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ANTITRUST TRADE AND PRACTICE

Expert Analysis

# Dancing Without a Partner: ABA Antitrust Section's Advice to the New Administration

By **Shepard Goldfein**

And **James Keyte**

Throughout the 2016 campaign, the major presidential candidates prominently featured their viewpoints on antitrust enforcement, so much so that they drew commentary from former Federal Trade Commission chairman Bill Kovacic in January 2016.[1] By the time President Donald Trump was inaugurated a year later, professional and business communities had spilled a lot of ink over Trump's target campaign statements on antitrust, as well as the implications of choosing Josh Wright to lead the FTC transition team. Now, the Section of Antitrust Law of the ABA (the section) has issued a Presidential Transition Report that, perhaps more than ever before, may offer the best picture of where antitrust may move over the next four years or more.

### The Report

In form, the report is an attempt to educate the administration on the current state of antitrust as well as to suggest what the federal antitrust authorities (the agencies) may wish to focus on in the new administration. The section sought to represent a range of political, ideological and professional views, and in May 2016 the ABA assembled a task force of twenty lawyers, professors and economists with broad expertise to brainstorm their recommendations. It is possible the new administration will use the report's expert consensus as a framework for legislation to consider or judicial interpretations to seek that will shape the law in the coming years. At a minimum, the report offers practitioners and other interested observers a well-grounded perspective of antitrust challenges facing those in charge of the agencies going forward.

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The section directly references Trump's campaign statements that suggested the possibility of a "radical reorientation of enforcement policy."[2] Although policy changes are always expected to result from major shifts in agency leadership, this year's report seems particularly concerned with maintaining a level of continuity in the federal approach to antitrust enforcement.[3] However, despite the cautionary tone taken throughout the report, the section still makes several noteworthy recommendations that potentially could result in significant antitrust developments.

### The Recommendations

Most of the report is dedicated to identifying numerous antitrust issues that are ripe for guidance by one or both of the agencies, whether through published guidelines or more informal channels. Two areas of enforcement the report suggests focusing on are the analysis of "holdup" and "holdout" issues in patent-related agreements and vertical issues in the context of mergers. The section also requests guidance to supplement a series of recent cases on how to treat collective activity in the financial services industry (i.e., benchmarking commodity prices and interest rates).[4]

Rather than suggest a specific policy view that the new administration should take in these areas, the section primarily requests that the agencies increase transparency efforts and clarify current enforcement policies. In several instances, the report simply expresses support for the continuance

SHEPARD GOLDFEIN *and* JAMES KEYTE *are partners at Skadden, Arps, Slate, Meagher & Flom.* KYLE SNAPP, *a law clerk at the firm, assisted in the preparation of this column.*

of certain practices, including the challenge of health care mergers, scrutiny of standard development organizations (SDOs) and input provided on state antitrust laws. But, the report elicits more interesting observations when one looks at recommendations related to each agency.

***DOJ***

The report's recommendations to the Department of Justice primarily focus on cartel enforcement. Though the section commends the DOJ's enforcement efforts, it urges the department to reduce complexities in sentencing and fining processes for prosecutions by reexamining volume of commerce (VOC) determinations and coordinating with foreign enforcement agencies to ensure consistent treatment of these decisions. The section also advocates proactive cartel enforcement through expansive compliance programs and ramped-up identification efforts.

The report recommends the DOJ take specific actions in the financial services and health care industries. The DOJ is urged to use its authority to ensure the creation of new financial services markets remains open and accessible, perhaps by establishing rules limiting the conduct of market participants. In health care, the section encourages the DOJ to issue statements that expand on the relevant market theories pleaded in the recent high profile health insurance merger cases.[5]

Finally, the DOJ is advised to restore the position of the International Deputy Assistant Attorney General (DAAG), which was disbanded after the DOJ's realization that every DAAG office dealt with international matters. The report suggests that, rather than having the sole responsibility for international affairs, the office should primarily facilitate coordination between the agencies and foreign competition authorities.

***FTC***

Many of the recommendations directed at the FTC involve advocating changes to consumer protection laws to reduce the confusion created by overlapping jurisdictions of the FTC, the Consumer Protection Financial Bureau (CFPB) and the Federal Communications Commission (FCC). However, the report also offers several considerations for developing enforcement frameworks, most notably regarding the Commission's recent activity in health care.

First, the section encourages the FTC to continue to challenge and litigate physician mergers, even if the chance of success at trial is low. The section believes litigation can induce judicial opinions that resolve open questions concerning vertical integrations of hospitals and physicians or efficiencies achieved through contract rather than merger. The report suggests clear instructive guidance on the broader implications of recent results in *St. Lukes*,[6] *ProMedica Health System*[7] and *Penn State Hershey Medical Center*[8] and on the correct interpretation of the term "payment" in the 2013 *Actavis* case.[9] The FTC is advised to monitor and comment on regulatory or legislative actions that have the potential to circumvent the commission's authority (e.g., CON laws that approve challenged mergers or REMS restrictions imposed by the FDA).

> A third set of interesting recommendations encourage the agencies to show more leadership in advancing antitrust policies, even if this requires direct intervention in domestic or foreign proceedings.

The section also warns against imposing extra-jurisdictional remedies in patent litigation cases, as the FTC did in *Rambus*.[10] There, the commission issued a cease and desist order that applied to the company's enforcement of its patents everywhere in the world, an order that was ultimately overturned on appeal. The report makes clear the section's concern that such remedies may serve to add to comity problems when cross-border antitrust issues are approached differently in multiple jurisdictions.

***'Fresh' Perspectives***

Several recommendations suggested embracing procedural changes or specific stances on substantive issues that are likely to be met with more skepticism by the new administration but, if supported, could have significant implications for antitrust law in the United States. These proposals can be grouped into three categories: (1) recommendations for new legislation, (2) suggestions for implementing various practices—some found in other jurisdictions—for merits assessment and (3) instructions on asserting agency opinion in legal proceedings.

One significant highlight from the report is the section's direct support of the SMARTER Act, which the House passed in Spring 2016. This legislation would raise the FTC's standard for obtaining a preliminary injunction against a proposed merger and eliminate the commission's ability to pursue administrative adjudication when it seeks an injunction in court. The section also offers commentary that expressly criticizes heavy regulation of the financial services sector. Although specific laws aren't targeted, the report observes that compliance measures often impose high burdens on smaller financial firms and suggests that regulations should be evaluated to determine if they "needlessly distort competition."

The second group of recommendations propose innovative practices

to test possible new approaches to antitrust analysis. First, the report suggests using a working group to experiment with alternative modes of proceedings for civil enforcement and litigation. Based off so-called "hot tub" proceedings used in Australia, Canada and New Zealand, the proposed alternative trial structures would require experts to appear side-by-side in a debate-like setting or sequenced based on issue rather than party.

The section also proposes changes to merger enforcement, including a DOJ policy change to require upfront buyers in remedies that involve divestitures, a condition increasingly imposed by both agencies in recent years. The section also advocates for increased use of retrospective studies of mergers and patent combinations or disaggregations in order to evaluate the accuracy of market power and efficiency predictors.

A third set of interesting recommendations encourage the agencies to show more leadership in advancing antitrust policies, even if this requires direct intervention in domestic or foreign proceedings. The report advises the agencies to develop and communicate a unified global policy approach to antitrust, especially for the legal standards applied to IP rights. Although the agencies have traditionally taken a cooperative approach to international antitrust law, the section recommends a somewhat more interventionist approach when the agencies notice flawed foreign legislation that has the potential to adversely affect U.S. firms. When necessary, it is suggested that the agencies engage the Executive Branch to resolve elevated disputes.

The agencies are also advised to bring cases that challenge domestic judicial decisions, particularly with respect to the treatment of the Foreign Trade Antitrust Improvements Act (FTAIA) as substantive in the Seventh and Third Circuits[11] and the circuit split on the proper antitrust test for bundled discounts.[12] In addition, the report recommends more enforcement actions and amicus briefs on the correct substantive analysis for exclusionary conduct in two-sided markets[13] and contracts that reference rivals (CRRs), as well as the use of predatory pricing standards for bundling and tying arrangements. If the new leadership at the agencies make any of these changes a priority, the next four years may help answer several of the biggest questions that have arisen in domestic antitrust law in the last few years.

## Conclusion

Although the Presidential Transition Report may not be a perfect predictor of antitrust developments that observers can expect under the new administration, it provides a rare in-depth look at the issues that antitrust leaders find to be most pressing and may be indicative of the hottest issues in antitrust for the next several years.

1. William Kovacic, Former Chairman, FTC, The Next Administration's Antitrust Policy, Remarks at the Heritage Foundation (Jan. 26, 2016).

2. See ABA Section of Antitrust Law, Presidential Transition Reports: The State of Antitrust Enforcement (January 2017).

3. Compare with ABA Section of Antitrust Law, Presidential Transition Reports: The State of Antitrust Enforcement (January 2013, January 2001) (where specific antitrust policy of the candidate was not discussed, despite changes in power between the major political parties).

4. See *Gelboim v. Bank of Am.*, 823 F.3d 759 (2d Cir. 2016); *In re Aluminum Warehousing Antitrust Litig.*, 883 F.3d 151 (2d Cir. 2016); *In re London Silver Fixing, Ltd. Antitrust Litigation*, No. 14-MD-2573 (VEC), 2016 WL 5794777 (S.D.N.Y. Oct. 3, 2016).

5. *United States v. Aetna*, No 1:16-cv-01494 (D.D.C. filed July 21, 2016); *United States v. Anthem*, No. 1:16-CV-01493 (D.D.C. filed July 21, 2016).

6. *St. Alphonsus Med. Ctr. Nampa v. St. Luke's Health Sys.*, 778 F.3d 775 (9th Cir. 2015).

7. *FTC v. ProMedica Health Sys.*, 749 F.3d 559 (6th Cir. 2014).

8. *FTC v. Penn State Hershey Med. Ctr.*, No. 1:15-cv-2362, 2016 WL 2622372 (M.S. Pa. May 9, 2016).

9. *FTC v. Actavis*, 133 S. Ct. 2223, (2013).

10. Final Order in the *Matter of Rambus Incorporated*, File No. 011-0017, Dkt. No. 9302 (F.T.C. 2007).

11. *Minn-Chem v. Agrium*, 683 F.3d 845 (7th Cir. 2012); *Animal Sci. Prods. v. China Minmetals*, 654 F.3d 462 (3d Cir. 2011).

12. *Cascade Health Sol'ns v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008); *LePage's v. 3M*, 324 F.3d 141 (3d Cir. 2003).

13 See *United States v. American Express*, 838 F.3d 179 (2d Cir. 2016) (holding that constraints on the exercise of market power and competitive effects needed to be analyzed for customers on both sides of the market in a vertical restriction case).