HALCYON DAYS ARE HERE AGAIN
The Return of Antitrust to M&A

BEST PRACTICES OF THE BEST DEALMAKERS
2014

Featuring
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ack in 1972, the U.S. Supreme Court ruled on more than 170 antitrust cases. Forty years later that number had dropped to 80. The 1990’s and 2000’s were quiescent in terms of antitrust and M&A. Since 2008, however, the two federal antitrust enforcement agencies, the U.S. Department of Justice and Federal Trade Commission, appear to have ramped up the intensity of their antitrust scrutiny of M&A transactions. Does this trend reflect the political considerations of the Obama administration or the influence of other factors, such as technology, whose impact will outlast the Obama years? What effect will the continuing proliferation of antitrust regimes worldwide have on M&A activity? In this Special Report, we explore the onset of a new era in antitrust scrutiny of M&A deals large and small.
"Welcome back, counselors." ~ Marshall Sonenshine

Introduction by Marshall Sonenshine

It is not enough to say that major antitrust authorities in the US, Europe and elsewhere are today an increasingly active and potent force in global M&A. It is more important, at least in this forum, to say why that is and what this means for dealmakers on the front lines of business as well as what it means for the antitrust attorneys who try antitrust cases in the U.S. and, now, worldwide. My perspective is that of a dealmaker who is also a non-practicing attorney.

In the U.S., there were halcyon days for antitrust from the early 20th century trust busting under the Sherman and Clayton Acts to much later cases that would define major American industries from movies to alcohol to computers. By contrast, for meaningful periods during the great bull market from 1988 to 2008, antitrust enforcement was often quiescent, at times shrinking the standing army of antitrust lawyers or at least sending some home early with nary a case to work on. In the years preceding the global financial crisis, the US Department of Justice allowed a half decade to elapse without litigating a single merger case.1

From a dealmaker’s perspective, the era of quiescent antitrust enforcement is over. Anyone who doubted that assessment was rudely awakened in 2011 when the US government blocked AT&T from acquiring T-Mobile, a result that arguably seemed predictable since the deal would have removed one of the top four industry competitors, though that predictability had not stopped AT&T from agreeing to a nosebleed $4 billion break fee triggered by its failure to win over the US antitrust authorities. Normally big breakup fees protect acquirers from other bidders; this one protected the target from antitrust regulators. One might marvel at the moxie of the proposed merger and the agreed fee – and at the tepid wrist slap that the board ceremoniously delivered to AT&T CEO Randall Stephenson after the fact, apparently reducing his over $20 million annual compensation by around $2 million2. On the other hand, big seemed good in America. The U.S. had just survived the greatest financial crisis in 75 years, revealing the problems of financial institutions deemed Too Big to

Fail, and in the wake of that crisis the Dodd Frank Act actually permitted the financial giants to get…. bigger! (The top five financial institutions in the U.S. today control some 60% of financial assets, a level of concentration never before seen or permitted in American financial history). In that moment, all things big seemed plausible, but, alas, limits would be drawn.

By 2012, the two federal antitrust enforcement agencies, the Department of Justice (DOJ) and Federal Trade Commission (FTC), were scoring big, imposing the largest ever fine ($500 million for price fixing by Taiwanese electronic display manufacturer AU, with significant criminal penalties for two of its executives), and bringing a host of cases for alleged cartelization in a broad range of industries from maritime shipping to municipal bond pricing, chocolate manufacturing, lithium batteries and eBooks. As these cases progressed, the $500 million AU fine quickly moved from awe inspiring to almost commonplace; U.K. based Barclays bank would settle LIBOR bid rigging charges with U.S. and U.K. agencies for $456 million and, Apple would agree to a $450 million settlement in its e-book antitrust case after losing at trial.

These half billion dollar fines rose as antitrust commentators argued cartel sanctions had been inadequate to serve as effective deterrents. More recently, the mind numbing $7-$11 billion fines levied against large global financial institutions for financial law violations would dwarf these antitrust sanctions. In parallel with renewed price fixing cases are the notable direct interventions in large public mergers, since the disallowance of the AT&T / T-Mobile merger. Thus, in 2013, in one of the final acts of the American Airlines bankruptcy cases, the DOJ and several state attorneys general would challenge American’s $11 billion exit merger with US Airways. The deal would ultimately occur, but not without the antitrust authorities’ extracting required landing slot divestments in New York and Washington and maintenance of certain hub and scheduled service operations. Similarly, in 2013, AB InBev would ultimately be permitted its $20 billion merger with Modelo but only after agreeing to certain divestments and other restructured transaction terms.

In one small but closely watched hospital merger, the FTC won in federal district court an unwinding of St Luke’s Health System’s 2012 acquisition of Saltzer Medical Group, an Idaho physician’s practice group. Why such consternation over a purchase of a 44-member physician’s practice group? This was the FTC’s message to Big Health: we may be in the age of the Affordable Care Act and its preference for efficiencies, including those derived

from economies of scale, but we are still concerned with traditional antitrust. The government speaks with multiple voices. The little St Luke’s hospital merger case arises as Big Pharma, inspired by cost savings and tax arbitrage, proposes jaw dropping mergers like Abbvie/Shire and Medtronic /Covidien, and Pfizer’s (for now) terminated bid for AstraZeneca. One might add to the list Valeant’s audacious if uncertain (for reasons unrelated to antitrust) bid for Abbott Labs. At the wholesale and retail end of the value chains, pharmaceutical distribution and retailing consolidated, largely during antitrust quieter days.

There are numerous other matters brewing. In Technology, Google is settling privacy matters in Europe while it wins a second chance at an antitrust action in the U.S., where its Motorola Mobility service, acquired several years ago, continues pressing antitrust claims against display makers Sharp in Japan and Samsung in Korea. In Media, the smart money bets that Comcast’s preemptive divestments will garner deal approval from US antitrust authorities in its purchase of Time Warner Cable, though not without a protracted debate over how market power can affect pricing of cable and bundled internet services. Meanwhile, Time Warner is in the cross hairs of Fox, prompting questions over market power on the content side of the media. In Financial Services, U.K. antitrust authorities are opening an investigation into concentration in British retail banking, presumably unnerving market leaders Lloyds, RBS, HSBC and Barclays. Meanwhile, back in the U.S., several large US private equity firms have agreed to settle collusion charges in the buyout business while others may head to trial.

So why have the antitrust authorities awakened? Part of the answer lies in the obvious fact of large scale consolidations. Strategic M&A has continued strong, even if at reduced volumes post-financial crisis, and this year may drive a $3.5 trillion annualized global merger market if first half trends continue. Part of the explanation arguably resides with the long shadow cast by the financial crisis itself, which if nothing else, stands for the proposition, however ironic in the age of continued banking consolidation, that where there is corporate scale there is public risk. Part of the answer might be found in tendency in the U.S. for antitrust policy to be more activist under Democratic than Republican administrations. There is also the stock market run-up, which facilitates stock mergers, testing concentration limits. And there is the market preference for pure plays, which facilitates spin-offs leaving companies to diversify less and concentrate (horizontally and vertically) more.
Part of the renaissance in antitrust policy and enforcement also relates to globalization, which inspires market consolidation requiring review by multiple authorities in multiple countries. There is an enforcement uptick not just in the U.S. but also in Europe, and closer coordination between U.S. and European merger review regimes. Antitrust authorities in emerging markets are taking note. There is increasing antitrust regulation in Latin America, and notable rule-making and reform in China, where that nation’s ministry of commerce (MOFCOM) has even taken a swipe, albeit a relatively small and perhaps quirky one, requiring a Latin divestment as condition to its approving the big Glencore/Xstrata merger. The global market invites global vigilance as large cap corporates scale up to enhance market power and to engage in tax and regulatory arbitrage.

Thus, as the drumbeat of globalization continues, M&A continues apace, prompting antitrust agencies around the globe to take closer watch. In this new environment of consolidation and globalization, the halcyon days of regulation are here again. Welcome back, counselors.

Marshall Sonenshine  
Chairman, Sonenshine Partners  
Professor of Finance, Columbia University
About 95% of the DOJ’s Antitrust Division and the FTC are permanent and are not political appointees.

Part I: Elections Matter

Elections matter, but not necessarily in ways that we anticipate. Regarding U.S. antitrust posture toward M&A transactions, the election results of 2008 and 2012 have held true to that axiom. Vibrant in the 1970s, U.S. antitrust actions initiated by the two federal agencies entrusted with that task – the U.S. Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC) – waned in the 1980s during the Reagan administration, revived during the administration of George H.W. Bush, blossomed during the Clinton Administration, receded somewhat during the George W. Bush administration and have revived with President Barack Obama in the White House. In other words, antitrust activity during Republican and Democratic administrations generally appears to reflect the public perception of each political party’s traditional antitrust posture: Republican antitrust enforcement tends to be more skeptical of governmental market intervention and places a greater investigative focus on horizontal mergers and price-fixing; Democratic enforcement is more aggressive, with a focus on vertical mergers. Perception, however, often fails to fully capture reality.

According to the prominent antitrust lawyers interviewed for this chapter, differences between how Republican and Democratic administrations pursue antitrust cases do exist, but usually those differences are less stark and far more nuanced than is generally imagined. The reason can be found, in part, in the number 95. According to Mark Gidley, who chairs the White & Case antitrust and competition practice, more than 95% of the employees of the DOJ’s Antitrust Division and the FTC are permanent and are not political appointees. The fulcrum of DOJ antitrust enforcement strategy necessarily resides in the office of the politically appointed assistant attorney general who heads the Antitrust Division. He/she sets the tone in deciding which cases to push, which to settle and which to abandon. “There is more room for policy in antitrust law than in any other area of the law,” Gidley explains. At the FTC, which consists of five appointed commissioners, with the majority appointed by the administration in power and the minority belonging to the out party, strategy formulation is reliant on the FTC chairman and his/her policy priorities and on the commission structure.
While it is true that the U.S. political needle rarely moves more than slightly to the right or left of center and radical departures are more myth than fact, it is also true that the confluence of forces beyond the political realm can conspire to produce the illusion that a politically driven radical departure from the antitrust norm has occurred when, in fact, it has not. The antitrust posture of the DOJ and the FTC during the Obama administration is a case in point. While all of our report contributors acknowledge that in general the politics of the Obama administration are to the left of its Republican predecessor and perhaps slightly to the left of its most recent Democratic predecessor, they emphasize that Obama administration M&A antitrust strategy does not, in the main, represent a sharp departure from historic norms.

So what’s different? At first, early Obama administration antitrust policy was designed to help prevent aftershocks of the global financial crisis that was already underway when it took office. Soon, however, other non-political forces emerged that inevitably impacted the administration’s antitrust policies in ways that were new and unanticipated. The major apolitical change agent: technology. Technology created the means for economists to create vast computerized simulations – models – of post-merger competitive environments and product pricing pressure. The fuel for these simulations: an unprecedented enormous volume of digitized data. In part in an attempt to account for this trend and harness it, the DOJ Antitrust Division, in conjunction with the FTC, in 2010 updated its merger guidelines. While intended to help M&A dealmakers, their attorneys and the two federal agencies adapt to a new environment, the 2010 guidelines also created consequences that may have been unintended but are perhaps combining to alter the M&A landscape for years to come, no matter which political party wins the White House in 2016.

Part II. The Changing Antitrust Landscape: the Political and Legal Backdrop

A. Antitrust: the Origin of the Species

“Speak softly but carry a big stick.” – Theodore Roosevelt

Antitrust. For the uninitiated, it is a word fraught with paradox. Who would oppose trust, and what does that have to do with the enforcement of federal government policies aimed at ensuring the appropriate level of competition in industries in the U.S. and, increasingly, around the world? As it turns out, the
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“Only those who have done something wrong will be prosecuted.”
– Teddy Roosevelt

historical roots of U.S. antitrust enforcement have everything to do with that word. In the late 19th century, trusts were that era’s cartels. They were huge and unregulated industrial combinations that dominated American business and drove the economy. Created by business giants named Carnegie, Vanderbilt, Morgan, Harriman and Rockefeller, among others, trusts set prices, eliminated competition, occasionally ran roughshod over employees and typically dominated the politics of both major U.S. political parties. Abuses endemic to the trust system inspired muckraking journalists and the growth of early labor unions. Trusts also engendered the birth of the Progressive movement in the U.S. and the emergence of an unlikely Progressive flag bearer, President Theodore Roosevelt, a Republican.

Roosevelt in the late 19th century gained national attention as an aggressive New York City police commissioner, a war hero, a colorful and outspoken assistant secretary of the Navy, an innovative Republican governor of New York and as Vice President of the U.S. in the administration of William McKinley. In the fall of 1901, after McKinley’s death from an assassin’s bullet, Roosevelt ascended to the White House. From his days as New York City police commissioner he had befriended muckrakers, imbibing their fury at unfair social and labor conditions and business practices that he was convinced would soon threaten America’s social stability, burgeoning prosperity and new global reach. Wielding the 1890 Sherman Antitrust Act as his cudgel, and with the U.S. Supreme Court behind him, Roosevelt almost immediately took on the most powerful industrialist in the U.S. via an antitrust suit: J. P. Morgan.

On February 19, 1902, Morgan was dining at home in New York when the telephone rang. He became enraged when he learned that Roosevelt’s Attorney General was bringing suit against Morgan’s Northern Securities Company for violations of the Sherman Act. Morgan hung up the phone and muttered to his shocked dinner guests that it was rude to file such a suit without warning. A few days later, Morgan, face to face with Roosevelt in the White House, accused the president of treating him like a common criminal. Roosevelt informed Morgan that no compromise could be achieved in the matter of Northern Securities, and the issue would be settled by the courts.
DEAL NOTES

War Stories – and Lessons Learned – from the Antitrust Battleground

All are litigators, courtroom warriors whose battlegrounds are the two U.S. antitrust enforcement agencies: the Department of Justice (DOJ) and the Federal Trade Commission (FTC). Two of the litigators have fought on both sides at different stages of their legal careers, currently for corporate clients but earlier on behalf of one or both of the enforcement agencies. Each has his war stories.

James Keyte's law firm, Skadden, Arps, Slate Meagher & Flom – Skadden, or Skadden Arps, for short – recently represented creditors during the American Airlines/US Airways merger. He was intimately involved in assessing the antitrust risk and, if necessary, potential solutions, because creditors owned a majority of American Airlines in bankruptcy. In addition to the usual concerns in airline mergers, pricing practices were a significant issue, says Keyte, a partner in Skadden's antitrust and competition practice. "Based on the government's earlier challenge to the H&R Block/Tax Act merger, which hinged in part on the merger allegedly removing a maverick pricer, there was a risk that the government would focus on the possible elimination of US Airways' pricing programs." Yet there were good reasons, in terms of complementary networks and consumer value, for the deal to go through. "We believed that some form of a fix could resolve most of the government's concerns--for enough slot consolidation at DCA was front and center--that I other potential problems were manageable and, perhaps most important, that fully litigating the matter in federal court would be very risky for the government." The transaction, he adds, was one of the rare cases where politics may actually have mattered, thanks to strong union support for the deal. In the end, the deal went forward. The combined company emerged from bankruptcy--and the creditors were fully repaid, with interest.

“We are often confronted by deals that raise significant antitrust issues,” says David Wales, who leads the Jones Day global antitrust practice. Jones Day represented American Airlines in its successful merger with US Airways last year and is currently involved in some of the highest profile mergers, including AT&T/DirecTV, Sprint/T-Mobile and Reynolds American/Lorillard. Wales, who has the unique experience of serving in senior positions at both the DOJ and FTC, proffers some advice for other antitrust attorneys with less experience: Do not take a passive approach with the antitrust authorities. “Be proactive and strategic in every step of the process,” he declares. “Be mindful of the evidence you provide. Be aware of when to offer a fix. Make sure the agencies are put to their proof, because this is an adversarial process, not a popularity contest. Let them know that if they are going to challenge your deal you are willing to fight them in court, if necessary.”

Mark Gidley, a former DOJ and FTC attorney who chairs the White & Case worldwide antitrust and competition practice, has two war stories that ended well for him. The first involves the Toyota Industries/Cascade vertical merger that was challenged by
the government. Cascade manufactures special attachments for forklifts. The second involves the SunGard/Comdisco horizontal merger. Both war stories are instructive, ironic, even tragic. Initially, Gidley was convinced the Toyota/Cascade deal would close quickly. However, the same month the deal was announced, November 2013, a DOJ career staff economist generated an unpublished, not-yet-peer-reviewed paper that touched on areas of dispute in the deal – and was then assigned to the Toyota/Cascade transaction. As a result, says Gidley, “we went through the year’s biggest vertical scrub.” To meet the challenges, Gidley and his team hired the dean of the Yale School of Management, a well-known microeconomist and, in an unusual move, industry experts, including experts in the forklift industry. According to Gidley, the forklift experts, none of whom had Toyota or Cascade ties, told government investigators, “This is an industry with many standards. The standards are public. Anyone who has a good idea can manufacture forklift attachments. There is no patent on these attachments. Market entry is easy.” The defense factual work was successful. The DOJ dropped its challenge and the Financial Times named the deal one of the year’s most innovative.

In 2001, SunGard Data Systems, one of three companies that dominated the disaster recovery industry, was a Gidley client. SunGard’s merger target, Comdisco, Inc., was in bankruptcy. “We struck a deal, on paper, to buy Comdisco, which some thought would reduce the competitors in the disaster recovery to two: SunGard and IBM,” Gidley says. This 3-2 result, he recalls, “was too much, even for Republicans.” The George W. Bush administration DOJ challenged the transaction. In September 2001, Gidley was responding to a second request when two planes hit New York’s World Trade Center. In an instant, in addition to the catastrophic loss of life, about 50 White & Case clients lost all their computer systems, including their back-up. The tragedy in New York, Gidley says, appeared to reinforce the government’s competition position, necessitating a vigorous response. “We didn’t sleep for 22 days. We were working so fast we didn’t have time to read the government’s exhibits.” The White & Case argument: This is not a traditional 3-2 merger; the combined companies will have less than 1% of Fortune 1000 companies as customers because those companies perform disaster recovery on their own. “It was the middle of the night; I was finally reading through the government’s exhibits. Government exhibit 72 said exactly what I’d been trying to prove in court. The judge agreed. We were free to close.”

Like Mark Gidley, Alan Rutenberg takes a lessons-learned approach to his antitrust experience. In terms of presenting a market definition perspective, he recommends providing the enforcement agencies with an alternative to their view, one that reveals a broader market with more competitors. “Be able to show what are and are not barriers to entry and that entry has been underway on an ongoing basis.” In defending a strategic deal, he says, it is important to present the agencies with a narrative that spells out why the merger parties are doing the deal. “Deals often carry important efficiencies and synergies. If an agency is convinced that a deal might have serious antitrust problems, synergies and efficiencies alone are a heavy burden in proving they will outweigh any harm.” Therefore, a clear explanation of a deal’s purpose is mandatory. “The information we present, and our explanations must be very fact-specific to the deal, including a description of the role of power buyers and their influence on customer pricing.”
Morgan asked Roosevelt if any of his other interests were at risk. “Only those that have done something wrong will be prosecuted,” Roosevelt replied. In a 2004 speech to the British Institute of International and Comparative Law Conference, DOJ AAG and Antitrust Division head R. Hewitt Pate spelled out the role, practice and continuum of U.S. antitrust enforcement since Roosevelt’s presidency:

Little has changed over the last century in terms of the wording of our antitrust statutes. The Sherman Act was enacted in 1890, the Clayton Act in 1914, and the legislative amendments since that time have been minimal. Yet U.S. antitrust law has come a long way indeed in those years through judicial interpretations of the law. Congress chose not to enact detailed prescriptions for antitrust enforcement, relying instead on the courts to apply the broad statutory principles to particular fact situations. As former Assistant Attorney General William Baxter has observed, this “common law” approach may lack the certainty provided by a more detailed statute, but it “permits the law to adapt to new learning without the trauma of refashioning more general rules that afflict statutory law”.

Our Supreme Court has described the antitrust laws as having “a generality and adaptability comparable to that found to be desirable in constitutional provisions.”

American antitrust law began to take shape only when the Supreme Court began to build the basic framework of antitrust analysis in its decisions. In 1911, it decided the landmark Standard Oil case, in which the United States sought to break up the famed oil conglomerate. Observing that the standards of the antitrust law must be developed by the courts deciding each case “by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute,” the Court announced the Rule of Reason, under which the Sherman Act is deemed to prohibit only “unreasonable” restraints of trade. In another decision that year, United States v. American Tobacco Co., involving a conglomerate in the tobacco industry, the Supreme Court emphasized the Rule of Reason’s fundamental grounding in competition concerns. This standard proscribed “contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade.

Pate later added, “The Supreme Court’s pre-1950 decisions set the stage for the late twentieth-century developments in antitrust law. They established the

5. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360 (1933)
6. Standard Oil Co. v. United States, 221 U.S. 1 (1911)
7. Id. at 64
8. 221 U.S. 106 (1911)
fundamental principle — consistent with the modern approach worldwide — that antitrust laws prohibit only conduct that unreasonably restricts competition, to the detriment of consumers. And the Court established that the type of inquiry required depended on the nature of the particular conduct at issue.”

Nevertheless, application of U.S. antitrust law has enjoyed anything but a smooth ride, according to Pate:

That auspicious beginning did not mean that the course of American antitrust analysis always ran smoothly through the last half of the century. A consequence of the common law approach is that when antitrust thinking veers from the path of promoting consumer welfare, the Supreme Court may follow. We experienced that effect in the 1960s and 1970s as our Supreme Court issued decisions emphasizing artificial presumptions not soundly grounded in economic reasoning. In Brown Shoe, Pabst, and Von’s Grocery, the Court ruled that mergers could be found unlawful based on extremely small increases in market concentration. In Schwinn, it abandoned its formerly cautious approach to vertical practices, holding exclusive dealer territories unlawful per se. Similarly, in Albrecht, it held vertical maximum price fixing illegal per se.

As the sophistication of economic analysis increased, our Supreme Court began to reexamine some of these precedents and return to fundamental principles of competition and consumer welfare. In GTE Sylvania, the Court overruled Schwinn, and in State Oil v. Khan, it overruled Albrecht. The Court adopted a significantly different approach to mergers in General Dynamics, refusing to find a violation, despite current high market shares, in a case where those market shares did not reflect a realistic threat to future competition. And in Matsushita, the Court poured cold water on theories of liability that make little economic sense, and it expressed skepticism of liability theories based on price cutting, which is often “the very essence of competition.”

Which brings us to 2014 and the crux of the matter: Have political considerations by the Obama administration ushered in a revival of the 1970s, when the Supreme Court issued 164 written antitrust opinions in 1972, compared to just 81 in 2002? The consensus among the veteran antitrust attorneys who contributed their insights to this chapter is, no, the enforcement
policies of the Obama administration do not represent a sharp departure from the normal continuum. Yet other forces are afoot that may indeed alter the U.S. antitrust enforcement landscape for years to come, regardless of whether the occupant of the White House is a Democrat or a Republican.

B. The Opening Salvo: the Agencies Lay Down Their Markers

“The enforcement direction will be influenced by elections.” – Mark Gidley

In her first speech as Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice, Christine Varney in early 2009 stated clearly that antitrust scrutiny of M&A transactions would intensify under Obama administration stewardship. Her aim, she said, was to use antitrust scrutiny to help avoid aftershocks from the ongoing global financial crisis. But that wasn't all. She also said that the Antitrust Division would not sit on the sidelines but would instead “push forward” to explore controversial areas of merger enforcement, including vertical theories in which merger parties are not competitors in the same market but instead have a potential customer/supplier relationship or operate in adjacent markets. Like her Federal Trade Commission counterpart, FTC Chairman Jon Leibowitz, AAG Varney entered the post-Inauguration Day fray backed by a team of experienced litigators who were prepared to take to court cases they could win. At the FTC, however, the pro-enforcement majority had begun to beat the enforcement drum loudly even during the Bush administration.

“The enforcement direction will be influenced by elections,” declares Mark Gidley, whose long litigation resume includes early-career stints during the administration of President George H. W. Bush handling antitrust issues for the DOJ Deputy Attorney General and as Deputy Assistant AG in the Antitrust Division. “It’s always political in the sense that antitrust heads are chosen to reflect the enforcement and policy priorities of an Administration.”

Every incoming administration sets its own antitrust agenda and direction. In every administration, the responsibility for implementing that agenda in an agency in which 95% of the employees are permanent resides with the AAG running the DOJ Antitrust division. In the FTC it resides with the
FTC Chairman and the FTC commissioners from the president’s party who comprise the agency’s voting majority. Yet despite the different backgrounds of the Antitrust Division’s AAG and the FTC Chairman and that agency’s commissioners, and each party’s politically based approach to antitrust enforcement, federal antitrust policy historically has reflected the U.S. body politic, whose needle rarely ventures more than slightly to the left or right of the political center. In other words, radical departures from the established norms are virtually unheard of. Antitrust enforcement during the years of the Obama administration is no exception: its antitrust policies have, in the main held to those norms. And Gidley points out that the antitrust agencies are very insulated from day-to-day political concerns; career staff attorneys analyze the cases, immune from Capitol Hill.

David Wales, Practice Leader, Worldwide Antitrust and Competition Practice, Jones Day, agrees. Wales, who served as an antitrust attorney at both federal antitrust enforcement agencies during the George W. Bush administration, says it is over-simplistic to claim that political consideration causes dramatic changes in antitrust enforcement. Generally, he says, the Republican version of antitrust enforcement entails less “envelope pushing” by enforcement authorities in pursuit of gnarly cases on the margin. In any administration, he adds, M&A deals that have obvious antitrust issues will be flagged and blocked. The difference between administrations representing rival political parties, he stresses, is on the margin. “Maybe one administration is a little tougher on mergers that are right down the middle. Maybe another administration is more aggressive in its desire to preserve the number of competitors in a specific industry, or more aggressive on the remedy,” says Wales, who adds, “I don’t think we have seen a huge sea change between the end of the Bush administration and the first few years of the Obama administration.”

James Keyte, Partner, Antitrust and Competition, Skadden Arps, attributes some of the Obama administration’s increased antitrust scrutiny to a friendly rivalry between the DOJ and FTC. “There is a healthy competition that has developed between the two agencies in terms of litigation success,” he remarks. He traces the roots of that rivalry to the DOJ’s loss of a high-profile case in

“Both agencies went outside their staffs to hire attorneys who could actually bring a case to trial and win.” – James Keyte
2004, when a federal judge, who sided with Oracle in its proposed acquisition of software rival PeopleSoft, stated in the ruling that the acquisition posed no threat to competition. Meanwhile, the FTC was victorious in two equally high-profile courtroom battles, forcing a settlement that called for Whole Foods to restore competition by divesting 32 stores acquired in its acquisition of Wild Oats and successfully blocking the attempt by CCC Information Services, Inc. to acquire Mitchell International, Inc. in 2009. Through the years since the DOJ’s Oracle setback, through a Republican and Democratic administration, the two agencies have become ever more vigorous in selecting cases they can litigate and win in court. “Both agencies look to hire attorneys who can better position a case to trial.” Keyte says. Not only has this resulted in government staff with more litigation experience, he adds, “it has also resulted in increased threatened enforcement that, in turn, leads to more consent arrangements or even abandoned transactions.” (See Appendix I)

As anticipated after AAG Varney’s 2009 speech, the two federal antitrust agencies have more closely scrutinized vertical mergers. Vertical mergers are between two companies producing different goods or services for one specific finished product. The motivation behind most vertical mergers is a desire by the parties to increase synergies and efficiencies. However, in 2010 the DOJ, in conjunction with the FTC, and in an attempt to inject more flexibility into the merger review process, reformulated the guidelines for horizontal mergers for the first time since 1992. Some of the guidelines, explains Alan Rutenberg, Chair, National Antitrust Practice, Foley & Lardner LLP, have been updated to better reflect what the agencies were already doing in practice. The guidelines, Rutenberg adds, focus more on the competitive effects of mergers and do not look as rigidly at market definition and market share considerations. “The guidelines may be viewed as less rigidly structured and as a more nuanced analysis.” Adding flexibility, he says, makes the new set of guidelines more open-ended” than the previous set thus reducing certainty. In addition, he notes, the focus of the guidelines has changed somewhat and may have made the front end a little less objective because it does not look as rigidly at structural characteristics, market definition and market share.” In some ways, Rutenberg acknowledges, the guidelines may have reduced the level of specificity.” Nevertheless, he declares, “I can’t say I’ve seen any problems” emanating from the 2010 guidelines.
Mark Gidley, however, takes a different tack. The Obama administration, like the Clinton administration, has looked more closely at vertical mergers, Gidley views the Obama antitrust approach as potentially more aggressive than Clinton’s. After all, Gidley comments, Clinton, as governor of Arkansas, had chaired the centrist Democratic Leadership Conference and had reinvented the Democratic Party to reflect a more conservative southern perspective. Even Clinton-era FTC Chairman Robert Pitofsky seemed to reflect that perspective. “Bob Pitofsky and would pay close attention to vertical combinations, but he didn’t bring many challenges.” Gidley notes.

As a recent case in point, Gidley cites Toyota Industries’ recent acquisition of Cascade, a company with $1 billion in annual revenue that manufactures highly sophisticated attachments for forklifts produced by Toyota, among other companies. Cascade does not manufacture forklifts and thus did not compete with Toyota. But the Obama administration’s DOJ looked closely at the vertical issues in the transaction, with a forklift manufacturer buying a speciality forklift attachment maker. A second request followed. “That second request resulted in very detailed (and time consuming) economic analyses.” Gidley recalls, requiring six months to resolve the issues the request raised. “This deal would likely not have been investigated during either of the Bush administrations and perhaps not by the Bob Pitofsky FTC during the Clinton administration.”

Ironically, it may have been a controversial merger that was not challenged by the George W. Bush administration antitrust agencies that ignited a cyclical blowback during the Obama administration. In the mid-2000’s, Maytag, a leading U.S. washer/dryer manufacturer, acquired Whirlpool, a strong U.S. rival. The combination, which the Bush-era antitrust agencies did not challenge despite the near-absence of any other significant industry competitors, foreign or domestic, created a U.S. washer/dryer giant with an 80% market share. According to Gidley, some observers pointed to highly visible transactions, such as Whirlpool/Maytag, with very high market shares in certain product lines as transactions that should have been challenged “to remind everyone that the Antitrust Division still exists, that the cop is still on the beat.”

Unlike the Obama administration, which some accuse of favoring the opinions of merger parties’ industry rivals during merger reviews, Reagan era DOJ Antitrust Division head William Baxter took the opposite approach. Baxter, who was responsible for overseeing the court-ordered break-up of the old
AT&T into regional phone companies dubbed “Baby Bells,” declared, “If the rivals are complaining, then the merger is an efficient one then we ought to approve it.” According to Gidley, the “Baxter Rule” holds that “Industry rivals fear a merger because it will likely push them around in the marketplace.” In the long run, Baxter felt that bucking rivals’ complaints and approving a merger amounts to creative destruction, which is good for consumers and for innovation.

**Part III: the Rise of the Machines**

**A: Technology and an Avalanche of Automated Data Change the Game**

“The merger guidelines have developed in a way that gives the government much more flexibility to conclude that a merger can harm competition.” – James Keyte, Partner, Antitrust and Competition, Skadden Arps.

The DOJ/FTC 2010 horizontal merger guidelines, which some experts insist strengthen presumptions that a merger is uncompetitive, also add new types of technology-driven evidence. These two factors, which are mostly independent of political considerations, have heightened the level of uncertainty among many dealmakers and may interact to alter the M&A topography for years to come, pushing dealmakers to work harder to nudge deals through the agencies’ evolving review process.

The 2010 guidelines, which do not address vertical mergers or acquisitions, supersede those issued in 1992 which, aside from some 1997 modifications, had remained unchanged since issuance. The 2010 guideline revisions do not carry the force of law but instead are intended to reflect the current and ascendant merger review practices of the federal agencies. The current revisions provide detail on several subjects, especially regarding the economic models created by agency economists and used by the agencies to assess the potential anticompetitive effects on horizontal mergers. These merger simulation models, according to the agencies, “need not rely on market definition.” The guidelines state that the DOJ and FTC will place more emphasis on economic modeling tests of “upward pricing pressure” (UPP), “which also need not rely on market definition,” and on win/loss data and “natural experiments.” This approach, in some quarters of the antitrust community, has since opened the federal enforcement agencies to criticism for creating the appearance of relying on market definition when they support a specific enforcement action and disregarding it in favor of other economic
simulation techniques that purport to demonstrate a horizontal merger's anti-competitive impact.

Dealmaker uncertainty has also been intensified by the deletion in the revised guidelines of the popular 35% safe harbor provision which presumed that harmful unilateral effects of a horizontal merger would not arise as long as the merged firm had a market share below 35%. This deletion dilutes the significance of the revised guidelines’ higher Herfindahl-Hirschman Index (HHI) thresholds. HHI calculations represent a commonly accepted measure of market concentration.

Below are other highlights of the key merger guidelines which reflect the agencies’ current philosophy, including a more detailed description of the effect of HHI’s upward revision. These highlights appeared in an April 22, 2010 client update prepared by law firm Davis Polk. Briefly, the revised guidelines:

- Downplay the importance of market definition in the horizontal merger analysis, stating that “[m]arket definition is not an end in itself: it is one of the tools that the agencies use to assess whether a merger is likely to lessen competition.” In recent years, the government’s biggest court losses in horizontal merger cases (Arch Coal/Triton; Oracle/People Soft; and—at the district court level—Whole Foods/Wild Oats) have turned on market definition issues.

- Place significant emphasis on price discrimination—a price increase for a small subset of vulnerable customers—which may, in some cases, encourage very narrow market definitions comprised only of those customers.

- Upwardly revise the Herfindahl-Hirschman Index (“HHI”) thresholds. The revised Guidelines state that the agencies will consider markets “unconcentrated” if, after the merger, they have a HHI below 1,500 (an increase from a threshold of 1,000). A market will be considered “highly concentrated” at a HHI of 2,500 or greater (an increase from 1,800). A merger producing (i) an increase of more than 200 HHI points and (ii) a post-merger HHI exceeding 2,500 will be presumed anticompetitive.

The potential for technology-driven increased antitrust enforcement creates higher risk and uncertainty regarding deal completion and timing.
“Today, there is more data that is automated and there is a feeling in the agencies that the data exists and must then be analyzed.” – Mark Gidley

The new thresholds, however, do not represent a loosening of horizontal merger review standards but, instead, conform the Guidelines to the thresholds that the agencies have most often used in practice.

- Contain a significantly expanded discussion of unilateral effects of a horizontal merger, consistent with the interests of agency chief economists. Importantly, the revisions note that, like new entrants into the relevant market, non-merging firms’ ability to reposition their products to offer close substitutes for the products offered by the merging firms may deter or counteract what may otherwise be significant anticompetitive unilateral effects.

According to Davis Polk, the practical implications of the revised guidelines overall reflect “a pro-enforcement perspective and an effort to blunt various tools that merging parties have used successfully in the past to defeat horizontal merger challenges. They are consistent with a more activist enforcement policy.”

While our legal experts do not necessarily share the Davis Polk assessment regarding the Obama administration’s activist enforcement policy, all acknowledge that the technology-fueled flood of automated data, and its selected use in merger reviews, will have an impact on the merger review process and M&A dealmaking in general, although the long-term nature of that impact is as yet unknowable.

**B: Technology’s Gift: Seeking Certainty**

“Dealmakers don’t want to do a deal in which there is excessive uncertainty.” – David Wales, Practice Leader, Worldwide Antitrust and Competition Practice, Jones Day.

Ironically, in their effort to inject predictability and a higher level of exactitude into their merger review calculations and subsequent enforcement decisions, the enforcement agencies’ employment of high-tech computerized simulation techniques appears to have achieved the opposite result for M&A dealmakers who seek deal execution certainty, or at least some predictability.
The revised guidelines and an uptick in deal scrutiny, says David Wales, have deprived dealmakers of some of the certainty they seek during the deal execution process and which they have had since the issuance of the 1992 merger guidelines. “Dealmakers don’t want to do a deal in which there is excessive uncertainty,” Wales remarks. That uncertainty can consist of economic and financial issues as well as antitrust issues. However, the potential for technology-driven increased antitrust enforcement creates higher risk and uncertainty regarding deal completion and timing. Dealmakers need to be able to estimate a deal’s duration. For example, a typical review of a case with antitrust issues can require 6-12 months. Suspension of the deal process for that time span can spawn difficulty for dealmakers and may induce them to question the viability of the deal. Says Wales, “It’s not just whether or deal is challenged or blocked, it’s also about how long it will take to get the deal done.”

The proliferation of automated data and its impact on potential agency enforcement decisions is beginning to cast a shadow over dealmaking. According to Mark Gidley, the massive amounts of machine-readable data may have played a role in the government’s review of the Toyota/Cascade merger. “Today, more data is automated and there is a feeling in the agencies that the data exists and must then be analyzed.” Gidley does not attribute this trend specifically to the Obama administration DOJ and FTC. The trend predates this Administration, but it has intensified with the tremendous explosion of automated data and economic modeling that takes advantage of this new data.

Today’s large-scale computer simulations require the input of 20-30 variables, which can include the projected gross margin of all the competitors in a given industry. Changes in assumptions are made based on combinations of variables which are then run through the simulator. The result is the potential generation of millions of outcomes, which are then compiled.

According to James Keyte, the sophisticated computerized evaluation tools now emphasized by the federal enforcement agencies under the revised guidelines can be effective in evaluating scanner data in retail industries and in facilitating more robust elasticity analysis. Yet, the current iteration of the DOJ/FTC models that suggest the anti-competitive effects of merger analysis
Halcyon Days Are Here Again: The Return of Antitrust to M&A

remain simplistic relative to how sophisticated they may become during the coming years as information technology evolves. In fact, Keyte explains, for the most part they are all variations on older Cournot competition models—which attempt to measure a merger’s effect on output capacity—or Bertrand competition models—which measure a merger’s effect on price.

C: UPP and GUPPI: the SABRmetrics of Merger Review

"Baseball is the most quantitative of all sports and has an astonishing number of statistics, just like antitrust reviews." –Mark Gidley, Chair, Global Antitrust and Competition Practice, White & Case.

SABRmetrics, invented by baseball statistician Bill James, leaves no aspect of baseball unmeasured and uncompared. Explaining SABRmetrics to the untutored or uncaring is a laborious process that is often unsuccessful. Nevertheless, in less than a generation SABRmetrics have come to dominate the decision-making processes of its most elite professional practitioners while serving as a snooz button for old-school pros and fans who prefer more traditional measurement methods. Literally, SABRmetrics, despite their occasional opacity, have been a game-changer. Will the SABRmetrics of antitrust impose the same game-changing result on the agencies’ merger review process—and results? It is early yet in the game, and the jury remains out.

Baseball and antitrust enforcement appear to have much in common, especially in their storage and use of enormous databases of numeric data. Companies store information on gross margins, prices for every product, whether their product offerings consist of 300-500 product offerings or tens of thousands. If called for, the government may request a data strip of hundreds or thousands of variables in computer-readable form in order to crunch and analyze those numbers via simulators. The increasing abundance of digitized data is accelerating the appetite for metadata during merger reviews. Mark Gidley opts for a baseball illustration to highlight the scope of the government’s data appetite. To him, it’s like merging two successful baseball teams in this era of SABRmetrics, the Yankees and Oakland A’s, for example. “You can smash together the Yankees and A’s and overnight they become an overwhelmingly dominant franchise. And the baseball commissioner would give that combination a definitive thumbs down for competitive reasons,” all of which would have been available to MLB economists in a flood tide of SABRmetrics.

The 2010 merger guidelines revisions’ emphasis on competitor pricing and relative capacity at the expense of market definition, were driven in part
by related two acronyms that would be beloved by SABRmetricians: UPP and GUPPI. The Upward Pricing Pressure (UPP) test now administered by the federal antitrust enforcement agencies during merger review that was invented by antitrust economists Joseph Farrell and Carl Shapiro provides an alternative to traditional concentration based tests in merger analysis. In addition to being free of market definition, UPP’s appeal to some is in its ease of use: one formula indicates whether a merging company has an incentive to increase post-merger pricing. The UPP test identifies a company’s incentive to raise prices post-merger by comparing its incentive to increase prices due to lost competition and the opposing incentive to decrease prices due to cost synergies. Revisions similar to those that established UPP as a prime indicator of a post-merger environment are underway in overseas jurisdictions, especially the European Union.

The Gross Upward Pricing Pressure Index (GUPPI), also a new tool, assesses unilateral merger price effects in markets for differentiated products. GUPPI provides a quick, albeit somewhat crude, measure of UPP. Like UPP, GUPPI does not rely on market definition or concentration. Instead, the index calibrates the value of sales diverted to one merging company’s product due to a post-merger rise in the price of the merger partner’s product, relative to the revenue lost due to fewer sales of the product with the price increase. The 2010 guidelines do not establish any clear thresholds for what constitutes a high GUPPI as opposed to a low GUPPI or which values are likely to trigger enforcement actions beyond stating, “If the value of diverted sales is proportionately small, significant unilateral price effects are unlikely.” The lack of clear thresholds qualified GUPPI and its UPP cousin as SABRmetrics that produce a higher level of uncertainty for dealmakers large and small.

Does GUPPI have any advantages? Yes, say some economists, such as those at Economists Incorporated. A GUPPI advantage is that it can be extended to include potential efficiencies, which reduce the incentive to raise prices, producing downward pricing pressure because the efficiencies increase the margin on each unit of sales lost due to a price increase. The verdict of Economist Inc. senior economist Lona Fowdur, is less enthusiastic: Despite its theoretical elegance, GUPPI provides an incomplete estimate of unilateral incentives because it disregards other factors that influence a company’s...
product pricing decision, such as repositioning by non-merging companies, new market entrants and changes in demand. Furthermore, GUPPI cannot be employed to quantify the extent of post-merger pricing changes, instead merely indicating the change in the merged companies’ incentives to raise prices relative to pre-merger prices. That is why, given the limitations of a GUPPI's analysis, the 2010 guidelines specify that the enforcement agencies may complement GUPPI with other evaluative tools, including merger simulation techniques and any other relevant qualitative or quantitative evidence to determine the extent to which unilateral effects would result in reduced competition.

James Keyte acknowledges the new tools’ sophisticated simplicity. A confessed technology Luddite, he is more concerned with the results produced by these tools than about how those results are generated. Like other antitrust attorneys, he is worried that the tools invariably tend to show an effect that, however inadvertently, can create problems for pro-competitive mergers. The reason: When a company merges with any substantial competitor, the government’s model will show that there will be a negative effect because a direct competitor has been eliminated. In Keyte’s opinion there is a battle currently underway pitting those who trust the results generated by new evaluative tools against those who place greater stock in understanding the qualitative evidence of the likely marketwide impact of a merger that acknowledges, among other things, customer negotiating power and the likely reactions of current or additional industry players in response to any sustained attempts at anticipative behavior, post-merger. Relying on modeling that de-emphasizes market definition and market dynamics in favor of other factors that may be less relevant amounts to a denial of existing case law grounded in real-world competitive decision-making. Fortunately, Keyte adds, courts occasionally eschew some simulator generated results and instead have reverted to the more traditional benchmarks. In the 2011 case in which the government was successful in blocking the H&R Block/Tax ACT merger (and, more recently, the BazaarVoice/PowerReviews merger), the judge’s decision...
was based not on modeling feedback but instead on the court’s study of the merger parties’ internal documents.

Nevertheless, Keyte anticipates that an increasing number of court decisions may be impacted by simulation results. His advice to dealmakers: be aware of how results gleaned from modeling results may be used and prepare appropriate responses. He confidently anticipates that many decisions will continue to be based on market definition and structure as well as the quality of documents. In the final analysis, he remarks, “If a company has high market shares, a well-defined antitrust market and documents that suggest the proposed merger will lead to higher prices and reduced innovation, the merger will have problems because in that circumstance the law allows the government a presumption of anti-competitive effects.” The H&R Block case in particular, he notes, appears to make it more difficult for defendants to rebut those presumptions. He does not discount the indicative significance of UPP, but UPP results should simply alert the agencies about where else to focus in addition to pricing pressure. In court, he hopes old-fashioned qualitative analysis will retain its prominence in the eyes of judges who rule on merger challenges.

### Part IV. Size Doesn’t Matter: Middle Market M&A and Antitrust

#### A: Middle Market M&A Deals Won’t Escape Scrutiny

“The Division’s preliminary investigation in Bazaarvoice’s consummated acquisition of PowerReviews was opened after a Division attorney read about the deal in a trade publication.” - Leslie Overton, Deputy Assistant Attorney General, Antitrust Division.

When it comes to antitrust enforcement, middle market M&A transactions are not exempt from scrutiny. “Size doesn’t matter,” declares James Keyte, though he acknowledges that big, high-profile deals invite more attention. “When the agencies see an antitrust issue, almost no market is too small.” If the government finds a set of consumers that are distinct and may, in the agencies’ view, be harmed by a transaction, the agencies have the power to hold up those deals, even if a challenge involves only a small part of a much larger deal.” Such challenges, he adds, often result in consent arrangements or other agreements that are aimed at resolving the challenge.
“There are many ways to structure a deal so that all necessary information is seen but in a way that does not raise antitrust concerns.” – Alan Rutenberg

By law, M&A transactions under the $75.9 million threshold are classified as non-reportable to the DOJ and FTC, but that does not mean that non-reportable deals are exempt from agency eyeballs. “Merger parties should not assume that because a deal is too small to be reportable that antitrust constraints do not apply,” warns Alan Rutenberg. This was confirmed in April 2014 when, in a speech, Deputy Assistant Attorney General Leslie Overton highlighted the significance of non-reportable merger enforcement. According to Overton, between 2009 and 2013, the Antitrust Division initiated 73 preliminary inquiries into transactions that were not reportable under the Hart-Scott-Rodino Act, the 1976 legislation that amended U.S. anti-trust laws. During the same four-year period, non-reportable investigations represented close to 20% of all merger investigations of the Antitrust Division. More than one in four of the Division’s investigations into these non-reportable deals resulted in a challenge. The FTC statistics are similar. Between March 2009 and March 2012, about one-fifth of all FTC merger challenges consisted of consummated transactions. The good news for middle market dealmakers is that the vast majority of non-reportable transactions do not result in antitrust investigations. Nevertheless, it is clear from the statistics cited by Overton in her speech that non-reportable merger enforcement represents not just a trend, but a new normal in merger enforcement.

According to Overton, DOJ Antitrust Division enforcement officials learn about non-reportable deals in several ways. Agency lawyers and economists closely monitor developments, including non-reportable deals, in their assigned areas of responsibility. For example, Overton revealed, “The Division’s preliminary investigation into Bazaarvoice’s consummated acquisition of PowerReviews was opened after a Division attorney read about the deal in a trade publication.” She also acknowledged that the Division learns about non-reportable transactions directly from marketplace participants. “For example, the Division opened its investigation into Heraeus’s acquisition of Minco after steel producers approached the Division to express their concern that the deal would harm competition.” Sometimes, she continued, “We learn about non-reportable transactions that raise competitive questions from the merging parties themselves.”
Anatomy of the Merger Review Process

All are litigators, courtroom warriors whose battlegrounds are the two U.S. antitrust enforcement agencies: the Department of Justice (DOJ) and the Federal Trade Commission (FTC). Two of the litigators have fought on both sides at different stages of their legal careers, currently for corporate clients but earlier on behalf of one or both of the enforcement agencies. Each has his war stories.

James Keyte’s law firm, Skadden, Arps, Slate Meagher & Flom – Skadden, or Skadden Arps, for short – recently represented creditors during the American Airlines/US Airways merger. He was intimately involved in assessing the antitrust risk and, if necessary, potential solutions, because creditors owned a majority of American Airlines in bankruptcy. In addition to the usual concerns in airline mergers, pricing practices were a significant issue, says Keyte, a partner in Skadden’s antitrust and competition practice. “Based on the government’s earlier challenge to the H&R Block/Tax Act merger, which hinged in part on the merger allegedly removing a maverick pricer, there was a risk that the government would focus on the possible elimination of US Airways’ pricing programs.” Yet there were good reasons, in terms of complementary networks and consumer value, for the deal to go through. “We believed that some form of a fix could resolve most of the government’s concerns—for enough slot consolidation at DCA was front and center—that all other potential problems were manageable and, perhaps most important, that fully litigating the matter in federal court would be very risky for the government.” The transaction, he adds, was one of the rare cases where politics may actually have mattered, thanks to strong union support for the deal. In the end, the deal went forward. The combined company emerged from bankruptcy—and the creditors were fully repaid, with interest.

“We are often confronted by deals that raise significant antitrust issues,” says David Wales, who leads the Jones Day global antitrust practice. Jones Day represented American Airlines in its successful merger with US Airways last year and is currently involved in some of the highest profile mergers, including AT&T/DirecTV, Sprint/T-Mobile and Reynolds American/Lorillard. Wales, who has the unique experience of serving in senior positions at both the DOJ and FTC, proffers some advice for other antitrust attorneys with less experience: Do not take a passive approach with the antitrust authorities. “Be proactive and strategic in every step of the process,” he declares. “Be mindful of the evidence you provide. Be aware of when to offer a fix. Make sure the agencies are put to their proof, because this is an adversarial process, not a popularity contest. Let them know that if they are going to challenge your deal you are willing to fight them in court, if necessary.”
B: The Risk of Non-Reportable M&A Transactions

“The risk of some non-reportable deals can be real and substantial.” – Alan Rutenberg, Chair, National Antitrust Practice, Foley & Lardner LLP.

Traditionally, the federal antitrust enforcement agencies pay closer attention to strategic transactions than to financial deals. Anecdotal evidence points to an increase in strategic mergers in the wake of the economic trough of 2008-09. The reason for intensified scrutiny of strategic deals: They are often significant high synergies but also typically involve companies in the same industry and, due to industry structure, the size of the merger parties and other industry dynamics, may therefore invite some degree of enforcement scrutiny.

Despite its rhetoric, the Obama administration’s scrutiny of reportable and non-reportable transactions does not appear to Alan Rutenberg to represent a marked departure from the Bush administration. “For most cases, the same antitrust principles have applied and the fact-specific nature of merger reviews continues to apply.” Even the apparently invigorated scrutiny, investigation and challenge of non-reportable strategic deals, cited by Leslie Overton in her April remarks, represents a slightly amped continuation of a trend that emerged during the Bush administration. Additionally, the uptick in challenges to non-reportable transactions may be another consequence of the agencies’ increasing investment in litigation resources and their aggressive deployment in challenges that appear to be winnable.

C: Involve Antitrust Counsel Early

“There is nothing more terrifying for a seller than a blown deal because the seller is then perceived as damaged goods.” – Mark Gidley, Chair, Global Antitrust and Competition Practice, White & Case.

Deals can be torpedoed for many reasons, including antitrust challenges. Successful antitrust challenges by the government are dreaded by merger parties big and small, but the threat to middle market merger parties may be more pronounced due to the expenditure of time and resources required to cope with an agency challenge, especially a challenge that results in litigation. Whether a transaction is reportable or non-reportable, arranging the involvement of an antitrust attorney can be an effective preventive remedy.
There are several areas in which early engagement of antitrust counsel can be helpful. For instance, antitrust attorneys can provide effective guidance to the parties on careful document creation, thereby avoiding the unintended courtroom consequences of poorly prepared documents should a merger challenge result in litigation. Explains Alan Rutenberg, “The objective is to avoid making inaccurate or exaggerated statements that can be misinterpreted by enforcement authorities.” Several recent cases have pivoted in the government’s favor due to such misinterpretations. Early engagement of an antitrust counsel can also help provide guidance on deal structure and on information sharing. “There are many ways to structure any necessary information exchange for due diligence so that all necessary information is seen but in a way that reduces antitrust concerns, such as by using a ‘clean team’.” Rutenberg says. This can be important because information sharing during the deal execution process can become a concern to antitrust investigators later on and can create an unwanted sideshow as part of a merger investigation. Rutenberg tells dealmakers, “When an agency reviewing your transaction documents sees that the parties may have shared information inappropriately or in a way that was not carefully structured, delay and distraction can ensue in addition to potential legal risk.”

The contracting process is another area in which antitrust counsel can provide needed support in formulating the content of a purchase agreement, including efforts clauses, assumption of risk, risk disclaimers, termination abilities and a drop-dead date. In a transaction where the potential for antitrust scrutiny exists, the issue of risk allocation can be key. Buyers and sellers may differ on what constitutes an optimal provision, which can be addressed via a hell-of-high-water clause in which the buyer pledges to take all necessary actions to ensure deal completion. On the other side of the equation, buyers often demand provisions in an agreement exempting them from requirements to agree to any divestiture, remedy or restriction on freedom of action in order to get a deal done.

In this era of more intense antitrust enforcement, dealmakers, including middle market dealmakers, are faced with antitrust consideration beyond merger enforcement. For instance, in buying a company buyers may also be purchasing antitrust risk that has nothing to do with the merging parties. In other words, a buyer may be acquiring a party that is already subject to antitrust scrutiny or to an investigation on conduct grounds. The remedy, according to Rutenberg: In addition to trying to seek contractual protection in
the deal agreement, buyers should consider conducting due diligence to obtain a better sense of the antitrust risk they may be assuming by proceeding.

To a man, all the contributors to this chapter urge pre-signing front-end analysis of deal completion and timing risks. According to David Wales, that is often easier said than done, especially if a target prefers not to provide the level of access sought by the buyer. “However, we have been very successful in cases where the seller demands significant deal protection, but to get the level of protection sought, the seller must give us full access to its documents and business people so that the buyer can then formulate an independent assessment of the antitrust risk.” He has found that sellers prefer to front-load the antitrust risk, while buyers opt to back-load it. Targets with sophisticated antitrust counsel, he says, often insist on deal protection if is warranted. Less sophisticated targets will often demand a hell-or-high-water clause without explaining the reason for their demand. But the best target counsels, he points out, back up that request with evidence and explain why they believe there are antitrust risks. What neither side wants is a dispute about the facts. The best course, Wales says, is to develop a joint understanding of the facts on both sides. Then the parties can independently assess the antitrust risks and decide what level of deal protection to which they are willing to agree.

Despite the uncertainties afflicting dealmakers under the new merger guidelines, dealmakers, including middle market dealmakers, appear to be taking on the additional risk. “Maybe the market has calmed down and other risk variables have improved when it comes to dealmakers determining whether they want to proceed with a transaction,” Wales muses. As an antitrust counselor, he says, his responsibility is to provide those middle market dealmakers with as much guidance as possible in terms of assessing the deal completion risk and timing risk to enable them to make a fully informed front-end decision as to whether or not proceeding with a transaction is a worthwhile endeavor.

If a merger lands in litigation, James Keyte says, that the rigors of front-end analysis and careful documentation can pay off. “Typically, the agencies retreat when they realize they can’t win a case,” he declares. Often, the government reaches that conclusion early in a case. “Sometimes the market definition will cut one way and you then have to demonstrate to the government that the market definition is too narrow and creates an artificially post-merger high market share.” If that persuasion tactic is successful, Keyte says, “the government will go away when it realizes that consumers are not at risk.”
Part V: Antitrust Goes Global

A: Antitrust Regimes Proliferate Worldwide

“We publish a worldwide merger survey in which we canvas all the jurisdictions outside the U.S. When we began the survey in the mid-90s we canvassed 40 jurisdictions. Today we canvass 190, 140 of which have merger control regimes.”
– Mark Gidley, Global Antitrust Practice of White & Case.

Merger control regimes multiply exponentially across the globe, keeping pace with proliferating global mergers. The bad news is that merger control regime standards may vary somewhat from jurisdiction to jurisdiction. The good news, though, is that standards harmonization has increased among the world’s major jurisdictions to the point where there are no substantial differences between deals on substance. Although there are occasional outlier cases in which one agency arrives at conclusion that differs from another agency, substantial divergence of outcomes is increasingly rare. Yet some differences continue to exist. For example, although the standards of the European Union do not differ radically from those of the U.S. antitrust enforcement agencies, the EU tends to give the views of competitors than do the U.S. authorities. The EU also devotes more attention to non-horizontal mergers than its U.S. counterparts.

There are also jurisdictional differences not only in substance but in process and timing. For instance, the traditional U.S. waiting period for a non-problematic transaction is 30 days. Parties in global deals, however, must calculate how the difference between U.S. and non-U.S. jurisdiction may impact deal process and timing, as they often do. In China, which is becoming an increasingly important merger control regime because of the huge commitment of U.S. and other Western companies to its economy, filings that do not raise antitrust concerns can require waiting period of up to 4-5 months. Fortunately, China is moving to put in place a simplified filing process in an effort to align with norms in other industrialized jurisdictions. Differences in process also exist between jurisdictions. For example, the EU requires that its Form CO, the standard EU merger notification document, be filed first in draft form, followed by a pre-consultation process.
B: Coping with Global Jurisdictional Diversity

“Take a global view.” – Alan Rutenberg, Chair, National Antitrust Practice, Foley & Lardner LLP.

In order to help his clients understand and help avoid regulatory concerns in global deals, Alan Rutenberg advises them to take a global view early on in the transaction process. He explains that considering the cross-border implications of a transaction early in the process can be important both to understand the deal timing and substantive risks. When it comes to filings in multiple jurisdictions, he encourages a coordinated approach. While there may be a number of local counsel involved in preparing specific findings, the recommended practice is to have an antitrust attorney coordinate the global effort. While the facts matter, and often can vary from country to country, he adds that the coordinating antitrust counsel can play an important role in helping to develop a consistency of approach in areas such as market definition.

James Keyte recommends that the filing requirements and substantive and procedural frameworks of all jurisdictions involved in a global deal be understood at the outset. A strong management hand on the process is necessary early on, focusing on the nuts and bolts of multi-jurisdictional filing requirements, a complex chore in itself.

For Mark Gidley, whose law firm pioneered overseas expansion back in the 1980s, recourse to an outside courts system in non-U.S. jurisdictions is a vital factor in overseas mergers. Such a safety valve exists in the U.S. to handle disagreements with the government. A second factor is deal reporting, which differs by jurisdiction. Some jurisdictions have unwritten guidance requiring an office visit with the appropriate authorities to explain a transaction in advance of a filing, standard practice in the EU. However, Japan, Korea and other non-EU jurisdictions require a multiplicity of filings. The entire overseas deal process must be closely harmonized in global deals, Gidley says. Regardless of the jurisdiction, the goal is always the same: to close the deal without violating the law.

Step one, according to David Wales, is to quickly determine which jurisdictions will be reviewing a deal. The reality of global dealmaking, he points out, is that most non-U.S. jurisdictions maintain enforcement stances that are more aggressive than the two U.S. antitrust enforcement agencies. He cites the European Commission, Germany, China, Australia, South Korea, Brazil and India as some of the aggressive enforcers. The good news is that the U.S.
authorities typically set the pace in global deals, especially if the European Commission, the EU’s executive committee, is not involved. Some countries, he explains, are resource-constrained and will piggyback on the U.S. enforcement authorities. Usually the strategy for global dealmakers is to obtain U.S. approval first. Nevertheless, he cautions, “You can’t ignore the standards of other countries, especially if there are antitrust issues that are unique to a country involved in a deal, because not every deal has global markets.”

Despite its sophistication, the European Commission has been the source of many dealmaker headaches through the years, Gidley says. The EC is usually more aggressive in its enforcement decisions and strategies than its U.S. counterparts, a major difference between the two jurisdictions that Gidley expects will continue. Unlike in the U.S., where merger parties and the government can resort to the court system for a hearing, the EC “can proclaim your merger blocked, with no meaningful, timely court review.” Failure to convince EC regulators of a transaction's merits, he says, will almost certainly result in a dead deal.

Despite the controversy swirling around the question of the Obama administration’s perceived enforcement activism and the potential of a murky enforcement future thanks to the likely acceleration of computerized merger evaluation tools, the U.S., compared to jurisdictions elsewhere, remains the light of the antitrust enforcement world.

**Conclusion**

Do political agendas have an impact on antitrust enforcement? Yes, as they always have going back to the days of Teddy Roosevelt’s White House. Will the current trend favoring technology-driven evaluative simulation at the expense of more traditional merger benchmarks continue beyond the Obama era? Yes. Is a return to the aggressive enforcement of the 1970s likely? No. Will the evaluative tools of today and tomorrow inspire dealmakers and their counsel to test the limits of enforcement? Yes. And if the U.S. enforcement agencies wish to challenge a deal, they must still go before a federal court judge and convince him/her that a deal is uncompetitive, which will require the government to fit those traditional theories and rely on the evidence. For its part, the defense will rely increasingly on early, intense and thorough preparation and risk analysis in order to adapt to the enforcement conditions of a changing antitrust environment. After all, merger partners and their antitrust counsel do not wish to be associated with a transaction that is enjoined.
CONTRIBUTORS’ BIOGRAPHIES

**Alan D. Rutenberg** is Partner and Chair, Antitrust Practice, Foley & Lardner LLP in Washington, DC. His practice includes antitrust, commercial litigation and regulatory law. His clients include energy, insurance, financial services, automotive, consumer goods and media companies. He regularly represents clients before the U.S. Federal Trade Commission and the U.S. Department of Justice, Antitrust Division in mergers and acquisitions investigations. His experience has involved managing every phase of the investigation, including coordinating pre-merger notification filings, developing white papers and presentations for agency submission, responding to agency second requests and negotiating to address agency concerns, including consent decrees. He counsels clients on Hart-Scott-Rodino Act compliance and international pre-merger notification regimes. Mr. Rutenberg represents clients in criminal investigations undertaken by the DOJ Antitrust Division and in civil conduct investigations initiated by the antitrust divisions of the FTC and DOJ. In addition, he litigates matters, including class defense and antitrust issues, that arise in intellectual property litigation.

**David P. Wales** is Practice Leader, Global Antitrust and Competition, Jones Day in Washington, DC. He represents clients in all aspects of antitrust, including mergers and acquisitions. He has served as a senior official in both U.S. antitrust agencies. From 2001 to 2003 he was counsel to the assistant attorney general in the U.S. Department of Justice’s Antitrust Division, overseeing all antitrust matters before the agency, including the landmark U.S. v Microsoft case as well as the DIRECTV/Echostar merger and Northrop Grumman’s acquisition of TRW. From 2008 until 2009 he oversaw all of the U.S. Federal Trade Commission’s antitrust enforcement as acting director of the Bureau of Competition. Cases handled during his tenure included Whole Foods’ acquisition of Wild Oats, CCC’s acquisition of Mitchell and Inova’s acquisition of Prince William Hospital. Mr. Wales has testified on antitrust issues before the U.S. Congress and the Antitrust Modernization Committee.

**J. Mark Gidley** is Chair, Antitrust/Competition Practice, White & Case in Washington, DC. His practice focuses on mergers and acquisitions as well as cartel cases, frequently with a transnational focus. He served in several antitrust capacities at the U.S. Department of Justice during the Administration of President George H.W. Bush. From 1990 to 1991, Mr. Gidley served as Associate Attorney General. In 1991-92 he was Deputy Assistant Attorney General for Regulated Industries. In 1992-93 he was the Acting Attorney of the Antitrust Division, with responsibility for all civil, criminal and merger matters. During his DOJ tenure he worked on Bank of America’s acquisition of Security Pacific National Bank, He brought the successful lawsuit against major U.S. domestic air carriers for alleged price-fixing and supervised the government grand jury investigation of the Treasury bond auction market, which resulted in a $28 million asset forfeiture action against Salomon Brothers, then the largest antitrust penalty for cartel activity in the Division’s history.
James A. Keyte is Partner, Antitrust and Competition, Skadden, Arps, Slate, Meagher & Flom LLP in New York. He provides general antitrust counseling to clients on compliance with basic antitrust statutes, including issues related to competitor collaborations, unilateral conduct and distribution as well as on intellectual property matters with antitrust implications. As a litigator, Mr. Keyte has handled numerous cases involving alleged price-fixing, monopolization, litigated mergers and other restraints of trade and class actions. In the transactional area, Mr. Keyte has represented numerous clients before the Department of Justice and Federal Trade Commission as well as parties involved in litigated mergers. He currently represents the Unsecured Creditors Committee of American Airlines with respect to its proposed merger with US Airways. He represented Anheuser-Busch in its merger with Modelo, Sprint in its challenge to the unconsummated AT&A/T-Mobile merger, Toshiba in its acquisition of Westinghouse's nuclear division and Alcatel in its acquisition of Lucent Technologies.
# APPENDIX I

<table>
<thead>
<tr>
<th>Industry</th>
<th>Market Share Concentration Among Top 4 Companies (%)</th>
<th>Regulation Trends</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chocolate Production</td>
<td>69.5</td>
<td>Medium and steady</td>
</tr>
<tr>
<td>Breweries</td>
<td>79.9</td>
<td>Heavy and steady</td>
</tr>
<tr>
<td>Wireless Telecommunications Carriers</td>
<td>94.7</td>
<td>Medium and increasing</td>
</tr>
<tr>
<td>Soda Production</td>
<td>76.9</td>
<td>Medium and increasing</td>
</tr>
<tr>
<td>Audio and Video Equipment</td>
<td>87.3</td>
<td>Medium and steady</td>
</tr>
<tr>
<td>Manufacturing</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cable Providers</td>
<td>90.2</td>
<td>Heavy and decreasing</td>
</tr>
<tr>
<td>Domestic Airlines</td>
<td>54.9</td>
<td>Medium and steady</td>
</tr>
<tr>
<td>Pharmacies and Drug Stores</td>
<td>67.3</td>
<td>Medium and increasing</td>
</tr>
<tr>
<td>Major Household Appliance</td>
<td>91.8</td>
<td>Medium and increasing</td>
</tr>
<tr>
<td>Manufacturing</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hobby and Toy Stores</td>
<td>81.9</td>
<td>Medium and steady</td>
</tr>
</tbody>
</table>

Source: www.ibisworld.com
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