Facts Trump Politics: The Complexities of Comparing Merger Enforcement over Time and Between Agencies*, ANTITRUST, Summer 2008, at 37 (critique).

<sup>2</sup> John D. Harkrider, *Obama: The First Year*, ANTITRUST, Summer 2010, at 8.

<sup>3</sup> *Id.* at n.9.

<sup>4</sup> The FTC's Annual Report recently issued indicates that second requests as a percentage of filings doubled between FY08 and FY09 from 2.5 percent to 4.5 percent. The percentage of filings that led to a challenge also doubled from 2.1 to 4.3 percent. Fed. Trade Comm'n, *Hart-Scott-Rodino Annual Report Fiscal Year 2009*, available at <http://www.ftc.gov/os/2010/10/101001hsrreport.pdf>.

<sup>5</sup> Jia Lynn Yang, *Obama Antitrust Enforcement Looking Like More of the Same*, WASH. POST, Sept. 8, 2010, at A1.

<sup>6</sup> Baker and Shapiro argue that "[t]o the extent that advice is informed and heeded, we would expect to see a similar fraction of challenged deals every year, mainly comprised of 'judgment calls' close to the line, regardless of where the line is drawn." But because it may take time for these changes in enforcement activities to affect the actual deals undertaken, "the statistics should focus on the deviation of the merger enforcement rate from the average . . . . That is, an unusually low figure should be interpreted as indicating an unanticipated recent decrease in merger enforcement, and an unusually high figure should be interpreted as indicating an unanticipated recent increase in merger enforcement." Baker & Shapiro, *supra* note 1, at 15.

<sup>7</sup> For discussion of this issue, see, e.g., William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance*, 16 GEO. MASON L. REV.

<sup>8</sup> 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, available at [http://www.justice.gov/atr/public/press\\_releases/2006/215326.pdf](http://www.justice.gov/atr/public/press_releases/2006/215326.pdf).

# Consumer Protection Fellowship Project Enters Seventh Year

THE JANET D. STEIGER FELLOWSHIP PROJECT gives law students the extraordinary opportunity to work in the consumer protection departments of state and territorial Offices of Attorneys General throughout the United States. The eight-week paid Fellowships were initiated in 2004 by the ABA Section of Antitrust Law, in cooperation with the National Association of Attorneys General, as a consumer protection outreach initiative to introduce law students to the rewards of legal careers in public service.

The first and second year law students who have served as Steiger Fellows have characterized their experiences as truly rewarding, often well beyond their expectations. A number of students have said that for the first time they are considering law careers in public service, and several have already entered public service upon graduation.

Each of the highly motivated Steiger Fellows provides tangible, meaningful assistance to states and territories that are in substantial need of additional resources to fulfill their consumer protection mission. Attorneys General Offices that have hosted Steiger Fellows in the past have characterized the Fellows' work as exemplary, and have often described the students as some of the most talented interns the offices have ever attracted.

The Council of the Section approved funding for states to participate in the 2011 Steiger Fellowship Project. Each selected student will receive a \$5,000 stipend (subject to certain federal taxes and administered through the offices of the state attorneys general). This Project continues to be a tribute to the memory of the late Janet D. Steiger, one of America's great public servants who, during her remarkable tenure as FTC Chairman, dramatically improved cooperation, communication and coordination between state and federal consumer protection and antitrust enforcement agencies.

The states that will receive Steiger Fellows during the Summer of 2011 are:

Arizona	Kansas	New Hampshire	Oregon
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California	Mississippi	New Mexico	Utah
Colorado	Montana	New York	Vermont
Iowa	Nebraska	Ohio	Virginia

To obtain student applications, visit [www.abanet.org/antitrust](http://www.abanet.org/antitrust).

*Applications must be received by January 31, 2011.*