

PUBLICATION

President Obama's Antitrust Stimulus Package

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During the presidential campaign, candidate Barack Obama promised more vigorous enforcement of the antitrust laws. President Obama and his new administration have fulfilled that pledge. While some question the effectiveness of the financial stimulus packages, the "antitrust stimulus" is clearly being felt, with new pro-enforcement leadership at the Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC). Even Congress is joining in by introducing bills to overturn recent United States Supreme Court antitrust decisions favorable to defendants and by urging more aggressive enforcement of the antitrust laws.

The policy changes and increased litigation expected from the administration's antitrust initiatives will broadly impact the nation's transportation industry. Indeed, many companies are already feeling the impact of increased enforcement today. Significant activities relating to transportation and energy include:

- **DOJ Repudiates Bush "Passive" Antitrust Enforcement.** The head of the DOJ Antitrust Division, Christine Varney, condemned the "passive" antitrust enforcement policy of the Bush administration and expressly repudiated the 2008 Antitrust Division policy paper on Section 2 of the Sherman Act which had adopted a lenient approach on monopolization, attempted monopolization and dominant firms. Ms. Varney promised renewed antitrust focus on several specific sectors, including the energy and transportation sectors, and continued aggressive prosecution of criminal conspiracies to fix prices and allocate markets. It is expected that both antitrust agencies will significantly increase scrutiny of conduct by dominant firms.
- **FTC Suing Dominant Firms Under Section 5.** The FTC believes that Section 5 of the FTC Act, which prohibits unfair competition, is broader than the antitrust laws, and its recent complaint against Intel for alleged illegal use of its dominant position is based on this broad interpretation of Section 5. In addition, the FTC just announced a settlement under Section 5 which bars the nation's leading manufacturer of certain lens treatments from engaging in exclusionary conduct.
- **More Non-Merger Investigations.** There have been numerous non-merger investigations by the DOJ and FTC involving agreements among competitors regarding employees, optical disk drives, low prices paid to dairy farmers for milk, a proposed class action settlement between Google and book publishers and authors, and market-default swaps. In the Google matter, the DOJ has raised significant concerns with the court about the proposed settlement.
- **Special Task Force to Combat Collusion on Stimulus Funds.** DOJ has formed a special task force to combat collusion with respect to federal funds. A Citizen Complaint Center has been established to collect reports of potential collusive conduct and fraud in procurement and granting of awards using federal stimulus funds. The DOJ has also published a list of "Red Flags of Collusion" to aid in the identification of potential collusive activities.
- **Aggressive Criminal Enforcement.** Aggressive criminal enforcement of the antitrust laws continues to focus on cartels, agreements among competitors to fix prices, allocation of markets and bid rigging. Enforcement has been particularly active against government contractors alleged to have rigged bids on projects relating to the wars in Iraq and Afghanistan, and against international and domestic cartels. The DOJ has already collected more than \$1 billion in criminal fines for the most recent fiscal year, a record amount.

- **Long Jail Time for Individuals.** Incarceration of individuals remains a priority, as DOJ views long prison sentences as a strong deterrent to violations of the antitrust laws. A 48-month prison sentence was recently imposed on a shipping executive for bid rigging on coastal shipping services between the U.S. and Puerto Rico. Individuals have been indicted in connection with the sale of municipal bonds and in connection with kickbacks to Home Depot. The ex-wife of a Home Depot employee received a two-year jail sentence for filing false tax returns in connection with this kickback scheme.
- **Small Businesses Targeted.** Even relatively small businesses are being targeted for criminal prosecution. Criminal price fixing charges have been brought against individuals and companies in the packaged ice business. Recently a former executive of an Iowa ready-mix concrete business agreed to plead guilty and serve 19 months in jail for participating in price fixing conspiracies involving sales in Iowa.
- **Foreign Nationals Targeted.** The DOJ recently indicted a Swedish national for his alleged role in fixing surcharges on international air cargo shipments and for allegedly obstructing justice; the defendant is outside of the United States and the DOJ is believed to have filed an INTERPOL red notice, which would subject the defendant to arrest if he crosses an international border and could result in his extradition if, generally speaking, at least one of the crimes alleged in the indictment is a felony in both the United States and the country from which extradition is sought.
- **Business Review Letter on LTL Joint Venture.** The DOJ announced in a Business Review Letter that it would not challenge a proposal by seven less-than-truckload (LTL) freight carriers to bid jointly and engage in other collaborative activity as part of a nationwide LTL joint venture. This conclusion was based on the carriers' representation that there was "insignificant overlap" in their operations, that they faced significant competition in their areas of operations and that the proposal would allow them to offer "seamless" nationwide LTL services and respond to shipping opportunities that originate from multiple regions by sharing the information and internal systems. The LTL carriers sought this review following approval of a pooling agreement by the Surface Transportation Board, which provided antitrust exemption for certain activities, but the parties were concerned that the exemption was not broad enough. While DOJ stated that it would currently not challenge the proposal, it also expressed concern about the possible elimination of significant current or potential competition among members.
- **Private Antitrust Transportation Actions Raising Immunity Issues.** Transportation companies should also be aware of the recent federal court decision *In Re Household Goods Movers Antitrust Litigation*, MDL Docket No. 1865 (D.S.C. Sept. 10, 2009), a class action alleging a conspiracy to unlawfully impose fuel surcharges. The court ruled that defendants' alleged conspiracy on fuel surcharges was not immunized from the antitrust laws by statutory immunity or the filed rate doctrine. The judge relied on deposition testimony from executives in finding that defendants did not conform to the statutory requirements for immunity and that the surcharges returned far more than the actual increased cost of the fuel and could not have been based on industry average carrier costs. The court certified its decision for immediate appeal on the basis that these issues involve controlling questions of law as to which substantial grounds for difference of opinion exist. In an air passenger fuel surcharge class action, the district court dismissed with prejudice plaintiffs' third amended complaint on the grounds that the alleged conspiracy was immunized by federal law, and even if no immunity existed, plaintiffs had failed to adequately plead an illegal price fixing conspiracy. *LaFlamme v. Societe Air France* (E.D.N.Y. April 5, 2010)
- **Trade and Professional Associations Targeted.** Trade associations and professional associations continue as a popular target for the antitrust agencies. The FTC charged a trade association of manufacturers, distributors and dealers of musical instruments with antitrust violations for organizing meetings among competing music retailers to discuss strategies for implementing manufacturer minimum retail prices, restricting retail price competition and securing higher retail prices. The defendants entered into a consent order with the FTC.

The FTC brought price fixing charges against a 600-physician independent practice association for fixing prices charged to health care insurers and unlawful concerted refusal to deal, with the defendants settling the case. Recently, the FTC took action against the executive director of a Boulder Valley, Colorado physician association for attempting to evade a previous FTC order against the association.

- **More Merger Challenges.** The agencies are aggressively challenging mergers of all sizes, including consummated mergers and non-reportable mergers. The FTC obtained a preliminary injunction blocking a \$1.4 billion acquisition involving companies providing systems and software for estimating the cost of collision repairs and the value of passenger vehicles damaged beyond repair. The FTC successfully challenged a \$20 million completed acquisition of outpatient clinics in Roanoke, Virginia, with the acquiring party agreeing to divestiture. Other acquisitions have been abandoned after the FTC or DOJ started investigations.

The FTC is requiring divestiture of certain bulk de-icing road salt operations in connection with a recent proposed acquisition to preserve competition in Maine and Connecticut.

DOJ has required divestiture of certain assets for the production and sale of desalters used in the oil refinery industry in Cameron International's acquisition of Natco Group. The DOJ stressed that this divestiture would also remedy the harm to competition caused by a 2005 Cameron acquisition.

- **Revised Draft Horizontal Merger Guidelines.** The DOJ and FTC have just issued revised Draft Horizontal Merger Guidelines for comment that describe how the agencies will analyze mergers. These revised Guidelines are intended to conform with current agency practice and focus more attention on competitive effects of acquisitions, both proposed and consummated.
- **Petroleum Market Manipulation Rules.** The FTC has issued its Petroleum Market Manipulation Rules effective November 4, 2009, and a Compliance Guide to help businesses and individuals comply with the Rules and the Energy and Independence Act of 2007. These rules prohibit manipulative or deceptive conduct in wholesale petroleum markets, including crude oil, gasoline or petroleum distillates.
- **Workshops on Competition in Agriculture Industry.** The DOJ has been holding public workshops with the Department of Agriculture to explore competition issues affecting the agriculture industry, including buyer power (monopsony power), vertical integration, patent and intellectual property issues and retailer concentration. The DOJ has expressed concerns that small farms are being lost at "astronomical and intolerable rates."
- **Congressional Action.** The Senate and House of Representatives Judiciary Committees have approved bills to make resale price maintenance per se unlawful and overturn the United States Supreme Court decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), which replaced the per se illegality standard with a rule of reason test.

Bills are also pending in both Houses that would return the pleading standard for surviving motions to dismiss in antitrust and other cases to the more lenient standard that existed prior to the United States Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

Members of Congress have been active in urging the antitrust agencies to pursue investigations of various industries.

While not specifically related to antitrust, the False Claims Act was recently amended to greatly expand the parties who could be held liable, including third parties who do not deal directly with the government. Many antitrust claims involving sales to the government also include False Claims Act allegations. DOJ has obtained \$2.4 billion in settlements and judgments through False Claims Act cases through the end of September.

With this increased antitrust enforcement, this may be a good time for companies to review existing antitrust compliance programs or implement such programs if they are absent. Companies should consider alerting management and sales force employees and any employees or agents with contact with competitors to this increasing antitrust scrutiny. Companies that engage in business abroad should also bear in mind that competition authorities outside the United States are increasing antitrust enforcement and imposing significant fines. Additionally, state attorneys general are expected to be more active as the FTC stresses increased cooperation with the state offices.