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Obama's Antitrust Stimulus: The First 6 Months

Law360, New York (August 26, 2009) -- During the presidential campaign, candidate Obama promised more vigorous enforcement of the antitrust laws. President Obama and his new administration have fulfilled that pledge.

While some are questioning the effectiveness of the financial stimulus packages, the “antitrust stimulus” is clearly being felt, with new pro-enforcement leadership at the U.S. Department of Justice Antitrust Division and the Federal Trade Commission.

Even Congress is joining in by introducing bills to overturn recent Supreme Court antitrust decisions favorable to defendants and by urging more aggressive enforcement of the antitrust laws.

Significant activities during the first six months include:

U.S. Department Of Justice

Shortly after her confirmation, new DOJ Antitrust Division head 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.

That policy paper had adopted a lenient approach on monopolization, attempted monopolization and dominant firms. Ms. Varney promised renewed antitrust focus on the banking, health care, energy, telecommunications and transportation sectors and in high-tech and Internet-based markets and continued aggressive prosecution of criminal conspiracies to fix prices and allocate markets.

She also announced the formation of a special task force to combat collusion with respect to federal stimulus funds. Recent DOJ activities include:

- Investigating a class action settlement involving authors, publishers and Google that would allow Google to digitize millions of books and affect prices and access to digitized books.
- Investigating alleged agreements among Google, Yahoo, Apple and Genentech to refrain from poaching each other's employees.
- Investigating the proposed merger of Ticketmaster and Live Nation, the world's largest concert promoting company.
- Investigating Nuance's acquisition of a Philips speech recognition company that serves health care organizations, a nonreportable acquisition that was completed last year.
- Investigating the market for credit-default swaps, with the Antitrust Division sending notices to Markit Group Ltd., which provides derivative and bond data, and reportedly to several banks.
- Investigating AT&T's proposed acquisition of Centennial Communication, a mobile phone company.
- Investigating the recent acquisition by Blackboard, a learning management system company, of competitor Angel Learning.
- 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.
- Requiring divestiture in an acquisition involving the manufacture and sale of aluminum sheathing, with the parties having combined sales of \$43 million.
- Establishing a Citizen Complaint Center 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.
- Joining the FTC in arguing that pay-for-delay settlements involving generic drugs are presumptively unlawful, a reversal of DOJ's prior position, which had put the DOJ at odds with the FTC.
- Opposing blanket antitrust immunity for Continental Airlines to join United Airlines and other carriers in the Star Alliance due to concerns about reduction in competition between cities where United and Continental provide service.

- Continued aggressive criminal enforcement of the antitrust laws involving suspected cartel behavior, 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 approximately \$1 billion in criminal fines for this fiscal year, a record amount.

In addition, a record-breaking jail sentence of 48 months was also recently imposed, and prosecution and incarceration of individuals remains a priority, even for seemingly small matters, as DOJ views incarceration as a very strong deterrent to violations of the antitrust laws.

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 whom extradition is sought.

Federal Trade Commission

The FTC has also been very active in pursuing antitrust cases:

- Charging 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.

- Obtaining 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 totaled passenger vehicles.

- Challenging an acquisition that increased concentration in plasma-derivative protein therapies. The parties abandoned the deal after the challenge was announced.

- Bringing 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.

- Investigating a nonreportable proposed transaction involving cryotherapies to treat cancer. The parties abandoned the deal due to the cost and burden of the FTC investigation.

- Challenging a \$20 million completed acquisition of outpatient clinics in Roanoke, Va., with the FTC contending that out-of-pocket costs for many patients are likely to increase by 900 percent for some treatments.
- Challenging an acquisition involving potential competition for heart failure medical devices, with the parties abandoning the deal shortly after the challenge was announced.
- Promulgating final rules prohibiting market manipulation in the petroleum industry,
- Investigating interlocking directorates between the Google and Apple boards, with the CEO of Google recently resigning from the Apple Board.
- Further motivation for the FTC comes from the Chair of the Senate Commerce Committee, who told the FTC at a recent hearing that the FTC needs to be more aggressive with doctors, hospitals, pharmaceutical manufacturers and medical suppliers who manipulate the market.

Congress

- A House Judiciary Subcommittee has favorably reported legislation to make resale price maintenance per se unlawful and overturn the Supreme Court's Leegin decision and to limit antitrust immunity for railroads.
- Sen. Arlen Specter, D.-Pa., has introduced legislation to return the motion to dismiss pleading standard in antitrust and other cases to the more lenient standard that existed prior to the Supreme Court's Bell Atlantic Corp. v. Twombly decision.
- A Senate Judiciary Subcommittee is investigating the business practices of large group purchasing organizations.
- A House Subcommittee has favorably reported, at the urging of the FTC, legislation that would ban reverse or exclusionary payments or pay for delay settlements as part of patent settlements between generic and branded pharmaceutical companies.
- Members of Congress have also been active in urging the antitrust agencies to pursue investigations of various industries and specific mergers.
- 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.

In the face of such increased antitrust enforcement, companies should review existing antitrust compliance programs or implement such programs if needed.

Companies should consider alerting management and sales force employees and any employees or agents with contact with competitors to this increasing antitrust scrutiny.

Companies who engage in business abroad should also bear in mind that competition authorities outside the United States are increasing antitrust enforcement and imposing significant fines.

Finally, increased activity by the federal agencies usually results in more follow-on private treble damage class actions.

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