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US: Merger Control

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This past year might be known as the year of LBO – Lehman and Barack Obama, that is, not leveraged buy-outs. The collapse of Lehman Brothers and subsequent devastation of financial and other markets in the autumn of 2008 throttled an already slowing merger business. The election soon thereafter of President Barack Obama on a platform of ‘change’ then swept new leadership into both US antitrust agencies – the Federal Trade Commission (FTC) and the Department of Justice (DoJ) Antitrust Division – two believers in stronger antitrust enforcement, particularly as regards mergers, and particularly in times of broader economic turmoil. Time for a quick look back at pre-LBO merger enforcement and a cautious look forward at what post-LBO enforcement might look like.

The US merger control regime consists mainly of the enforcement of section 7 of the Clayton Act,¹ which prohibits mergers and acquisitions that may substantially lessen competition, and of the Hart-Scott-Rodino Act (the HSR Act),² which requires parties to most mergers or acquisitions above a certain dollar threshold to observe a ‘waiting period’ before closing the deal, during which the government can review the competitive effects of the transaction. After rising steadily for five years, the number of mergers and acquisitions requiring HSR Act filing dropped significantly during the fiscal year ended 30 September 2008 and collapsed thereafter to levels not seen in decades. The FTC and DoJ reported that 1,726 transactions required filings in the year through September 2008.³ That represents a drop of some 22 per cent compared to the prior fiscal year, even pre-LBO. Post-LBO, judging by the serially increasing case numbers assigned to HSR filings which are published when the reviews are terminated early, the number of transactions reported fell off dramatically. In the months October through December of 2008 they dropped to at most half of what was seen during the prior year, and by July 2009 they had dropped further, to below 40 per cent of the prior year.⁴ Overall, the numbers through July 2009 suggest filings are down to about one third from the heights seen in 2007.⁵

Whatever might have been said during the presidential election campaign about antitrust enforcement, pre-LBO enforcement activity remained strong during the last fiscal year of the Bush administration, particularly in light of the declining number of merger filings. In the fiscal year ended 30 September 2008, the FTC challenged 21 transactions, leading to 13 consent decrees and six restructured or abandoned transactions,⁶ which almost exactly matched the numbers of the previous year. For its part, the DoJ challenged 16 transactions, resulting in 15 consent decrees and one restructuring, an increase in challenges of about 25 per cent compared to the prior year.⁷ The agencies continued enforcement against transactions that had already been consummated⁸ and against violations of the HSR Act reporting obligation.⁹ Post-LBO enforcement continued, despite the even more precipitous drop in merger filings. Through 30 June 2009 the FTC reports 15 challenges, resulting in five blocked deals, eight consent decrees, and two abandoned or restructured deals.¹⁰ Through the end of July 2009, the DoJ had announced eight challenges, resulting in six consent decrees, one abandoned transaction, and one merger still contested in court.¹¹

The following summarises the pre-merger review process under the HSR Act, including the most recent filing thresholds, discusses some notable cases during the past year, and ventures some guesses about possible trends in merger enforcement under the new leadership at the FTC and DoJ.

HSR pre-merger review process and filing thresholds

The HSR Act requires parties to a proposed merger or acquisition of stock or assets to file a pre-merger notification form and pay a filing fee, if certain threshold circumstances and other jurisdictional requirements are met. Filings go to both the Antitrust Division of the DoJ and the FTC’s Bureau of Competition, either of which may review a given merger. Which agency will actually do so depends primarily on the industry involved and the agencies’ respective areas of industry expertise. Once the notification form is filed, the parties cannot close the merger until an initial waiting period of 30 days (15 days for cash tender offers) has elapsed. During this period, the reviewing agency will assess the likely competitive effects of the transaction. The agency may decide to grant ‘early termination’ of the waiting period, allowing the transaction to be consummated. If competitive concerns exist, the agency may decide to issue a ‘second request’, a demand for additional information and documents that can often be time-consuming and burdensome.¹² The second request effectively extends the waiting period until 30 days (10 days for cash tender offers) after the parties have reached substantial compliance with the government’s demand. During the second-request period, the government may try to reach a remedial agreement or consent decree with the parties to alleviate competitive concerns regarding the transaction. If no such agreement can be reached, the government may ultimately seek a court injunction to prevent consummation of the merger. The FTC also has the power to review mergers in administrative proceedings in addition to a court challenge.

Whether a transaction must be reported to the agencies depends on the sizes of the transaction and of the parties,¹³ dollar value thresholds for which are established by statute and revised annually to remain constant in real terms.¹⁴ As of 12 February 2008, all transactions must be reported (regardless of the size of the parties) if the acquiring person will hold an aggregate amount of the voting securities and assets of the acquired person in excess of US\$260.7 million.¹⁵ Furthermore, if as a result of the transaction the acquiring person will hold more than US\$65.2 million (but less than US\$260.7 million) of the voting securities and assets of the acquired person, the transaction must be reported if:

- the seller has at least US\$13 million in total assets (or, if engaged in manufacturing, annual net sales or total assets), and the buyer has at least US\$130.3 million in net sales or total assets; or
- the seller has at least US\$130.3 million in annual net sales or total assets and the buyer has at least US\$13 million in such sales or assets.¹⁶

As always, the corresponding US dollar values in the HSR Rules that implement the statute and specify various exemptions have also been adjusted. The filing fees remain the same, but the thresholds

for the different levels were also adjusted upward.¹⁷ For transactions in which the acquirer will hold less than US\$130.3 million of the stock and assets of the seller, the fee is US\$45,000. For transactions over US\$130.3 million but less than US\$651.7 million, the fee is US\$125,000, and for transactions involving stock and assets of over US\$651.7 million, the fee is US\$280,000. Effective 10 February 2009, the civil monetary penalty for violating the HSR Act reporting requirements increased to US\$16,000 per day.¹⁸

Pre-LBO enforcement

During the last fiscal year of the Bush Administration, the agencies' merger-enforcement efforts continued to reflect careful review and illustrated some issues not often seen.

DoJ's intervention in CommScope's acquisition of Andrew Corporation illustrated continuing interest in even minority holdings of competitors.¹⁹ Andrew held a 30 per cent minority interest with certain governance rights and rights to appoint members to the board of directors of a company whose subsidiary, PCT International, was allegedly one of only four companies making drop cables, which are used by television cable companies to connect their transmission networks to subscribers' own systems. CommScope, meanwhile, also made drop cables, leading the DoJ to charge that the acquisition would empower and incentivise CommScope either to coordinate its activities with those of PCT International or to sabotage it. This, the DoJ alleged, violated not only section 7 of the Clayton Act, which bars mergers that may unduly restrict competition, but also section 8, which prohibits, in many circumstances, being able to appoint officers or directors of companies that compete horizontally. The parties resolved the matter by agreeing to sell the offending stock and governance rights.

Another example of concern about cross-holdings among competing companies was DoJ's handling of the simultaneous acquisitions by two private equity firms, Bain Capital LLC and Thomas H Lee Partners LP, separate 35 per cent interests in radio station operator Clear Channel of Communications Inc.²⁰ Acquisitions by private equity firms rarely give rise to antitrust concerns, because they rarely combine competing companies in already concentrated markets. Radio, however, has become a frequent exception, as investors have sought to create economies of scale and other advantages by combining growing chains of radio stations operating in multiple and sometimes overlapping individual metropolitan markets. The Clear Channel investment involved such a combination, as the two private equity firms each already held 25 per cent interests in a radio station operator that competed with Clear Channel stations in certain cities. Here, again, the ownership of partial interests in competing companies led the DoJ to challenge the transaction. The acquisition was permitted to go forward after Clear Channel agreed to sell its stations in four overlap cities.

The FTC continued to challenge consummated transactions raising antitrust concerns, using its own adjudicative powers, rather than the federal district courts. In September 2008 it initiated an administrative proceeding against Polypore International Inc for buying a rival maker of lead-acid battery components called separators.²¹ The FTC also alleged Polypore had entered an illegal joint marketing arrangement with a different company that was a potential competitor and had attempted to maintain monopoly power through illegal unilateral conduct, including by imposing exclusive-dealing requirements on customers. An FTC administrative law judge held a factual hearing during the summer of 2009. In April 2008, the FTC challenged over half a dozen acquisitions completed between 2002 and 2005 by TALX Corp, a subsidiary of Equifax,

Inc.²² TALX provides two kinds of information-handling services related to hiring employees and to handling unemployment claims that were also provided by the targets of these acquisitions. The FTC claimed that the buying spree had essentially swallowed up all of TALX's significant competitors in small bites. Interestingly, rather than require TALX to unwind any or all of these transactions, the FTC entered a consent order intended to facilitate the entry and expansion of new and nascent competitors by, among other things, barring TALX from enforcing non-compete clauses against current and former employees, requiring TALX to permit long-term customers to cancel contracts without penalty if they switch to a competitor, and requiring TALX to provide information and other support to competitors that do manage to switch customers.²³

In addition to the contract modifications accepted in TALX, the FTC accepted remedies other than pure divestitures in several other matters. For instance, in Flow International Inc, the FTC challenged the combination of the two leading developers and manufacturers of waterjet cutting systems.²⁴ It considered each to be the other's closest competitor, because of the technologies they both use, but permitted the transaction to proceed without a complete divestiture, requiring only that the target company offer other competitors royalty-free licenses to its patented technology. In the FTC's view, the licences would solve the competitive problem by removing the main barrier to entry by other competitors.²⁵ In Pernod Ricard, SA, the FTC required divestiture of distribution interests for one of two overlapping brands of premium vodka, but accepted 'firewall' protections to prevent access to competitively sensitive information about four other competing brands of spirits marketed by a marketing joint venture in which the target company Vin & Sprit AB participated.²⁶

The FTC's September 2008 intervention in the dialysis market was unusual in several respects. In that case, Fresenius Medical Care proposed to contract for an exclusive sublicense from a US subsidiary of Japanese pharmaceutical company Daiichi Sankyo Company of the right to manufacture and supply the drug Venofer to dialysis clinics in the United States.²⁷ Fresenius is the largest US provider of dialysis services for end-stage renal disease, for which it uses intravenous iron sucrose preparations like Venofer. Because the licence prevented Daiichi from selling the drug to dialysis clinics, pursuant to standard antitrust doctrine the FTC deemed the licence the acquisition of assets subject to challenge just like any merger or share purchase. Such acquisitions-by-licence are more common in the health-care sectors than in other industries. The transaction was somewhat more unusual, however, in that it constituted a purely vertical acquisition, which the US antitrust agencies have rarely challenged in recent years. Even more unusual, however, were the FTC's rationale and remedy for challenging the transaction. The usual vertical concern is that the merged entity could exert monopsony or monopoly power to reduce output and impair competition in either the upstream or the downstream market. In this case, however, the FTC did not fear a reduction in output at either level – indeed it admitted a likely increase in demand from competing dialysis providers²⁸ – but instead that Fresenius would extract higher total payments for its dialysis services from a federal governmental health-care programme (Medicare) by artificially inflating its internal transfer price for purchasing the Venofer drug, which government regulations mandated be reimbursed to dialysis centres at essentially cost plus 6 per cent. Although it recognised that these payment rules would change beginning in 2011, the FTC considered it necessary to intervene. Rather than bar the licence or require it be postponed until the new payments rules come into effect, the FTC took the very unusual step of directly regulating the price at which Fresenius could charge itself for the drug.²⁹

‘And now for something completely different...’ post-LBO

During the 2008 presidential election campaign, Barack Obama was the only candidate to provide a substantive response to an inquiry from the American Antitrust Institute, an organisation founded in 1998 to foster increased antitrust enforcement and a frequent commenter in merger matters opposing prominent transactions.³⁰ Although somewhat general, Mr Obama’s response argued that antitrust law had been inadequately enforced in recent years, particularly as regards mergers and acquisitions.³¹ Not surprisingly, among the ‘change’ that he promised was revitalisation of antitrust enforcement against mergers. True to his word, upon taking office President Obama quickly appointed as lead antitrust enforcers two individuals well known for their political savvy and for believing in just such heightened scrutiny.

The FTC’s new chairman, Jon Leibowitz, was first appointed to the Commission in September 2004 to fill a seat traditionally reserved for a member of the Democratic Party. Prior to that he had served several years in key Democratic staff posts on antitrust matters in Congress.³² As a commissioner, he had supported vigorous application of the antitrust laws to protect consumers, particularly in the health-care and pharmaceutical markets. He had also endorsed trying to expand the FTC’s use of its powers under the somewhat amorphous section 5 of its enabling act to reach cases that would not violate the antitrust laws.³³ Since his elevation to the position of chairman, where he has much greater ability to influence the FTC’s agenda, his public speeches have emphasised ‘continuity and change.’³⁴

Like Jon Leibowitz, DoJ’s new top antitrust enforcer, Christine Varney, has both strong (Democratic) political experience and experience in government. Over the years she has served as general counsel to the Democratic National Committee, cabinet secretary to President Clinton, and as a member of the FTC during the Clinton Administration.³⁵ Unlike Chairman Leibowitz, however, she also has extensive experience as a private antitrust practitioner, having practised as an antitrust lawyer in Washington for over a decade, where she focused most of her energies on internet and e-commerce matters. During her required Senate confirmation hearings, Ms Varney echoed President Obama’s call for more merger and other antitrust enforcement. After being confirmed as assistant attorney general in charge of the Antitrust Division, Ms Varney wasted no time signalling that a new policeman was in charge by announcing – in a speech before the liberal ‘think tank’ Center for American Progress – that she was immediately withdrawing a major policy document issued by DoJ in the closing months of the Bush Administration.³⁶ In her view, that report on single-firm conduct had excessively tied the hands of the government to enforce antitrust laws against dominant firms, and she all but invited anyone with complaints about dominant firms to give her staff a call. Although the report was not specifically related to mergers, its dramatic withdrawal underscored Ms Varney’s intention to follow through on her commitment to ratchet up antitrust enforcement in the United States.

What ‘change’ may look like

A trenchant analysis of the public statements by both Commissioner Leibowitz and Assistant Attorney General Varney suggests several likely ways in which merger enforcement may change under their leadership.³⁷

Less Chicago School Economics

Both Leibowitz and Varney have publicly stated that they believe merger enforcement has been unduly limited by the economic teachings of the Chicago School of economics.³⁸ What precisely they have in mind as wrong about the Chicago School’s teachings is unclear, but in merger analysis, those teachings are best known for emphasising the ability of many markets to correct themselves without governmental intervention after events that (temporarily) reduce competition, at least as measured structurally in number or concentration of market participants. Some have criticised these teachings for excessive confidence that new entry or capacity expansion can (soon enough) restore competition and that mergers can increase efficiencies sufficiently to benefit customers. As a general matter, at least, it seems likely that the antitrust enforcers will be more sceptical about such arguments than in recent years.

Possible New Horizontal Merger Guidelines

Consistent with their general scepticism about pure Chicago School theories, both Leibowitz and Varney have appointed lead economists at their respective agencies who are well known for work regarding limitations of these theories. Most vigorous in this regard has been Carl Shapiro, the new chief economist at DoJ, who publicly criticised the Bush Administration’s decisions not to oppose the two prominent *XM/Sirius* satellite radio and *Whirlpool/Maytag* large home appliance mergers.³⁹ But Joseph Farrell, the FTC’s new director of the Bureau of Economics, has similarly focused on alternatives to traditional merger analysis. Indeed, he and Shapiro have co-authored several papers on a variety of analytical techniques that could supplement or even replace the current ones enshrined in the joint DoJ and FTC Horizontal Merger Guidelines. For instance, both have written extensively about the use in merger review of critical loss analysis, a mathematical technique relating a firm’s profit margin and estimated ratio of sales diverted to other products to help predict the effects of a merger on the unilateral conduct of the post-merger firm.⁴⁰ Their views suggest that firms with large pre-merger profit margins may find a very sceptical audience if they argue for broad markets; put another way, the agencies’ new lead economists seem to favour narrow markets.

Building on their past work, Shapiro and Farrell have espoused presumptions of anti-competitive unilateral or coordinated effects based on certain limited economic analysis early in a merger review. In their view, relying, as the agencies’ Horizontal Merger Guidelines do, on market shares and concentration to focus enforcement efforts both fails to reflect current economic insights and unduly hampers enforcement decisions. Instead, when the primary concern is that a merger would facilitate greater post-merger coordination, the agency should presume anti-competitive effects if the transaction eliminates a maverick or even a merely significant competitor.⁴¹ When unilateral conduct after the merger is the main concern, particularly involving differentiated products, then anti-competitive effect should be presumed if a new measure called ‘upward pricing pressure’, based on pre-merger gross margins and inter-party diversion ratios, is not completely offset by an assumed ‘default’ level of efficiencies.⁴² Although they would permit merging parties to rebut the presumption by demonstrating new entry, greater efficiencies, incorrect calculations of gross margins and diversion ratios, etc, doubts they have expressed in earlier papers about some of these arguments suggest that the proposed presumption scheme could be tough on mergers if adopted. Indeed, the two economists have not been shy about wanting to strengthen the agencies’ hand.⁴³

Given the past close working relationship between the two new lead economists and the comparable closeness in ideology of the heads of the two antitrust agencies, questions have already been asked about whether the venerable Horizontal Merger Guidelines might be changed. FTC Chairman Leibowitz is already on record that a review and possible changes are likely.⁴⁴ The two lead economists seem to agree.

Beyond horizontal overlaps

There are also some indications that the agencies may explore new theories of how a merger might be economically harmful, going beyond the conventional focus on mergers involving horizontal competitors.

The FTC's December 2008 decision to challenge a consummated acquisition by Ovation Pharmaceuticals included a discussion, in separate opinions by Chairman Leibowitz and Commissioner Tom Rosch, that a transaction might be problematic even if it did not combine horizontal competitors.⁴⁵ The FTC's lawsuit challenged Ovation's acquisition from Abbott Laboratories of a heart drug used to treat premature infants, in light of Ovation's prior acquisition of the only competing product, Indocin, from a different pharmaceutical company and its subsequent raising of price by 1,300 per cent. What is of interest, however, is that while the suit challenges only the second acquisition, in keeping with mainstream antitrust theory, Commissioners Leibowitz and Rosch argued that the first acquisition should also have been challenged – even though Ovation had no competing product at that time. In their view, Indocin's original owner, Merck, had been unwilling to charge high prices for Indocin for fear of injuring its reputation with respect to its many other pharmaceutical products. But Ovation was not so 'reputationally constrained,' and transferring Indocin to it created incentives to act as a monopolist, which in their view should be grounds to challenge the Indocin acquisition. Although incentives and ability to compete are at the centre of modern economic and antitrust thinking about companies, the mainstream antitrust view is that transferring a monopoly from one company to another should not be matter for antitrust concern. The proposed theory would unquestionably expand the reach of merger enforcement beyond that mainstream view. As ultimately filed in court, the Ovation challenge did not rely upon the Leibowitz-Rosch theory and rested on the conventional concerns about horizontal competition. Consequently, we will not have a district court's views on the new theory from that case.

Another area that may see more enforcement is vertical mergers. In recent years, both the FTC and the DoJ have reviewed and occasionally enforced against transactions combining a supplier and purchaser who do not compete with each other at the same level of manufacturing or distribution, but their primary emphasis has been on the horizontal effects of mergers. Under the new leaders the agencies may show greater interest in vertical mergers. Christine Varney, in particular, seemed to identify a need for more enforcement in vertical mergers during her Senate confirmation process, responding to Senator Charles Schumer that she 'would not shy away from considering whether the vertical integration resulting from a merger of acquisition is likely to substantially lessen competition' and mentioning vertical mergers in her first speech after confirmation.⁴⁶ During her tenure as an FTC commissioner in the 1990s, she spoke repeatedly about potential anti-competitive effects of vertical integration, particularly in markets with networks.⁴⁷

The FTC's recent consent order against Fresenius Medical Care, mentioned above, presents an interesting combination of

both vertical issues and a concern about changed incentives. As noted above, that transaction involved a classic vertical integration by a supplier of services that purchased a source of an input. A traditional theory of vertical harm might have been that the new owner of the input would reduce sales of the input to its horizontal competitors, but the theory of harm articulated by the FTC was a change in the new owner's pricing incentives that might, in fact, increase sales to competitors. Somewhat akin to the Leibowitz-Rosch theory in *Ovation*, after the acquisition Fresenius would have a new incentive to manipulate prices upward because of how the input and the downstream product are regulated. Although perhaps an unusual constellation of facts, the *Fresenius* transaction reflects the very fact-specific inquiry – and remedy – that will be required if the agencies do move beyond traditional concerns about mergers between horizontally overlapping companies.

Although the global financial crisis and ensuing economic collapse made the past year a slow one for mergers generally, enforcement of antitrust laws against questionable combinations has continued at roughly the same pace under both the waning months of the Bush Administration and the initial months of the Obama Administration. The new leadership at both the FTC and the DoJ, however, promise vigorous merger enforcement going forward. Going by past speeches and writings, we may see a period of experimentation with new ideas and economic theories, perhaps even a change to the Horizontal Merger Guidelines. Hopefully the coming year will bring with it both renewed interest and financial ability to enter into mergers and further guidance from the US antitrust agencies of what they have in mind for their invigorated merger reviews.

Notes

- 1 15 USC, section 18.
- 2 Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), 15 USC, section 18a, as amended, Pub L No. 106-553, 114 Stat 2762 (21 December 2000).
- 3 See FTC & DoJ, Hart-Scott-Rodino Annual Report, at 1 (14 July 2009), www.ftc.gov/os/2009/07/hsrreport.pdf.
- 4 Because the FTC publishes the serial case number of all HSR filings the review of which it terminates early, we can roughly gauge the collapse in merger filings by comparing the serial numbers from one year to the next. The last early termination in December 2008 was numbered 221, about half the last one in December 2007, which was numbered 440. Compare FTC, Transaction Granted Early Termination (2 January 2009), www.ftc.gov/bc/earlyterm/2008/12/et081231.pdf with FTC, Transaction Granted Early Termination (2 January 2008), www.ftc.gov/bc/earlyterm/2007/12/et071231.pdf. The last in July 2009 was numbered 608, about 39 per cent of the last one in July 2008, numbered 1531. Compare FTC, Transaction Granted Early Termination (3 August 2009), www.ftc.gov/bc/earlyterm/2009/07/et090731.pdf with FTC, Transaction Granted Early Termination (30 July 2008), www.ftc.gov/bc/earlyterm/2008/07/et080729.pdf. These comparisons are rough for many reasons, including that some filings assigned a case number are ultimately deemed unnecessary and the proportion of transactions that can be terminated early may vary from year to year. But these errors would be small compared to the drop in filings discussed.

- 5 Compare FTC, Transaction Granted Early Termination (3 August 2009) (referring to transaction numbered 608), www.ftc.gov/bc/earlyterm/2009/07/et090731.pdf with FTC, Transaction Granted Early Termination (1 August 2007) (referring to transaction numbered 1829), www.ftc.gov/bc/earlyterm/2007/07/et070731.PDF.
- 6 See FTC & DoJ, Hart-Scott-Rodino Annual Report, at 1 (14 July 2009), www.ftc.gov/os/2009/07/hsrreport.pdf.
- 7 See id at footnote 2.
- 8 See, for example, *In re TALX Corp*, FTC Dkt No. C-4228 (28 April 2008) (FTC complaint challenging several acquisitions consummated in 2002 through 2005 involving outsourced services relating to unemployment compensation management and verification of income and employment), www.ftc.gov/os/caselist/0610209/index.shtml; *In re Polypore International Inc*, FTC Dkt No. 9327 (10 September 2008) (FTC complaint challenging 2008 combination of two battery separator manufacturers), www.ftc.gov/os/adjpro/d9327/091008cmp9327.pdf.
- 9 See *United States v Iconix Brand Group Inc*, No. 1:07-CV-01852 (DDC, filed October 15, 2007) (alleging failure to file require 'Item 4(c)' documents analysing the transaction with respect to various competition issues; agreed to US\$500,000 in civil penalties); *United States v ValueAct Capital Partners, LP*, No. 1:07-CV-02267 (DDC, filed December 19, 2007) (alleging failure file at all for three acquisitions; agreed to US\$1.1 million in civil penalties).
- 10 See FTC Competition Enforcement Database: Merger Enforcement Actions (30 June 2009), www.ftc.gov/bc/caselist/merger/index.shtml.
- 11 See DoJ Press Releases index at www.usdoj.gov/atr/public/press_releases/2009/index09.htm and www.usdoj.gov/atr/public/press_releases/2008/index08.htm.
- 12 Government investigations into transactions that do not require a pre-merger filing under the HSR Act can often be similar in scope and content to second requests, albeit without the benefit of statutory deadlines.
- 13 15 USC, sections 18a and 19(a)(5).
- 14 See FTC, Revised Jurisdictional Thresholds for section 7A of the Clayton Act, 74 Fed Reg 1,687, at 1,687 (29 January 2008).
- 15 See 15 USC, section 18a(a)(2)(A), as revised annually by the FTC.
- 16 See id.
- 17 See 15 USC, section 18a, note entitled 'Assessment and Collection of Filing Fees'.
- 18 See 74 Fed Reg 857 (9 January 2009) (previously US\$11,000, adjusted pursuant to Debt Collection Improvement Act of 1996, Pub L No. 104-134 (April 26, 1996)).
- 19 *United States v Commscope Inc and Andrew Corp*, No. 1:07-CV-02200 (DDC, filed 6 December 2007) (complaint and consent decree), www.usdoj.gov/atr/cases/commscope.htm.
- 20 *United States v Bain Capital LLC, Thomas H Lee Partners LP and Clear Channel Communications Inc*, No. 1:08-CV-00245 (DDC, filed 13 February 2008), www.usdoj.gov/atr/cases/bain.htm.
- 21 *FTC v Polypore International Inc*, FTC Dkt No. 9327 (administrative complaint issued 9 September 2008), www.ftc.gov/os/adjpro/d9327/index.shtml.
- 22 *In re Talx Corp*, FTC Dkt No. C-4228 (complaint issued 28 April 2008), www.ftc.gov/os/caselist/0610209/080428complaint.pdf. See also id (revised complaint issued 8 August 2008), www.ftc.gov/os/caselist/0610209/080808complaint.pdf.
- 23 See id (consent order entered 8 August 2008), www.ftc.gov/os/caselist/0610209/080808decision.pdf.
- 24 *In re Flow International Corp*, FTC Dkt No. C-4231 (complaint issued 10 July 2008), www.ftc.gov/os/caselist/0810079/index.shtml.
- 25 Id (consent order entered 15 August 2008), www.ftc.gov/os/caselist/0810079/080819flowdo.pdf.
- 26 *In re Pernod Ricard SA*, FTC Dkt No. C-4224 (complaint issued 17 July 2008), www.ftc.gov/os/caselist/0810119/index.shtml; id (consent order entered 14 October 2008), <http://www.ftc.gov/os/caselist/0810119/081017pernoddo.pdf>.
- 27 *In re Fresenius Medical Care AG & Co KGaA and Daiichi Sankyo Company Ltd*, FTC Dkt No. C-4236 (complaint issued 15 September 2008), www.ftc.gov/os/caselist/0810146/080915freseniuscmpt.pdf.
- 28 See id at 3 (analysis to aid public comment issued 15 September 2008), www.ftc.gov/os/caselist/0810146/080915freseniusanal.pdf.
- 29 See id (consent order entered 21 October 2008), www.ftc.gov/os/caselist/0810146/081021freseniusdo.pdf.
- 30 See American Antitrust Institute, About AAI, www.antitrustinstitute.org/about_us/index.ashx.
- 31 See statement of Barack Obama for the American Antitrust Institute (published 27 September 2007), www.antitrustinstitute.org/archives/files/aai-%20Presidential%20campaign%20-%20Obama%2009-07_092720071759.pdf.
- 32 See biography of Jon Leibowitz, www.ftc.gov/commissioners/leibowitz/index.shtml.
- 33 See, for example, 'Tales from the Crypt.' Episodes '08 and '09: The Return of section 5, Remarks by Commissioner Leibowitz at the FTC Workshop: section 5 of the FTC Act as a Competition Statute (17 October 2008), www.ftc.gov/speeches/leibowitz/081017section5.pdf.
- 34 See, for example, Remarks by Chairman Jon Leibowitz at the 2009 Center for Democracy and Technology Gala (10 March 2009), www.ftc.gov/speeches/leibowitz/090310remarksfordctdinner.pdf.
- 35 See press release announcing confirmation of AAG Varney (20 April 2009), www.usdoj.gov/atr/public/press_releases/2009/245029.htm.
- 36 Christine A Varney, assistant attorney general for antitrust, 'Vigorous Antitrust Enforcement in This Challenging Era, Remarks as Prepared for the Center for American Progress' (11 May 2009), www.usdoj.gov/atr/public/speeches/245711.htm.
- 37 See Andrea Agothoklis, 'In Their Own Words: Predicting Enforcement Under Varney and Leibowitz', 23 Antitrust 5 (Summer 2009).
- 38 See statement of Christine A Varney, nominee for assistant attorney general for antitrust, US Senate Committee on the Judiciary (10 March 2009), judiciary.senate.gov/hearings/testimony.cfm?id=3700&wit_id=7670. During remarks at the ABA antitrust section's spring meeting in April 2009, FTC Chairman Leibowitz asserted that the future would bring 'continuity and change,' with the latter including continuing to incorporate more economic insights gleaned about the limitations of the Chicago School.
- 39 See, for example, Jonathan B Baker & Carl Shapiro, 'Detecting and Reversing Decline in Horizontal Merger Enforcement', Antitrust 29 (summer 2008).
- 40 See, for example, Joseph Farrell & Carl Shapiro, 'Improving Critical Loss Analysis, Antitrust Source' (February 2008), www.abanet.org/antitrust/at-source/08/02/Feb08; Joseph Farrell & Carl Shapiro, 'Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition' (25 November 2008), faculty.haas.berkeley.edu/shapiro/alternative.pdf.
- 41 Baker & Shapiro, *supra* note 41, at 34.
- 42 Farrell & Shapiro, 'Antitrust Evaluation of Horizontal Mergers', *supra* note 42, at 10.
- 43 Id at 31.
- 44 Chairman Leibowitz offered comments to this effect during the roundtable discussion of antitrust enforcers at the ABA antitrust section's 2009 spring meeting.
- 45 *FTC v Ovation Pharmaceuticals Inc* (DD Minn 16 December 2008) (complaint); Concurring Statements of Commissioners Leibowitz and Rosch available at www.ftc.gov/os/caselist/0810156/index.shtml.
- 46 See Answers to Questions for the Record, Questions from Senator Schumer, <http://judiciary.senate.gov/nominations/AssistantAttorneyGeneralAntitrust-ChristineVarney.cfm>; Christine A Varney, *supra* note 36.

- 47 See, for example, Christine A Varney FTC Commissioner, 'Vertical Restraints Enforcement at the FTC', Speech Before the ALI-ABA Eleventh Annual Advanced Course on 'Product Distribution and Marketing', Snowbird, Utah (16 January 1996); Christine A Varney FTC Commissioner, 'Vertical Merger Enforcement Challenges at the FTC', Speech Before the 36th Annual Antitrust Institute, San Francisco, California (17 July 1995); Christine A Varney FTC Commissioner, 'New Directions at the FTC: Efficiency Justifications in Hospital Mergers and Vertical Integration Concerns', Speech Before The Health Care Antitrust Forum, Chicago, Illinois, (2 May 1995). These are all available at www.ftc.gov/speeches/var1.shtm.

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Step toe & Johnson has a diversified antitrust and competition law practice based in both Washington and Brussels, with four major areas of focus.

First, Step toe has long represented clients in merger and non-merger investigations before the antitrust division of the Justice Department and the Federal Trade Commission. A majority of the partners in the antitrust practice group have worked for these agencies. In addition, as competition law enforcement has spread around the globe, so has Step toe's experience in defending merger and non-merger investigations in the European Union and elsewhere.

Second, owing to its Washington roots, Step toe has represented clients in many regulated industries. As these industries have been deregulated in recent decades, many have lost their antitrust exemptions and Step toe lawyers have become highly knowledgeable about the application of antitrust law to the electric utility and power generation, telecommunications, airline, railroad, trucking, pipeline, maritime, insurance and financial services industries.

A third branch of Step toe's antitrust practice has been representation of clients as defendants in private class actions, other complex treble damage litigation, and *parens patriae* cases brought by state attorneys general. Over the past decade, Step toe has also increasingly represented clients in state court class actions based on unfair trade practice and consumer protection theories.

Finally, Step toe's white-collar criminal practice has grown to be one of the most significant in Washington. Step toe's lead lawyers in this area have had extensive experience in the Justice Department before entering private practice. They have defended corporations and top management in several recent high profile criminal antitrust investigations and prosecutions.



Kenneth P Ewing

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Kenneth P Ewing is a partner and leader of the antitrust group. Mr Ewing regularly advises US and non-US clients about the antitrust implications of proposed mergers, acquisitions, joint ventures and strategic alliances under the competition laws of the United States and the European Union. He also counsels clients about other business initiatives such as long-term, exclusive or reciprocal supply or distribution arrangements, responses to industry deregulation and antitrust compliance programmes. His antitrust litigation experience includes defending treble damages suits alleging conspiracies under the Sherman Act, investigations by the Federal Trade Commission and US Department of Justice's antitrust division and administrative litigation regarding mergers in regulated industries. Industries of particular focus include international airlines, industrial chemicals, travel reservation systems, express package delivery services, gas and oil pipelines, medical equipment, construction equipment, telecommunications and electric power. Mr Ewing is a member of the International Competition Network's group of private sector advisers. He has served in various leadership positions in the American Bar Association antitrust section including the editorial board of *Antitrust Law Developments* and currently as vice chair of the books and treatises committee.