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EDITOR'S NOTE

# New Leadership At the Federal Antitrust Agencies: Change Matters

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EVERY NEW ELECTION BRINGS change to Washington. Sometimes it is dramatic, as when a new President from the opposite party takes the helm. Sometimes it is more incremental—a second-term President facing departures of key players. And these changes often make their way into the leadership of the federal agencies overseeing antitrust enforcement. These leaders often emphasize that any differences between them and past predecessors are minor—even when they are from different parties. Chairman Muris said that he did not expect to depart significantly from the enforcement practices of Chairman Pitofsky.[1] Assistant Attorney General Rill and Chairman Muris attended the Senate confirmation hearings of Assistant Attorney General Baer as a sign of support. Thus, a reasonable question is whether these changes make a difference.

There can be no doubt that leadership changes affect antitrust enforcement—at least on the margin and sometimes more significantly. Some have argued that enforcement during the George W. Bush era was down significantly,[2] while others have quarreled with that analysis.[3] But even putting aside debates over statistics and whether they can ever meaningfully be used to compare enforcement levels concerning different transactions and different conduct at different times, leadership changes no doubt affect the agencies' priorities and focus. Chairman Muris viewed the impact of the state action doctrine on antitrust as particularly significant and established a task force to examine it. Among Chairman Majoras's concerns was better articulating what the agencies were doing in analyzing mergers, leading to the Commentary on the Merger Guidelines. Assistant Attorney General Barnett joined in the Commentary, also supported further transparency efforts through the increased use of closing statements, and issued a report on the use of Section 2. One of Assistant Attorney General Varney's first acts was to withdraw the Section 2 report issued by her predecessor, noting a "shift in philosophy."[4] Chairman Liebowitz may be best remembered for his actions against pharmaceutical patent settlements.

The economic and regulatory environment matters as well. The merger boom in the 1990s made it easier to find large transactions to challenge. Where would "pay-for-delay" be without the Hatch-Waxman Act that affected the incentives of the parties to settle pharmaceutical patent litigation? And the growing patent thicket in fast-moving high-tech arena has brought the issue of standard essential patents to the forefront in recent years.

Predicting what the changes in leadership will mean—particularly given ongoing changes in various industries and the economy—is more difficult. But predictions are nonetheless interesting, and the business community certainly expects us to try. So with that backdrop, and the caveat that I have no crystal ball, I offer some thoughts on what the new leaders have said and done previously that might provide insights into their future efforts, as well as the key issues to watch in the coming years.

## The Department of Justice

Assistant Attorney General Bill Baer is a known quantity in Washington. He started his career at the FTC out of law school and then returned in 1995 as Bureau Director under Chairman Pitofsky, with whom he had worked in private practice. On the merger front, there can be little doubt that the successful challenge to the Staples/Office Depot transaction was the most important merger case of the Pitofsky-Baer tenure. In retrospect, the decision to challenge the transaction seems obvious. The evidence—as described by the court—makes clear that Staples' prices were significantly lower in markets where it faced competition from Office Depot than in markets where Staples was the only office-supply superstore.[5] Yet at the time, this sort of unilateral effects analysis was far from the norm. And the alleged product market—consumable products sold in office-supply superstores—was the sort of over-hyphenated product market definition frequently derided by antitrust lawyers and economists. Moreover, the alternative to a challenge was not simply to let the transaction proceed; there were settlement offers on the table that would have allowed an enforcement win through store divestitures. Losing this matter in court would have made the decision to challenge seem foolish; winning landed Pitofsky, Baer, and the rest of the team on the cover of *The American Lawyer* and garnered a decision many view as one of the most significant merger decisions of the modern era.

The other major merger development during Baer's tenure was the Divestiture Study—a study of divestitures in thirty-five matters to determine whether the divestitures were effec-

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tive.[6] The Study made passing reference to certain licensing orders described as a remedy the staff had "experimented with," a somewhat less than subtle suggestion that such remedies would quickly become disfavored. The Study found that while divestitures were typically successful, there were order provisions that could increase the likelihood that a divestiture remedy would be effective. Those provisions subsequently started making their way into orders.

Within days of joining the Antitrust Division, Baer was able to announce his first merger action. The Division filed suit to challenge Bazaarvoice's consummated acquisition of PowerReview, pointing, inter alia, to Bazaarvoice documents describing PowerReview as its primary rival.[7] But to suggest, as some clients have, that this reflects increased scrutiny of consummated mergers would be overreaching. The investigation had already been underway for some time before Baer stepped into office and reflects a continued Division effort to challenge consummated mergers.[8]

More interesting is the challenge to Anheuser-Busch Inc.'s (ABI) acquisition of control over Grupo Modelo. The beer industry is not a new one for the Antitrust Division, with past investigations spanning decades. Four years ago, under a different administration, the Antitrust Division closed its investigation into the combination of Miller and Coors. The Division concluded that the joint venture would lead to substantial savings and make the combined entity a more efficient competitor, without any discussion of the market concentration or market dynamics in the beer industry.[9] The complaint against the ABI/Modelo transaction alleges that the mergers would increase concentration in the beer industry nationwide by over 500 points to more than 2800—both well over the thresholds at which the Merger Guidelines state that mergers are highly likely to be challenged.[10] It then goes on at some length to describe how Modelo, even with only 7 percent of the national beer market, plays an important role in constraining the ability of the two market leaders—ABI and Miller—to increase price.

The transaction structure is interesting, with ABI having taken certain steps to limit its ability to affect the price of the Modelo brands. As a result, certain commenters suggested that there were additional conduct steps that could be undertaken to remedy any competitive concern.[11] But if they were suggested to the DOJ, they were rejected, as the Division challenged the transaction. After DOJ filed the complaint, ABI restructured the transaction to offer Constellation, a distributor of Modelo products, a brewery and a perpetual license.

While it is important to note that much of the investigation occurred well before Baer came to the Division, the ultimate decision to challenge was his. And it bears similarities to the decision to challenge the Staples transaction—that a competitive effects story is more important than the structure of the market alone and that the agencies will reject remedies proposed by the parties if they do not believe they will fix the competitive problem.

On the non-merger side, the most notable challenge of Baer's tenure as Bureau Director was the Toys "R" Us case, which alleged that Toys "R" Us had pressured suppliers to stop selling the same toys that were being sold to Toys "R" Us to club stores that were undercutting Toys "R" Us prices. The criticism of this case was that Toys "R" Us had simply implemented a series of unilateral and lawful vertical agreements with its suppliers. However, the Commission found instead that Toys "R" Us organized an illegal hub-and-spoke conspiracy with its suppliers to restrain competition from club stores.[12] Ultimately the case was upheld by the Seventh Circuit, which agreed with the FTC that there was sufficient circumstantial evidence from which to infer a horizontal agreement among the suppliers to boycott the discount retailers.[13] Given the fact-specific nature of this matter, it is difficult to draw meaningful conclusions as to what this case says about Baer's overall views on non-merger enforcement other than to suggest that exclusionary conduct will be scrutinized carefully by the Division under his leadership.

Two key areas to watch at the Division, irrespective of the change in leadership, are most-favored-nations clauses (MFNs) and standard essential patents (SEPs). The DOJ is litigating two high-profile cases challenging the use of MFNs—by Blue Cross Blue Shield in contracts with hospitals[14] and by book sellers in contracts with e-book retailers.[15] While such challenges are not new, as Stephen Smith explains in his article in this issue, *When Most-Favored is Disfavored: A Counselor's Guide to MFNs*, most have been settled by consent. The court challenges led to far more publicity concerning the risk of MFNs and increased discussion of how MFN enforcement policy should be established. The articles by Baker and Chevalier and Salop and Morton in this isuue offer views on the competitive consequences of MFNs and how enforcement policy will proceed. Whether the two MFN challenges are isolated or part of a more significant trend is yet to be seen.

Because it has not taken a major enforcement action in this area, the DOJ's focus on SEPs is mostly apparent through the numerous statements it has made on this issue. Indeed, it issued a lengthy closing statement explaining why it did not challenge a number of acquisitions of SEPs based, in part, on the acquiring companies' commitments to license these patents on fair, reasonable, and non-discriminatory terms.[16] Most recently, the Division, in conjunction with the Patent and Trademark Office, announced a Policy Statement on Remedies for Standard Essential Patents.[17] The policy statement asserts that injunctive relief and exclusion orders may not be appropriate remedies for the infringement of a SEP due to their potential impact on competition, except in exceptional circumstances.[18]

Finally, while Baer does not have prior experience enforcing the criminal antitrust laws, he has been involved in numerous criminal cases over the years in private practice. Based on that experience, there is no reason to think that he will put any less emphasis on the Division's criminal enforce-

ment program, which generated record-setting fines in FY2012 and which is now pursuing several major investigations in industries as wide ranging as auto parts and financial instruments. There have been reports in the press that the Division's criminal enforcement resources are being strained by these ongoing investigations.[19] If so, one would expect Baer to seek the additional resources he needs to carry out the Division's criminal enforcement program effectively. During his tenure at the Bureau of Competition, he and Chairman Pitofsky were successful in obtaining additional funding for the FTC to carry out its competition and consumer protection missions.

### The Federal Trade Commission

The Federal Trade Commission meanwhile is experiencing its own changing of the guard. Chairman Leibowitz recently stepped down after almost four years as Chairman and nearly a decade at the Commission. He will be best known for his efforts to outlaw patent settlements between branded and generic pharmaceutical manufacturers in which the branded manufacturer allegedly pays the generic to delay entry into the market, the so-called "pay-for-delay" cases. The first case of this nature was actually brought in 2001 under Chairman Pitofsky. While for several years thereafter there were few such settlements, and thus few to investigate, Chairs Muris and Majoras continued to bring enforcement actions when such settlements did exist—even after the courts of appeals ruled against the Commission in several of these actions.[20] Chairman Leibowitz has kept the issue in the public debate, supporting legislation to halt these settlements. Under his leadership, the Commission has persuaded the Supreme Court to resolve a circuit split as to how these settlements should be treated under the antitrust laws.[21]

While the Chairman's leadership is important, the Commissioners all leave their own marks at the agency as well. Commissioner Rosch recently stepped down after over six years at the agency. His concurrences and dissents on antitrust matters were numerous and often provocative. When the FTC filed a complaint against Ovation Pharmaceuticals regarding its acquisition of the drug NeoProfen, then-Commissioner Rosch issued a concurring statement fiercely advocating his position that the Commission should also have challenged Ovation's prior acquisition of the drug Indocin under Section 7.[22] He took similar opportunities to express in no uncertain terms his concerns with the Commission's failure to conclude its investigation of the proposed Endocare/Galil merger in a timely fashion;[23] his objections to the Commission staff's relevant product market definition in the complaint against Labcorp;[24] and his rejection of a consent decree in "the novel situation of a company willing to enter into a consent decree notwithstanding a lack of evidence indicating that a violation has occurred."[25]

Three new Commissioners will now influence agency action. Commissioner Ohlhausen previously served as the Director of the Office of Policy Planning at the FTC. After nearly a year, she has issued only a handful of dissents, demonstrating that she has largely agreed with the majority view in the cases she has considered. None of her dissents has been in a merger case. The main area of her disagreement with the majority has concerned the Commission's "enforcement policy on the seeking of injunctive relief on FRAND-encumbered SEPs," dissenting in enforcement actions against Bosch and Google.[26] She also noted that she believed no remedy was required for any of Google's search practices, including Google's alleged misappropriation of competitors' content.[27] She dissented from the Commission's decision to withdraw a policy statement without substantial deliberation or public comment.[28]

Commissioner Wright is also a veteran of the agency, having served as its inaugural Scholar-in-Residence. He has not been in office long enough to have opined on specific cases, but his writings from before his tenure at the agency give an insight into his views. *The Antitrust Source* will be publishing a series of reviews analyzing those writings. Prior to joining the Commission, Commissioner Wright disagreed with various enforcement positions of the agencies. For instance, he criticized the closing statements in Google/Motorola, Rockstar/Bidco, and Apple/Novell for "extracting promises not to enforce lawfully obtained property rights during merger review . . . in transactions that [did] not raise competitive concerns."[29] He also raised a more general issue with the notion of patent holdup as an antitrust concern.[30] Similarly, he expressed concern that the 2010 Horizontal Merger Guidelines did not make explicit that out-of-market efficiencies will make the agencies less likely to bring a case when those efficiencies are likely to benefit customers overall.[31]

President Obama has nominated Edith Ramirez, currently a Commissioner, to serve as the Chairman. She has largely decided with the majority on most matters, and it is hard to predict what her focus and agenda will be. However, her experience in private practice on intellectual property matters could suggest those will be among the issues on which she focuses.

A major difference between the Commission and the Division is that the Division has a single decision-maker, whereas at the FTC affirmative action requires a favorable vote by the majority of the Commission. This difference becomes particularly important when the Commission lacks a full complement of Commissioners, as is now the case, and may reamin so for at least some period of time.

During that time, the dynamics of the Commission will change. A vote of 3 to 2, as was the case in the recent Bosch/SPX matter,[32] allows the Commission majority to take action. In contrast, a vote of 2 to 2 means the Commission does not have the requisite majority, allowing two dissenting Commissioners to block action. This occurred twice, for example, in 2001 in merger investigations as a result of Chairman Muris being recused. The Commission voted 2 to 2 on taking action against both the Pepsi/Quaker[33] and General Mills/Pillsbury transactions,[34] resulting in statements from the four Commis-

sioners in each case. There is reason to think such split decisions could occur before the fifth Commissioner is in office.

It is difficult to assess how any given change in leadership affects the enforcement priorities or outcomes of a case, but no one can suggest that the changing faces of antitrust enforcement are irrelevant. Ultimately, change is inevitable—and it can be confusing—but it certainly is interesting.■

[1] Timothy J. Muris, Chairman, Fed. Trade Comm'n, Prepared Remarks Before ABA Section of Antitrust Law Annual Meeting (Aug. 7, 2001), *available at* http://www.ftc.gov/speeches/muris/murisaba.shtm.

[2] *See, e.g.*, Jonathan B. Baker & Carl Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement*, ANTITRUST, Summer 2008, at 29, 31.

[3] *See, e.g.*, William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903 (2009).

[4] Press Release, U.S. Dep't of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), *available at* http://www.justice.gov/opa/pr/2009/May/09-at-459.html.

[5] FTC v. Staples, Inc., 970 F. Supp. 1066, 1075–76 (D.D.C. 1997).

[6] FED. TRADE COMM'N, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS (1999), *available at* http://www.ftc.gov/os/1999/08/divestiture.pdf.

[7] Complaint, United States v. Bazaarvoice, Inc., No. C-13-0133 (N.D. Cal. Jan. 10, 2013).

[8] *See, e.g.*, United States v. George's Foods, No. 5:11-cv-00043 (W.D. Va Nov. 4, 2011); United States v. Election Sys. & Software, 722 F. Supp. 2d 117 (D.D.C. 2010).

[9] Press Release, U.S. Dep't of Justice, Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of the Joint Venture between SABMiller PLC and Molson Coors Brewing Company, (June 5, 2008), *available at* http://www.justice.gov/atr/public/press_releases/2008/233845.htm.

[10] Complaint at 12–13, United States v. Anheuser-Busch InBev SA/NV, No. 1:13-cv-00127 (D.D.C. Jan. 31, 2013).

[11] Renee Cordes, *Palatable Cures Seen for AB InBev's 'Merger Headache,'* THE DEAL PIPELINE (Jan. 17, 2013), http://www.thedeal.com/content/regulatory/palatable-cures-seen-for-ab-inbevs-merger-headache.php.

[12] Toys "R" Us, Inc., 126 F.T.C. 415, 551–53 (1998).

[13] Toys "R" Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000).

[14] United States v. Blue Cross Blue Shield of Mich., No. 2:10-cv-14155-DPH-MKM (E.D. Mich. filed Oct. 18, 2010).

[15] United States v. Apple, Inc., No. 1:12-cv-02826-UA (S.D.N.Y. filed Apr. 11, 2012).

[16] Press Release, U.S. Dep't of Justice, Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd. (Feb. 13, 2012), *available at* http://www.justice.gov/opa/pr/2012/February/12-at-210.html.

[17] U.S. Dep't of Justice & Patent & Trademark Office, Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (2013), *available at* http://www.justice.gov/atr/public/guidelines/290994.pdf. This was clearly developed prior to Baer's joining the Division but issued with his approval a week after he joined.

[18] *Id.* at 8–9 ("The DOJ and USPTO are concerned about the potential impact of exclusion orders on 'competitive conditions in the United States' and 'United States consumers' in some cases involving F/RAND-encumbered patents that are essential to a standard . . . . [W]e believe that, depending on the facts of individual cases, the public interest may preclude the issuance of an exclusion order in cases where the infringer is acting within the scope of the patent holder's F/RAND commitment and is able, and has not refused, to license on F/RAND terms.").

[19] *See, e.g.*, Melissa Lipman, *DOJ Antitrust Workload Questioned Amid Office Closings*, LAW360 (Jan. 25, 2013, 6:31 PM), http://www.law360.com/articles/410273/doj-antitrust-workload-questioned-amid-office-closings; Aaron Koepper, *House Amendment to Keep Four DOJ Antitrust Field Offices Open Fails*, MAIN JUSTICE (May 11, 2012, 2:40 PM), http://www.mainjustice.com/2012/05/11/house-amendment-to-keep-four-doj-antitrust-field-offices-open-fails/.

[20] *See e.g.*, FTC v. Cephalon, No. 08-cv-2141-RBS (E.D. Pa. Feb. 13, 2008), *available at* http://www.ftc.gov/os/caselist/0610182/index.shtm (pay-for-delay case brought under Chairman Majoras); In re Bristol-Myers Squibb, 135 F.T.C. 444 (2003) (pay-for-delay case brought under Chairman Muris); Press Release, Fed. Trade Comm'n, FTC Charges Bristol-Myers Squibb with Pattern of Abusing Government Processes to Stifle Generic Drug Competition (Mar. 7, 2003), *available at* http://www.ftc.gov/opa/2003/03/bms.shtm (Chairman Muris states that FTC will continue to investigate and bring pay-for-delay actions); Jon Leibowitz, Chairman, Fed. Trade Comm'n, ABA Section of Antitrust Law Fall Forum 2011, at 4 (Nov. 17, 2011), *available at* http://www.ftc.gov/speeches/leibowitz/111117fallforum.pdf (stating that the FTC continued to enforce the pay-for-delay agenda under Chairs Muris and Majoras).

[21] FTC v. Watson Pharms., 677 F.3d 1298 (11th Cir.), *cert. granted*, 2012 U.S. LEXIS 9415 (2012).

[22] Concurring Statement of Commissioner J. Thomas Rosch, Federal Trade Commission v. Ovation Pharmaceuticals, Inc., FTC File No. 0810156 (Dec. 16, 2008), *available at* http://www.ftc.gov/os/caselist/0810156/081216ovationroschstmt.pdf.

[23] Statement of Commissioner J. Thomas Rosch on the Abandonment of the Endocare, Inc./Galil Medical, Ltd. Merger, FTC File No. 0910026 (June 9, 2009), *available at* http://www.ftc.gov/speeches/rosch/090609endocarestatement.pdf.

[24] Dissenting Statement of Commissioner J. Thomas Rosch in the Matter of Laboratory Corporation of America and Laboratory Corporation of America Holdings, FTC Docket No. 9345 and File No. 101-0152 (Nov. 30, 2010), *available at* http://www.ftc.gov/speeches/rosch/101130lapcorpdisstatement.pdf.

[25] Dissenting Statement of Commissioner J. Thomas Rosch in the Matter of Pool Corporation, FTC File No. 101-0115 (November 21, 2010), *available at* http://www.ftc.gov/os/caselist/1010115/index.shtm.

[26] *See* Motorola Mobility LLC and Google Inc., 78 Fed. Reg. 2398, 2404 (FTC Jan. 11, 2013) (proposed consent agreement) (Ohlhausen, Comm'r, dissenting); Robert Bosch GmbH, 77 Fed. Reg. 71,593, 71,598 (FTC Dec. 3, 2012) (proposed consent agreement) (Ohlhausen, Comm'r, dissenting).

[27] Statement of Commissioner Maureen K. Ohlhausen, Google Inc., FTC File No. 111-0163 (Jan. 3, 2013), *available at* http://www.ftc.gov/os/2013/01/130103googlesearchohlhausenstmt.pdf.

[28] Withdrawal of the Commission Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 Fed. Reg. 47,070, 47,071 (Aug. 7, 2012) (Ohlhausen, Comm'r, dissenting).

[29] Josh Wright, *The DOJ's Problematic Attack on Property Rights Through Merger Review*, TRUTH ON THE MARKET (Mar. 13, 2012, 9:22 PM), http://truthonthemarket.com/2012/03/13/the-dojs-problematic-attack-on-property-rights-through-merger-review/.

[30] *Id.*

[31] Josh Wright, *Do the New HMGs Move from Cheap Talk to Commitment on Out-of-Market Efficiencies?*, TRUTH ON THE MARKET (Aug. 20, 2010, 8:21 AM), http://truthonthemarket.com/2010/08/20/do-the-new-hmgs-move-from-cheap-talk-to-commitment-on-out-of-market-efficiencies/.

[32] Robert Bosch GmbH, 77 Fed. Reg., 71, 593 (FTC Dec. 23 2012) (proposed consent agreement).

[33] Press Release, Fed. Trade Comm'n,, Federal Trade Commission Votes to Close Investigation of Proposed Merger of PepsiCo and Quaker Oats Co. (Aug. 1, 2001), *available at* http://www.ftc.gov/opa/2001/08/pepsi.shtm.

[34] Press Release, Fed. Trade Comm'n, Federal Trade Commission Considers General Mills/Pillsbury Merger (Oct. 23, 2001), *available at* http://www.ftc.gov/opa/2001/10/pillsbury.shtm.