ANTITRUST

NEW WIND BLOWS IN AN OLD WIND

It appears increasingly likely that the Trump administration will take a traditional Republican approach to antitrust issues: tough on crime, friendly on mergers. But a de-emphasis on federal enforcement could create openings for states and international jurisdictions to become more aggressive.

A shift to a merger-friendly stance would be a significant change versus the immediate past. "The Obama years could be considered the high-water mark in terms of antitrust enforcement," says Ryan Tisch, a partner in Crowell & Moring's Antitrust Group.

"This was true as represented by several metrics, beginning with staffing," Tisch elaborates. "Both the DOJ and the FTC added significant resources, notably trial lawyers, who were much more willing to litigate—and possibly lose—tough cases. As a result, enforcement was especially aggressive: the DOJ and the FTC blocked more than 40 mergers during Obama's time in office. And they weren't shy about using cutting-edge legal theories to make their cases."

A KINDER, GENTLER ANTITRUST REGIME

But it's a new day, with a new sheriff in town who is decidedly pro-business and strongly believes that the marketplace should be the final arbiter of whether companies succeed or fail. The nomination in March of Makan Delrahim as assistant attorney general of antitrust underscores that these tenets will likely form the foundation of antitrust policy going forward. [Note: At press time, Delrahim's confirmation by the Senate was widely expected, but hadn't yet occurred.]

Joe Miller, a partner in Crowell & Moring's Antitrust and Health Care groups and former assistant chief of the DOJ's Antitrust Division's Litigation 1 Section, says, "Delrahim would set the tone for antitrust enforcement. He's been a high-level antitrust lawyer in the George W. Bush administration as well as an M&A lawyer and understands how Washington works. Given his background, it's reasonable to expect him to approach the job with a traditional enforcement perspective."

That perspective rests on two fundamental presumptions: Mergers typically are beneficial to society because they create efficiencies in areas like pricing and distribution that work in favor of consumers. And classic laissez-faire: businesses should be allowed to duke it out in competition via mergers and other strategies because, ultimately, the marketplace will sort out who the winners and losers are.

For the DOJ and the FTC, this signals a return to merger analysis that rigorously focuses on economics and efficiencies. If a deal looks like it makes economic sense and will generate efficiencies, then it's more likely to be approved.

As demonstrated by the markets, the financial community appears to expect a more merger-friendly approach. Merger arbitrage spreads—the difference between the actual stock price of a company involved in a pending merger and the presumably higher stock price at which the deal should take place—have narrowed. This indicates that investors are confident not only that deals will stand up to regulatory scrutiny, but also that deals will close at their announced prices.

THINGS TO THINK ABOUT

What should companies be thinking about if they're considering merging or acquiring? Tisch has several suggestions:

- Expect economic analysis to figure prominently in regulators' analyses.
- Think hard about the economic and competitive implications of your deal before setting plans in motion.
- Prepare to advocate for your deal under the assump-

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tion that the new regime will listen to pro-competition deal stories—and that those stories will best be told via sophisticated economic analysis, customer reactions, and contemporaneous company documents.

WILD CARDS

Even if Delrahim is approved as the new DOJ antitrust head and the Republican view becomes standard policy, there are a couple of wild-card scenarios that could potentially reduce enforcement visibility into at least mid-2017.

One is the simple fact that the FTC doesn't have its full set of commissioners. Currently, there's only a Republican acting chairman and one Democratic commissioner, meaning that three seats—two Republican and one Democrat—are unfilled. "This could end up being a regulatory black hole," says Miller. "The administration isn't hurrying to fill these openings, and its plans aren't clear. Proposed deals could languish as businesses decide whether to move forward in light of the regulatory uncertainty. If your deal is a close call, you want to know who fills those seats before you sign a definitive agreement."

Another wild card is the possibility that the administration's agenda on issues such as trade and jobs could somehow find its way into the antitrust review process. While the influence of politics to this extent would be unprecedented, Tisch cautions that it shouldn't be ruled out. "Given the uncertainty surrounding so many policy areas, it's important to remember that there are multiple scenarios that could play out," he says. "But it's too soon to tell. We're eager to see what new leadership does and how it could affect antitrust decision making."

POWER VACUUM?

Federal regulation isn't the only game in town when it comes to antitrust. Depending on the nature of the transaction, there often are state-level hurdles to cross, and, in the case of big multinationals, non-U.S. jurisdictions come into play as well.

If the DOJ and the FTC end up taking an unequivocal hands-off approach, one consequence could be that the United States would cede some enforcement power to these other players. The question then becomes whether the other players would step up and try to fill the vacuum.

"There could easily be an uptick in state-level activity if federal enforcement recedes. This is something that companies should take very seriously," Miller says. "While many states don't allocate much in the way of resources to antitrust, some states do, and they can be quite aggressive. New York and California are good examples. Also, some deals can be very locally focused, such as hospital mergers. States definitely want to have a bigger say in what happens in their own backyards."

Miller adds that Crowell & Moring is monitoring state enforcement agencies more closely and keeping clients informed of potential changes in their degree and range of oversight.

As for deals with an international element, regulators outside the U.S. have become a greater presence in the past few years and continue to flex their muscles. They've also been coordinating their activities more closely than in the past.

Tisch warns that any perceived laxity in federal regulation could have adverse consequences for the United States. "The U.S. has long been the global leader when it comes to antitrust enforcement, and until now, many other countries have taken their cues from what we do or don't do," he says. "If we give other jurisdictions reason to believe that we're loosening up, they may feel compelled to become tougher on deals than they already are. Companies should place greater importance on addressing the concerns of non-U.S. regulators, as well as to develop a unified deal narrative that could resonate with regulators in multiple nations."

KEY POINTS

Back to the future

Antitrust enforcement policy will likely return to a traditional pro-competition stance.

Economics and efficiencies will be key

Regulatory analysis—and any deal's chances of approval—will focus on economics and efficiencies.

Seize the day

Less federal enforcement could mean more from states and other countries.