# MERGER ENFORCEMENT TWO YEARS LATER – WHAT CLUES DOES THE OBAMA ADMINISTRATION's RECORD HOLD FOR THE YEARS AHEAD?

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Two years into the Obama Administration, we have enough of a record on merger enforcement to pause and consider whether anything much has changed, and what this record has to say about the likely course of enforcement in the coming years. When the Obama Administration took the enforcement reins, there were many signals suggesting a new attitude of aggression. The new AAG for Antitrust, Christine Varney, had publicly questioned whether the prior administration erred in allowing several high-profile combinations.[2] The Division's new chief economist had recently co-authored an article criticizing the Division's merger enforcement as too lax,[3] and had joined with the new FTC chief economist in calling for new diagnostic techniques that most regarded as likely to treat many more transactions as potentially anticompetitive.[4]

How has this desire for change played out? A close examination of the merger enforcement records at both the Antitrust Division and the FTC – as reflected in what the agencies have chosen to investigate, how they have resolved those investigations, and what they have said about them – reveals clear signs of incremental change. We see at least six themes.

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[2] Timothy P. Daniel, *Whither Merger Review? Looking Forward While Looking Back*, The Antitrust Source 9 (Aug. 2009).

[3] Jonathan B. Baker and Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement* (Oct. 2007), *available at* http://faculty.haas.berkeley.edu/shapiro/mergerpolicy.pdf.

[4] Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition* (Nov. 25, 2008), *available at* http://faculty.haas.berkeley.edu/shapiro/alternative.pdf.

**The More Things Change . . .**

. . . the more they stay the same. In the merger enforcement realm, we have seen change that is far more incremental than revolutionary. More than any other aspect of antitrust enforcement, the agencies' merger enforcement agenda is driven more by events more than philosophy. The mergers that get proposed, as well as those that do not, are the primary determinants of the agencies' allocations of investigative resources and enforcement policy-making. Add to that the relative consensus in the legal and economic community – and certainly within the agencies' career staffs – on the basic analytical framework for assessing whether mergers are likely to be anticompetitive, and it becomes clear that – as with the Titanic in the North Atlantic – course changes of even a few degrees take a long while to show results.

Statistics offer some confirmation that any change has been largely incremental. Although the Administration's aggressive pro-enforcement rhetoric may have caused some firms to hesitate before proposing transactions that would attract the glare of antitrust scrutiny, it remains true that the vast majority of proposed mergers are not challenged by the agencies, and indeed receive little or no investigative attention.

That said, the agencies do seem to be looking harder for cases to bring. Available statistics suggest a greater likelihood that a proposed transaction will be investigated seriously and potentially challenged, although the odds are still small. The chances of a proposed transaction receiving a Second Request were 4.2 percent in 2009 and 2010, up from 2.8 percent in 2007 and 2008, ostensibly a 50 percent increase.[5] The odds that a Second Request investigation will end with some sort of enforcement action (a consent decree, an abandonment, or litigation) averaged 77 percent in 2009-2010, within the range of prior years (if perhaps

[5] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, HART-SCOTT-RODINO ANNUAL REPORT, FISCAL YEAR 2010, at 4-5 and Fig. 2 (2011), *available at* http://www.ftc.gov/os/2011/02/1101hsrreport.pdf.

towards the upper part of that range).[6] Such statistical analysis is notoriously unreliable in light of the constantly shifting mix of transactions being proposed, and we accordingly offer no opinion on whether philosophical differences or changes in analytical approach led to this seeming up-tick in the level of scrutiny.

Looking more closely at the specific transactions the agencies have been challenging in the past two years (and taking account of the agencies' far superior access to the facts), at most a small handful of decisions were driven by shifts in enforcement policy. The vast majority of the challenged transactions – if not all of them – likely would have attracted some form of enforcement attention in the last administration as well. Perhaps not surprisingly, the strongest candidates for a divergent outcome were cases brought by the Division against vertical transactions – *GrafTech* and *Comcast/NBCU* – and there the results likely would have been shaped more by remedial considerations than divergent substantive views.[7]

**The Newly Revised Horizontal Merger Guidelines Show the Way Forward**

From a policy standpoint, the biggest news from the agencies during the past year was their issuance of substantially revised Horizontal Merger Guidelines (the "2010 Guidelines"), and it is in these revisions that we see the clearest roadmap of the Administration's analytical approach.[8] Both agencies have emphasized that the revisions were principally designed to foster "transparency" by conforming the Guidelines to actual agency practice,[9] and they surely do. But

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6 *See generally* U.S. Dep't of Justice & Fed. Trade Comm'n, HART-SCOTT-RODINO ANNUAL REPORT, FISCAL YEARS 2001-2010, *available at* http://www.ftc.gov/bc/anncompreports.shtm (discussing enforcement actions and compiling Second Request data).

7 *See* United States v. GrafTech Int'l, 75 Fed. Reg. 76,026 (Dec. 7, 2010) (competitive impact statement); United States v. Comcast Corp., 76 Fed. Reg. 5,440 (Jan. 31, 2011) (competitive impact statement).

8 U.S. Dep't of Justice & Fed. Trade Comm'n, HORIZONTAL MERGER GUIDELINES (2010) (hereinafter 2010 Guidelines), *available at* http://ftc.gov/os/2010/08/100819hmg.pdf.

9 Jon Leibowitz, Chairman, Fed. Trade Comm'n, Statement of Chairman Liebowitz on the Release of the 2010 Horizontal Merger Guidelines (Aug. 19 2010), *available at* http://www.ftc.gov/os/2010/08/100819hmgleibowitz.pdf; Christine A. Varney, Assistant Attorney General, United States Dep't of Justice, Antitrust Div., Overview of 2010 Antitrust Enforcement

there is no doubt that those revisions are also aimed at adjusting the way courts evaluate the agencies' merger challenges, so that they have greater latitude to attack mergers using whatever analytical techniques are available in a given case unencumbered by constraints imposed by their own guidelines.[10]

The agencies have faced their greatest litigation difficulties at the intersection of unilateral effects theories and the courts' traditional focus on market definition and concentration, and it was widely understood that the structural emphasis in the 1992 Guidelines was not helping.[11] It is thus not at all surprising that the 2010 Guidelines completely revamped the exposition on unilateral effects analysis, doing away with the step-by-step structural approach of the 1992 Guidelines and instead emphasizing that the agencies will focus directly on the transaction's competitive effects using whatever evidence happens to be available, including natural experiments and other so-called "direct" evidence.[12] In this framework, inferences drawn from the transaction's impact on market structure – and such details as market definition and market share – are but one potential source of such evidence.[13] Nonetheless, at least for the foreseeable future we can expect the agencies to continue to think about the economic

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(Oct. 7, 2010), *available at* http://www.justice.gov/atr/public/speeches/264301.htm#7; *but see* J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, Statement of Commissioner J. Thomas Rosch on the Release of the 2010 Horizontal Merger Guidelines (Aug. 19, 2010), *available at* http://www.ftc.gov/os/2010/08/100819hmgrosch.pdf.

[10] AAG Varney made this explicit. Noting that the *Oracle* court had rejected the 1992 Guidelines' "discussion of unilateral effects in differentiated-products markets [as] 'not sufficient to describe a unilateral effects claim,'" she opined that "some clarification may be useful." Christine A. Varney, Assistant Attorney General, U.S. Dep't of Justice Antitrust Div., Merger Guidelines Workshops at 4-5 (Sept. 22, 2009), *available at* http://www.justice.gov/atr/public/speeches/250238.pdf (*quoting United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1117 (N.D. Cal. 2004)).

[11] *See*, *e.g.*, Transcript, U.S. Fed. Trade Comm'n, Unilateral Effects Analysis and Litigation Workshop, at 54:11-25 (Fed. 12, 2008).

[12] *Compare* 2010 Guidelines § 6 *with* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 2.21 (1992), *available at* http://www.ftc.gov/bc/docs/horizmer.shtm.1992 Guidelines § 2.21.

[13] 2010 Guidelines §2.1.3.

markets in which transactions may cause anticompetitive harm and to allege such markets when they challenge mergers in court.[14]

As one would expect, the Agencies' recent enforcement actions prominently feature unilateral effects theories, and this trend will surely continue. For example, the agencies' analyses in *Baker Hughes/BJ Services* and *Danaher Corp./MDS Analytical Technologies* reflect competitive concerns based on the fact that the merging firms were the top two choices for many customers.[15] The Division's analysis in *Bemis Co./Alcan Packaging Food Americas* focused on the merging firms' rivalry within a larger market including another, larger player.[16] Although the merged firm would continue to compete with a dominant supplier of flexible-packaging shrink bags, the Division concluded that many customers desired two suppliers and the merging firms often competed with one another to be the second source of supply.[17] Similarly, in *Agilent Technologies/Varian* and *Dean Foods/Foremost USA*, the agencies' challenges emphasized that the acquired firms were low-priced alternatives that had exerted downward pressure on the acquiring firms' prices.[18] As these cases and many others illustrate, unilateral effects analysis is here to stay, and both agencies will continue to examine whether the rivalry between the merging parties provides unique benefits for consumers, without regard to concentration in the broader market. As a practical matter, the cases in which these concerns arise likely will still involve some identifiable market in which the merging parties are among a relatively

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[14] Carl Shapiro, The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years, 77 Antitrust L.J. 49, 88 (2010).

[15] United States v. Baker Hughes Inc., 75 Fed. Reg. 24,984 (May 6, 2010) (competitive impact statement); Danaher Corp., 75 Fed. Reg. 5,796 (FTC Feb. 4, 2010) (aid to public comment).

[16] United States v. Bemis Co., 75 Fed. Reg. 9,929 (Mar. 4, 2010) (competitive impact statement).

[17] *Id.*

[18] Agilent Tech., 75 Fed. Reg. 28,616 (FTC May 21, 2010) (aid to public comment) ("Because Agilent and Varian directly compete with each other for many sales, and because Varian is frequently the low-priced competitor, Agilent would have a strong post-acquisition incentive to increase . . . prices."); Compl., United States v. Dean Foods Co., 10-c-0059 (E.D. Wisc. Jan. 22, 2010) (alleging the acquired firm "was an especially aggressive bidder[,] [which] forced its rivals to keep their bid prices as low as possible or risk losing substantial amounts of school milk business.").

small number of credible participants, but reliance on "market concentration" figures is becoming less and less reliable as a predictor of merger enforcement risks.

The other key shift in the 2010 Guidelines is the relaxation of standards for identifying anticompetitive coordinated effects.[19] The 1992 Guidelines had suggested the need for the agencies to make fairly concrete predictions of how the transaction would lead to the formation of particular "terms of agreement," how participants would detect deviations from those terms, and the mechanisms by which adherence would be enforced. Even if the agencies could rely on courts applying the robust structural presumption of *Philadelphia National Bank*, the guidelines' suggestion that the agencies may have needed to prove a roadmap of future collusion was a stumbling block, as the FTC's loss in *Arch Coal* illustrates.[20]

The new guidelines dramatically relax this requirement and now state that the agencies may challenge a transaction whenever the relevant market "shows signs of vulnerability to coordinated conduct [and the agency has] a credible basis on which to conclude that the merger may enhance" that vulnerability.[21] As with unilateral effects, this leaves the field wide open to agency discretion. Although the guidelines discuss a number of the considerations that will inform the agencies' "vulnerability" assessment,[22] they do not provide much guidance to parties – or courts – as to what is needed for them to find a "credible" basis for such concerns.

The agencies' recent enforcement actions do not add much in the way of guidance, other than to underscore that concerns about coordination will continue

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[19] 2010 Guidelines § 7.

[20] 329 F. Supp. 2d 109, 142-146 (D.D.C. 2004). The FTC also confronted other difficulties in that case, including the court's rejection of the agency's proposed market definition.

[21] 2010 Guidelines § 7.1.

[22] 2010 Guidelines § 7.2.

to motivate agency action. In three recent vertical cases – *GrafTech/Seadrift* and the separate acquisitions by Coke and PepsiCo of their respective bottlers – the agencies alleged that the transactions would facilitate coordination by giving the merged firm a new supply relationship with one of its competitors.[23] The merged firm's post-merger access to its competitor's confidential business information was alleged to make it more likely that the firms would coordinate their behavior.[24] In *Dean Foods*, the Division alleged that the transaction would facilitate coordination by removing a price-cutter from the market, thereby making it easier for the remaining firms to predict their competitors' pricing decisions.[25]

**The Courts' Reaction Has Been Mixed**

Shifts in agency enforcement mean little if the agencies cannot persuade courts to block transactions when the agencies decide to challenge them. The agencies' record in court in recent years has not been terrific, and the 2010 Guidelines were designed to help. The guidelines state with some optimism that they "may . . . assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws in the horizontal merger context."[26] The early results appear mixed at best, and courts continue to make life difficult for agencies seeking to prove a section 7 violation – or in the FTC's case even just seeking to demonstrate "serious questions" going to the merits to support a preliminary injunction under section 13(b).[27]

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[23] United States v. GrafTech Int'l, 75 Fed. Reg. 76,026 (Dec. 7, 2010) (competitive impact statement); PepsiCo, Inc., 75 Fed. Reg. 10,795 (FTC Feb. 26, 2010) (aid to public comment); Coca-Cola Co., 75 Fed. Reg. 61,141 (FTC Oct. 4, 2010) (aid to public comment).

[24] GrafTech Int'l, 75 Fed. Reg. 76,026 (Dec. 7, 2010) (competitive impact statement); PepsiCo, Inc., 75 Fed. Reg. 10,795 (FTC Feb. 26, 2010) (aid to public comment); Coca-Cola Co., 75 Fed. Reg. 61,141 (FTC Oct. 4, 2010) (aid to public comment).

[25] Compl., United States v. Dean Foods Co., 10-c-0059 (E.D. Wisc. Jan. 22, 2010).

[26] 2010 Guidelines § 1.

[27] *Fed. Trade Comm'n v. Lab. Corp. of Am.*, 2011 U.S. Dist. LEXIS 20345 (C.D. Cal. Feb. 22, 2011).

To be sure, the agencies have had some recent success in court. In *FTC v. CCC Holdings*, the court adopted the FTC's analytical framework regarding market definition and granted a preliminary injunction based on evidence of coordinated effects.[28] In *United States v. Dean Foods Co.*, the court denied the defendant's motions to dismiss, finding that the plaintiffs had sufficiently alleged "price discrimination markets" – as described in the guidelines – defined by reference to the locations of vulnerable customers rather than sources of supply.[29]

However, the agencies were also dealt two significant recent defeats. In *FTC v. Lundbeck* (perhaps better known as the *Ovation* case), the court dismissed the FTC's challenge to Ovation's acquisition of the rights to a drug under development, even though it would provide the only substitute for Ovation's product, and even though the FTC was able to demonstrate that Ovation had increased prices by 1300 percent after acquiring the second product.[30] And in *FTC v. Laboratory Corp. of America*, the court denied the FTC's motion for a preliminary injunction.[31] Although each of these cases presented its own litigation challenges, the common denominator was the courts' rejection of the FTC's proposed market definitions. In *Lundbeck*, the FTC's market was judged too broad, based on evidence that physicians favored one drug or the other and seldom substituted them;[32] and in *Lab. Corp.* the proferred market was judged too narrow, based on evidence that other labs offered substitutable services.[33]

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[28] 605 F. Supp. 2d 26, 31-35, 76-77 (D.D.C. 2009). Even in *CCC*, however, the court rejected the Commission's unilateral effects theory, finding a lack of credible evidence to support its argument that customers viewed the third major competitor as "a more distant third choice for a significant share of the market." *Id.* at 70-72.

[29] 2010 U.S. Dist. LEXIS 34137, at*10-11 (E.D. Wisc. 2010).

[30] 2010 U.S. Dist. LEXIS 95365, *56-58 (D. Minn. 2010).

[31] 2011 U.S. Dist. LEXIS 20345 (C.D. Cal. Feb. 22, 2011). The court subsequently denied the FTC's motion for a stay pending appeal. *Fed. Trade Comm'n v. Lab. Corp. of Am.*, No. SACV 10-1873 AG (MLGx) (C.D. Cal. Feb. 28, 2011).

[32] *Lundbeck*, 2010 U.S. Dist. LEXIS 95365, at *56-58.

[33] *Lab. Corp.*, 2011 U.S. Dist. LEXIS 20345, at ¶¶ 36-42. Notably, Commissioner Rosch dissented from the decision to issue a complaint. Despite agreeing that the transaction posed competitive concerns, Commissioner Rosch explained that complaint counsel's alleged relevant

The most noteworthy aspect of these losses may be the fact that they have generated two appeals by the FTC, which may provide opportunities for the courts of appeals – and perhaps someday the Supreme Court – to address the tension between the courts' traditional thirst for market definition and the thrust of modern merger analysis towards discerning anticompetitive effects more directly.

**The Agencies' New Interest in Exclusionary Conduct Rears Its Head**

The agencies have shown a new aggressiveness towards "exclusionary" conduct throughout their enforcement programs. AAG Varney began her tenure with the Division by withdrawing the previous administration's Section 2 Report, promising to "sit on the sidelines" no longer.[34] The FTC filed a broad-ranging suit against Intel,[35] and the Division's recent actions challenging Blue Cross Blue Shield of Michigan's use of most favored nation provisions[36] and United Regional Health Care System's use of loyalty discounts illustrate the Division's new focus on exclusionary conduct.[37]

This interest has reared its head in the merger world as well. The 2010 Guidelines note that "[e]nhanced market power may . . . make it more likely that the merged entity can profitably and effectively engage in exclusionary

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market – which consisted of laboratory testing services provided under capitated contracts – was too narrow, and should have included laboratory testing services provided under fee-for-service arrangements as well. Lab. Corp. of Am., File No. 101-0152 (FTC Dec. 1, 2010) (Comm'r Thomas J. Rosch, dissenting statement). The district court expressly noted Commissioner Rosch's dissent, and agreed that the relevant market included laboratory services performed under both capitated contracts and fee-for-service arrangements. *Lab. Corp.*, 2011 U.S. Dist. LEXIS 20345, at ¶ 45.

[34] Christine A. Varney, Assistant Attorney General, United States Dep't of Justice, Antitrust Div., Vigorous Antitrust Enforcement in This Challenging Era (May 11, 2009), *available at* http://www.justice.gov/atr/public/speeches/245711.htm.

[35] Intel Corp., 75 Fed. Reg. 48,338 (Aug. 10, 2010) (aid to public comment).

[36] Compl., United States v. Blue Cross Blue Shield of Mich., Civil Action No. 2:10-cv-15155-DPH-MKM (E.D. Mich. Oct. 18, 2010), *available at* http://www.justice.gov/atr/cases/f263200/263235.htm.

[37] United States v. United Regional Health Care System, 76 Fed. Reg. 13,209 (Mar. 10, 2011).

conduct."[38] There are signs that concerns about exclusionary conduct are playing a meaningful role in the agencies' merger decision-making. In *Comcast/NBCU*,[39] for example, the Division's challenge was based on concern that Comcast would have both the incentive and ability to use its control over NBCU programming to impede competition from Online Video Distributors ("OVDs"), which the Division (and, apparently, Comcast) perceived as posing a nascent, though significant, competitive threat.[40] Similar concerns played a role in *Ticketmaster/Live Nation*.[41] There, although the Division alleged a purely horizontal theory of harm premised on TicketMaster's acquisition of a nascent competitor, the Division's Competitive Impact Statement expressed concern as well about the potential that the transaction would raise entry barriers by enabling the merged firm to bundle primary ticketing services with artist management and/or promotion, requiring potential new competitors to offer content in addition to ticketing services.

So long as this heightened interest in exclusion continues, the agencies' analysis of transactions that create or involve vertically-integrated firms likely will include an assessment of the parties' incentives and ability to engage in post-merger exclusionary conduct, even when that conduct would not necessarily be reachable via Section 2 of the Sherman Act. The Division's pending review of Google's proposed acquisition of ITA offers an occasion to see if this pattern continues.[42]

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[38] Revised Guidelines § 1.

[39] United States v. Comcast Corp., 76 Fed. Reg. 5,440 (Jan. 31, 2011) (competitive impact statement).

[40] *Id.*

[41] United States v. Ticketmaster Entm't, 75 Fed. Reg. 6,721 (Feb. 10, 2010) (competitive impact statement).

[42] Jeff Bliss and Sara Forden, *U.S. Said to Probe Google-ITA Deal Impact on Searches*, Bloomberg.com (Feb. 2, 2011), *available at* http://www.bloomberg.com/news/2011-02-02/u-s-is-said-to-probe-google-ita-deal-s-impact-on-internet-travel-searches.html.

**The Agencies Are Less Reluctant to Regulate Post-Merger Behavior**

The most dramatic shift in merger policy may be the kinds of remedies the agencies are demanding when they challenge proposed transactions. Their increasing reliance on behavioral remedies is striking. The Division in particular has acted as if unencumbered by its own Merger Remedies Guide, which had for many years discouraged such reliance.[43] The use of behavioral remedies in part goes hand in hand with the agencies' concerns about exclusion and vertical transactions, which are not readily addressed by divestitures or other forms of structural relief. But the exuberance with which the agencies are placing themselves in a role of regulating ongoing post-merger conduct also reflects a new confidence in their ability to structure a remedy that does more good than harm and to administer that remedy over the life of the decrees without burdening the agencies or the parties with undue costs.

The apex of this trend is the *Comcast/NBCU* decree, which requires the parties' joint venture to license video programming to OVDs on terms comparable to those offered by its "programming peers," provides access to an entirely new arbitration mechanism to resolve licensing disputes, and compels the venture to abide by the FCC's "net neutrality" regulations whether or not those regulations are upheld by the courts.[44] Perhaps in a nod to the complexity and intrusiveness of these restrictions, the decree has a duration of only seven years – rather than the usual ten – and relies heavily on the FCC's separate dispute resolution mechanisms as the default means of implementing the licensing obligations when compensation and other disputes arise.

In other consent decrees, the agencies have imposed remedies that likewise entail long-term and probing oversight of the conduct of the merging

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[43] U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (2004), *available at* http://www.justice.gov/atr/public/guidelines/205108.htm#3a ("Structural remedies are preferred to conduct remedies" because "conduct remed[ies] [are] . . . more difficult to craft, more cumbersome and costly to administer, and easier than . . . structural remed[ies] to circumvent").

[44] United States v. Comcast Corp., 76 Fed. Reg. 5,440 (Jan. 31, 2011) (competitive impact statement).

parties. In *GrafTech/Seadrift Coke*, the acquisition put Graftech in a position of having the contractual right to audit the books of its own principal competitor (by virtue of GrafTech's pre-existing supply relationship with Conoco, SeaDrift's rival). The decree required not only that GrafTech modify its contracts with Conoco to remove the audit rights, but also demanded that GrafTech provide the Division on an ongoing basis any and all of its future agreements with Conoco "as well as any ordinary course business documents that illuminate Seadrift's output and sales decisions."[45]

Similarly, the FTC's consent decree concerning PepsiCo's acquisition of its two largest bottlers permitted the agency to appoint a monitor for a five-year term in order to ensure that PepsiCo restricted access to confidential business information of its soft-drink manufacturing competitors to only those employees performing bottling functions.[46]

Another reflection of the agencies' willingness to take on an active role in policing market behavior has been their insistence on remedies that exceed the scope of the competitive concerns they allege. The *Comcast/NBCU* consent decree's net neutrality provisions, for example, prohibit discrimination against all sources and forms of content, even when the content provider is not competing against NBCU or Comcast.[47] Similarly, in *L.B. Foster/Portec*, the consent decree requires the merging firms to provide advance notice to the Division of future acquisitions in markets in which the complaint alleged no anticompetitive harm.[48]

This recent experience suggests that the agencies will not hesitate to solve perceived competitive problems in creative ways, and may even look for opportunities to prevent future problems from arising. This new-found

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[45] United States v. GrafTech Int'l, 75 Fed. Reg. 76,026 (Dec. 7, 2010) (competitive impact statement).

[46] PepsiCo, Inc., 75 Fed. Reg. 10,795 (FTC Feb. 26, 2010) (aid to public comment).

[47] United States v. Comcast Corp., 76 Fed. Reg. 5,440 (Jan. 31, 2011) (competitive impact statement).

[48] United States v. L.B. Foster, 75 Fed. Reg. 243 (Dec. 20, 2010) (competitive impact statement).

confidence in their ability to monitor and police market behavior makes it more likely that the agencies will investigate, and bring cases, in contexts where prior administrations might have stayed their hand out of fear that any potential solution would be unworkable or even make matters worse.

**The Agencies Have Different Views on How Antitrust Best Protects Innovation**

The agencies' confidence in the role of antitrust intervention also shows up in changed attitudes towards antitrust enforcement in rapidly changing markets where innovation provides important consumer benefits. Both agencies have, as in previous administrations, worked hard to send the message that antitrust enforcement remains relevant and important in the high-tech sectors of the economy. And their case selection demonstrates that, also as in the past, they will not hesitate to bring cases challenging transactions involving the internet economy. Just as the last administration investigated and challenged the proposed Google-Yahoo! search advertising collaboration, so this one has been very attentive to transactions in this sector, with the FTC's investigation of Google-AdMob and the Division's well-publicized scrutiny of Google's proposed acquisition of ITA. The high-technology sector is an increasingly important part of the U.S. economy, and it is only natural for antitrust scrutiny to follow.

In rapidly evolving "new economy" markets, innovation has long played an important role in the agencies' analysis of competitive effects. Safeguarding the benefits of innovation is a central theme of the reports on intellectual property and antitrust issued by prior administrations, as well as numerous speeches by agency officials. And the new Horizontal Merger Guidelines place extra emphasis on the potential for transactions to diminish innovation.[49]

In the merger arena, however, concerns about innovation often offer no clear enforcement policy prescription. The future course of innovation can be

[49] 2010 Guidelines § 6.4.

very hard to predict, and economic wisdom often provides no straightforward answers to the question whether increase in market power caused by a merger will increase or retard the pace of innovation.

The agencies' recent merger enforcement record suggests, however, that they are more confident in their ability to predict the future and make judgments about the sources of innovation that antitrust policy ought to protect. Whereas prior administrations were hesitant to use antitrust to regulate the behavior of firms that had achieved success through path-breaking innovation, this administration has been far more willing to intervene to ensure opportunities for the next generation of firms to compete for consumer attention through innovation, even if doing so requires the dominant firm to pull its punches. This shift is nowhere clearer than in the 180 degree reversal of the Division's views about "net neutrality" regulation. In 2007, the division counseled caution, lest regulation reduce the incentives for broadband network owners to invest.[50] In 2011, the Division has affirmatively embraced net neutrality regulation by requiring Comcast/NBCU to comply with the FCC's new net neutrality regulations even if they are overturned by the courts.[51] More generally, *Comcast/NBCU* illustrates a new bias toward protecting the potential benefits from innovation by firms challenging the strong market position of market incumbents, and de-emphasis on the potential value of preserving the incentives for firms to strive to become dominant through innovation.

In addition, the agencies seem far more willing to stake decisions to bring cases on predictions about the likely evolution of fast-changing markets. We doubt that agency staffs are any better able to predict the future than they were in the past. Rather, the agencies seem philosophically more prepared to err on the

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[50] Press Release, United States Dep't of Justice, Antitrust Div., *Department of Justice Comments on "Network Neutrality" in Federal Communications Commission Proceeding* (Sept. 6, 2007), *available at* http://www.justice.gov/atr/public/press_releases/2007/225782.htm.

[51] United States v. Comcast Corp., 76 Fed. Reg. 5,440 (Jan. 31, 2011) (competitive impact statement).

side of using antitrust to foster new entry by smaller firms, and less inclined to think that markets might evolve favorably without their intervention or to worry that firms may be less inclined to innovate for fear that antitrust will force them to play fair with rivals if they achieve great success. Reflecting this attitude, the Division explained in *Comcast/NBCU* that the joint venture's potential post-formation conduct was "extremely troubling given the nascent stage of [online video distributors'] development."[52] The Division's pending investigation of Google's proposed acquisition of ITA Software makes this an area to watch.

**The Agencies' Evolving Concerns Have Led to a Spate of Vertical Merger Challenges**

Several of the agencies' recent merger challenges have involved transactions with a significant vertical dimension.[53] Scrutiny of vertical deals is nothing new, of course. The agencies have long had concerns about the potential for the merged firm to use its pre-existing market power to inhibit competitive threats (as in *Comcast/NBCU* this year and *Monsanto/Delta & Pine Land*[54] before it) or about the potential for the merged firm's relationships with its suppliers of customers, which are also competitors, to facilitate coordination (as in *Coca-Cola* and *Graf-Tech* this past year and *Premdor*[55] in 2001).

There seems no question, however, that a heightened propensity to challenge vertical transactions is one by-product of the agencies' newly invigorated interest in exclusion and their greater openness to reliance on

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52 United States v. Comcast Corp., 76 Fed. Reg. 5,440 (Jan. 31, 2011) (competitive impact statement).

53 United States v. Comcast Corp., 76 Fed. Reg. 5,440 (Jan. 31, 2011) (competitive impact statement); United States v. GrafTech Int'l, 75 Fed. Reg. 76,026 (Dec. 7, 2010) (competitive impact statement); Coca-Cola Co., 75 Fed. Reg. 61,141 (FTC Oct. 4, 2010) (aid to public comment); United States v. Ticketmaster Entm't, 75 Fed. Reg. 6,721 (Feb. 10, 2010) (competitive impact statement); PepsiCo, Inc., 75 Fed. Reg. 10,795 (FTC Feb. 26, 2010) (aid to public comment).

54 United States v. Monsanto Co., 73 Fed. Reg. 18,612 (Apr. 4, 2008) (response to public comments).

55 United States v. Premdor Inc., 66 Fed. Reg. 45,326 (Dec. 20, 2001) (competitive impact statement).

behavioral remedies. The Division's analysis in Comcast/NBCU suggests another reason that vertical transactions may be facing more probing scrutiny: the agencies may be more skeptical of assertions that customers or suppliers of the newly-merged firm will be able to transition away from reliance on their vertical relationship with that firm. The Division alleged that Comcast could impede competition from other video distributors, especially nascent online distributors, using its new "control over NBCU content that is important to [Comcast's] competitors."[56] And it pointed to several factors that supported its conclusion that NBCU programming was sufficiently "important" – including NBCU's highly-rated broadcast and cable programming (NBC shows like the Olympics, *Sunday Night Football* and *30 Rock* and popular cable channels like USA Network and Bravo); NBCU's ability to negotiate high retransmission fees; and economic studies showing that distributors suffer substantial customer losses when they lose important broadcast content for any significant period of time. These factors suggest a relatively low bar for finding a pre-existing supply relationship to be sufficiently vital to warrant antitrust protection. Many of them likely apply equally to a wide array of other content providers, suggesting that the Division's theory in Comcast/NBCU may reflect a broader concern about vertical transactions where any realignment in vertical supply relationships would prevent consumers from accessing all available content though a single distributional platform. Such a concern could have sweeping implications.

**A Reluctance to Let Go?**

For many practitioners and their clients, the merger enforcement experience is often more about the burdens occasioned by the *process* than it is about the conclusions the agencies reach on the substantive issues. The merger review process, of course, is bounded by statutory constraints that have not changed, but agency enforcement attitudes can have a major impact on the burdens and delays parties confront. In past administrations, a recognition of

[56] United States v. Comcast Corp., 76 Fed. Reg. 5,440 (Jan. 31, 2011) (competitive impact statement).

those burdens led the agencies to adopt formal procedural safeguards aimed at streamlining the merger review process and to pay close attention to how staff attorneys were exercising their investigative prerogatives. It is hard to generalize, but the experience of the past two years – largely anecdotal – suggests that the agencies are less concerned about the burdens their investigations cause, and somewhat more inclined to turn over every rock (or at least gather from the parties every rock, whether they turn it over or not) before closing an investigation.

**What Do These Trends Portend for the Coming Years?**

Although the cases the agencies investigate and bring in the coming years will continue to depend critically on the mergers that are proposed, these trends will shape the agencies' case selection, litigation strategies, and settlement approach. We can confidently predict that both agencies will be paying particular attention to transactions in industries – especially in the high-tech field – where they see a role for antitrust in protecting the opportunities of smaller firms to innovate. They will continue to pursue creative theories of competitive harm flowing both from unilateral incentive effects as well as from the facilitation of coordination, both tacit and explicit. And they will be focusing their limited resources on certain sectors of the economy where they see antitrust enforcement as mattering most. Among these key areas will be the healthcare and technology sectors, where both agencies have been quite active lately, as well as industries that are the focus of the administration's broader economic policies: financial services, energy, and agriculture.