

MAYER • BROWN

Government & Global Trade Post-Inauguration Webinar Series

The New Administration's Impact on Antitrust Law

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Agenda

- Introduction – Reinvigoration Is Watchword
- The Legislative Agenda – An Active Docket
- The Enforcement Agenda – Strong Words
- The Supreme Court – Judge Sotomayor’s Impact
- How to Prepare for the New Order – and Limit Risks

Introduction: Reinvigoration Is the Watchword The Bush to Obama Transition

- Antitrust Had Been Less Political in Bush I and Clinton – and Bush II's FTC
- However, the 2008 Election Was Very Different
 - Obama Antitrust Speech and Position Papers
 - Obama Antitrust Fundraiser

Antitrust Enforcement – The Bush to Obama Transition

- Why?
 - Bush Record at DOJ Was Considered Weak
 - No Monopolization Cases
 - Very Few Merger Cases
 - Good Cartel Enforcement, but . . .
 - Obama Pledged to “Reinvigorate”
 - Congress Was Quiet, Except to Increase Penalties
 - Courts Pulled Back, Primarily in Section 2

The Legislative Agenda – An Active Docket

The Impact of a Significant Majority

- Reinvigoration Extends to Congress?
 - Leegin Repeal – Return Minimum Resale Price Maintenance to Per Se Illegality
 - Hatch-Waxman Patent Settlement Legislation
 - Railroad Deregulation
 - McCarran – Ferguson Repeal
 - Insurance Exemption
 - Leniency Single Damages Legislation
 - Sunsets in June

The Enforcement Agenda

– Strong Words, Big Ideas

- Who Will Reinvigorate at DOJ?
 - Christine Varney, Assistant Attorney General
 - Molly S. Boast, DAAG for Civil Matters
 - William Cavanaugh, Jr., DAAG for Civil Matters
 - Carl Shapiro, DAAG for Economic Policy
 - Philip J. Weiser, DAAG for International, Policy and Appellate
 - Scott D. Hammond, DAAG for Criminal Enforcement
 - Sharis Pozen, Chief of Staff
 - Gene Kimmelman, Chief Counsel for Competition Policy and Intergovernmental Relations
 - The Career Staff

The Enforcement Agenda

– Strong Words, Big Ideas

- Who Will Reinvigorate at the FTC?
 - Jon Leibowitz, Chairman
 - Richard Feinstein, Director, Bureau of Competition
 - Joseph Farrell, Director, Bureau of Economics
 - Susan DeSanti, Director, Policy Planning
 - Willard K. Tom, General Counsel
 - The Career Staff

The Enforcement Agenda

– Strong Words, Big Ideas

- How Will They Reinvigorate?
 - Varney “Inaugural Addresses”
 - Weak Economy Requires Robust Antitrust Enforcement
 - Invoking Thurman Arnold
 - Sea Change in Section Two Enforcement
 - New Approach to Cartel Detection
 - Strong Words on Merger Enforcement
 - Shapiro’s Economic Analysis of the Road Ahead

The Enforcement Agenda

– Strong Words, Big Ideas

- Weak Economy Requires Robust Antitrust Enforcement
 - A History Lesson
 - Thurman Arnold's Legacy
 - Greater Temptation to Violate Laws

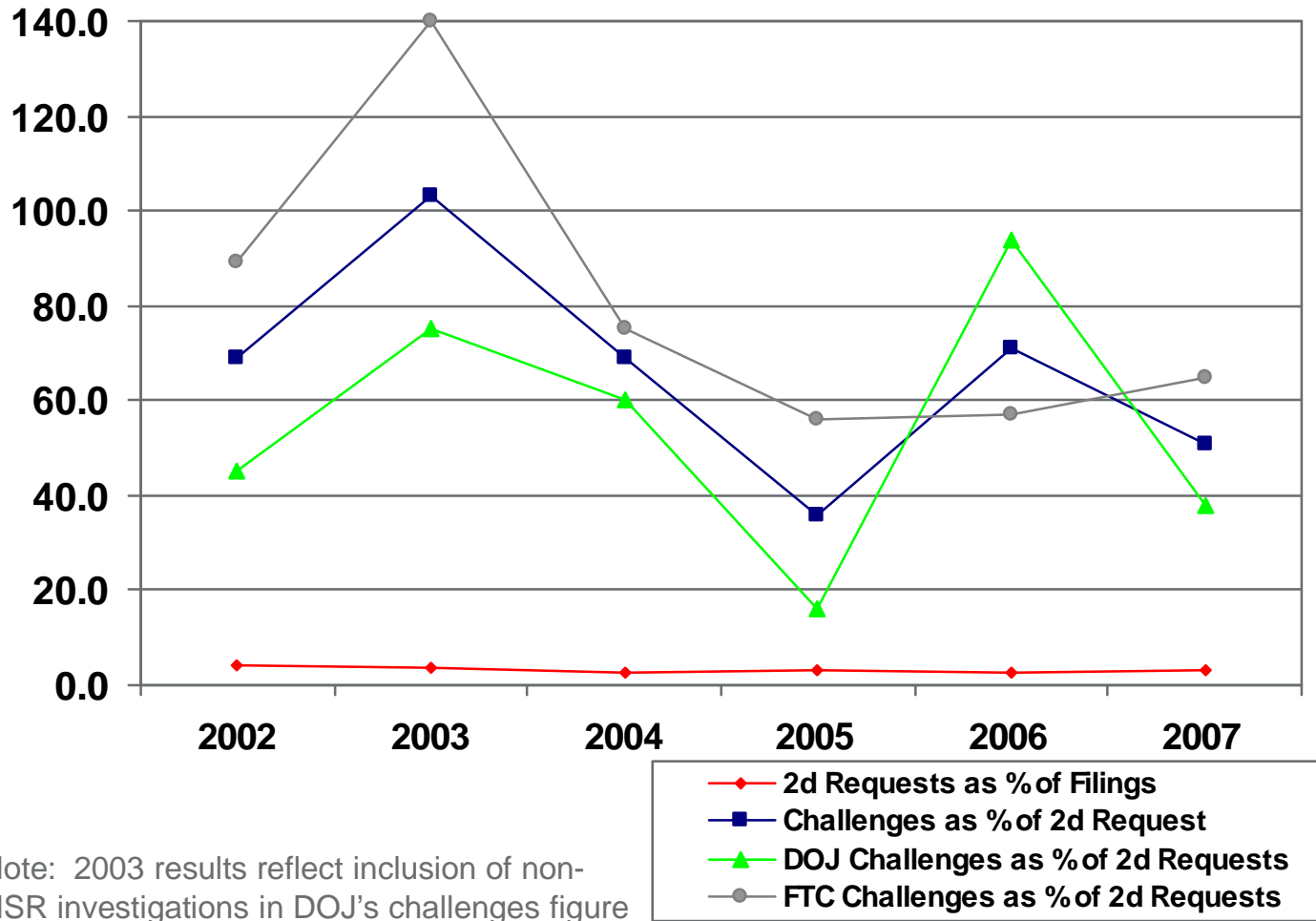
The Enforcement Agenda

– Strong Words, Big Ideas

- Stronger Words on Merger Enforcement
 - High Tech Interest – Varney and Shapiro
 - Division Will Explore Vertical Issues
 - A Varney focus at FTC
 - Warning: The Bad State of the Economy Is Not a Defense
 - Don't Let Companies Get “Too Big to Fail”

US Agency Merger Activity 2002-07

Second Requests and Challenges by Fiscal Year, Oct. 1 – Sept. 30



This Follows Very Sparse DOJ Record:

- Since *U.S. v. Oracle* in 2004, only two:
 - *U.S. v. Microsemi Corp.*, No. 1:08 CV 1311 (C.D. Cal., filed Dec. 18, 2008)
 - Military and aerospace transistors and diodes
 - Deal consummated in July 2008; not HSR-reportable
 - Filed in E.D. Va.; transferred to C.D. Cal.
 - *U.S. v. Daily Gazette Co.*, No. 2:07-cv-0329 (S.D. W. Va., filed May 22, 2007)
 - Involved Daily Gazette's consummated acquisition of its only competitor
 - Papers already were operating under a joint operating agreement
 - Depositions underway (each side allowed 25); trial in November at earliest

By Contrast, FTC's Merger Actions Are More Plentiful

- *Chicago Bridge & Iron*, Docket No. 9300
 - FTC decision blocking deal affirmed by 5th Cir.
- *Evanston Northwestern Healthcare Corp.*, Docket No. 9315
 - Post-merger challenge; FTC rejected divestiture as remedy – “may reduce or eliminate the resulting benefits for a material period of time.”
 - Remedy: separate negotiating teams to deal with managed-care organizations
- *Equitable Resources, Inc.*, Docket No. 9322
 - Acquisition of Peoples Natural Gas from Dominion Resources abandoned while appeal from dismissal of PI action was pending
 - FTC dismissed complaint after 10th Cir. affirmed denial of PI
- *Inova Health System Foundation*, Docket No. 9326
 - Transaction abandoned after PI granted

By Contrast, FTC's Merger Actions Are More Plentiful

- *Whole Foods Markets, Inc.*, Docket No. 9324
 - Resolved by Consent Order
 - FTC win on preliminary injunction
 - though precedential value unclear
- *FTC v. Ovation Pharmaceuticals*, Civ. No. 08-6379 (D. Minn., filed Dec. 16, 2008)
 - Consummated 2-to-1 acquisition; two Commissioners would have challenged earlier deal that did not reduce number of competitors
 - Same commissioners would have sought disgorgement
 - Set for trial in September

The Enforcement Agenda – Strong Words, Big Ideas

- Antitrust/Intellectual Property Enforcement
 - Hatch-Waxman Patent Settlements
 - FTC Active Cases and Litigation
 - Legislative “fix” pending
 - Rambus – Back to the Drawing Board?
 - Varney and Shapiro/Leibowitz and Farrell Heavily Focused on Tech Sector

The Enforcement Agenda

– Strong Words, Big Ideas

- Sea Change in Section 2 Enforcement
 - * DOJ “Report” Withdrawn
 - “Should not be used as guidance”
 - New approach will be policy
 - Reliance on Three Seminal Cases
 - *Lorain Journal*
 - *Aspen Skiing*
 - *Microsoft*

The Enforcement Agenda

– Strong Words, Big Ideas

- New Approach to Cartel Enforcement
- Continue Enforcement Successes
 - Over \$1 billion in fines this year
- Initiate Government Procurement “Recovery”
 - Cartel Profiling
 - Response to Stimulus Package
- No Decline in Enforcement Efforts in Downturn – It is the Time to Investigate

The Enforcement Agenda

– Strong Words, Big Ideas

- International Cooperation and Coordination
 - No More Policy Fights in Public
 - More Attention to Collaborative Investigation
 - Does This Signal True Convergence – a U.S. Intel Case?
 - What Do We Expect?

The Supreme Court

– Judge Sotomayor's Impact

- Judge Sotomayor Has Limited Antitrust Record
 - Visa/Mastercard Class Certification
 - NFL Exemption
 - General View of Business Litigation
- Reflects Philosophy Similar to Justice Souter's?

How Do You Prepare for the New Order – and Limit Risk?

- Review and Revise Compliance Program
 - Expect More Vigorous Section 2 Enforcement
 - Expect Tougher Merger Review
 - New Guidelines?
 - Expect More Vigorous and Stepped-Up Cartel Enforcement
 - Cartel Profiling?
 - Expect Technology Industry Focus
 - Expect Multijurisdictional Coordinated Investigations
 - Not Just Cartel Cases

Compliance: This Is the Time to Rethink Policies – and Communicate Them to Executives

- Let Executives Know There Is no Tolerance for Antitrust Misconduct
- Offer Executives “Leniency” Within the Company to Root out Antitrust Problems
- Conduct Compliance Mini-Audits to Drive Home Seriousness of the Effort

Compliance: The Best Training

- Train Senior Executives Separately and Intensively
 - Practical Issues
 - Subtle Meanings
- Words Matter: Review the Language Executives Use
- Teach Executives What to Expect in an Antitrust Investigation
 - Raids
 - Drop-by Visits

Compliance: The Best Training

- Train The Procurement Staff
 - Protect The Company From Being A Victim
 - Apply DOJ “Recovery” Initiative to Save The Company from Fraud and Abuse