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Recent FTC Report and Nomination of New FTC Commissioners Suggest More Active Antitrust Enforcement

Introduction

A report issued by the Federal Trade Commission (“FTC”) on Nov. 17, 2009, shows that merger enforcement activity at the FTC has increased over the past year. One day before the report was published, President Obama also nominated two Democrats—Julie Brill and Edith Ramirez—to serve as FTC Commissioners. If confirmed by the Senate, the political composition of the FTC Commissioners will go from one Democrat, one Independent, and two Republicans, to three Democrats and two Republicans, giving Chairman Jon Leibowitz a Democratic majority for the first time since he was named Chairman.

More Active Antitrust Enforcement at the FTC

President Obama pledged during his 2008 campaign to “reinvigorate antitrust enforcement” and “step up review of merger activity.”¹ President Obama criticized the Bush administration for “what may be the weakest record of antitrust enforcement of any administration in the last half century.”² We expect that the new FTC Commissioners will further President Obama’s pledge of more active antitrust enforcement.

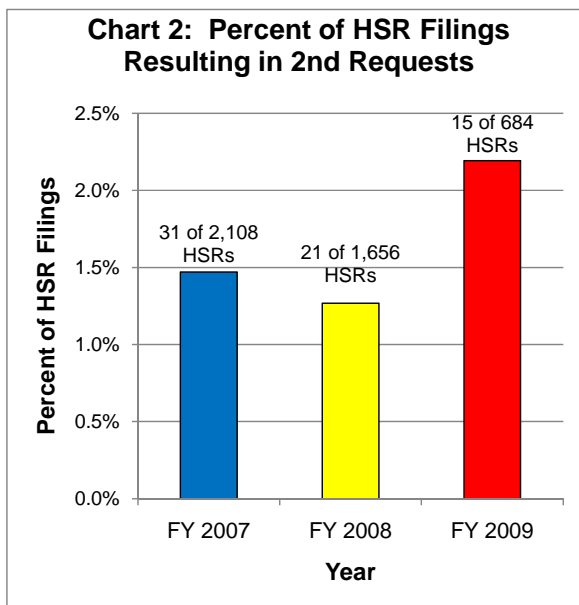
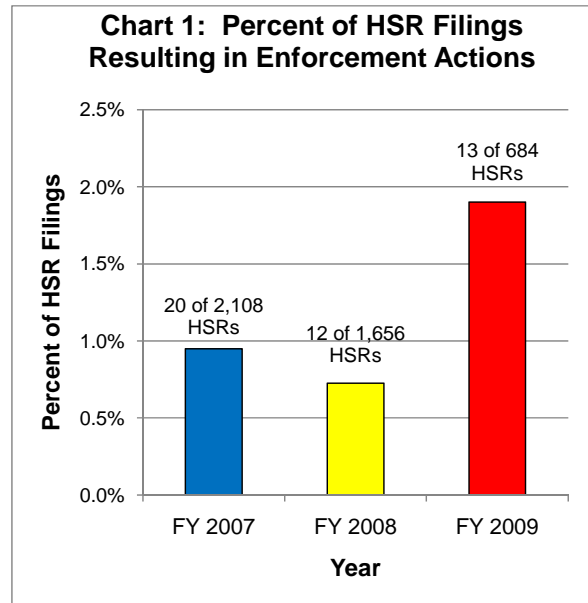
In fact, the FTC already appears to be taking a somewhat tougher stance on merger enforcement since President Obama came into office. Statistics released in the FTC’s 2009 Performance and Accountability Report³ suggest that the FTC may have become more enforcement oriented since the November 2008 election.

1 Statement of Senator Barack Obama for the American Antitrust Institute, *available at* http://www.antitrustinstitute.org/archives/files/aa-i-%20Presidential%20campaign%20-%20Obama%2007_092720071759.pdf.

2 *Id.*

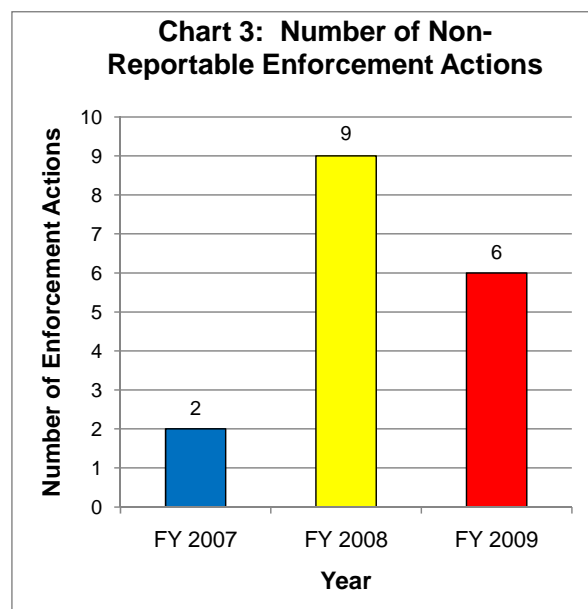
3 Federal Trade Commission Performance and Accountability Report Fiscal Year 2009, *available at* <http://www.ftc.gov/opp/gpra/2009parreport.pdf>.

As reflected in Chart 1, in fiscal year (“FY”) 2009, the number of enforcement actions as a percentage of Hart-Scott-Rodino (“HSR”) merger filings more than doubled when compared with FY 2008 and FY 2007.



As reflected in Chart 2, the number of “second request” investigations as a percentage of HSR filings increased by about 50% in FY 2009 when compared with FY 2008 or FY 2007.

The FTC also has the authority to investigate and challenge mergers that are not reportable under the HSR Act, even if they already have been consummated. As reflected in Chart 3, the FTC appears to have stepped up its efforts to investigate non-reportable transactions in the past two years.



Merger enforcement statistics for FY 2009 are not yet available for the U.S. Department of Justice (“DOJ”) Antitrust Division. However, DOJ Assistant Attorney General Christine Varney echoed President Obama’s calls for more active antitrust enforcement, stating that, “In the last decade, the Division has not been—in my opinion—as active as it could have been. It is time for the Antitrust Division to step up its efforts.”⁴

FTC Nominations

On Nov. 16, 2009, President Obama nominated Julie Brill and Edith Ramirez to serve as new Democratic Commissioners at the FTC. If confirmed by the Senate, they will fill vacancies left by the resignation of former Republican Chairman Deborah Platt Majoras in March 2008 and the expiration of Independent Commissioner Pamela Jones Harbour’s term in September 2009.

Background on Julie Brill

Julie Brill is currently the Senior Deputy Attorney General and Chief of Consumer Protection for North Carolina. Ms. Brill also serves as a Lecturer in Law at Columbia Law School, where she teaches a seminar on the Role of the State Attorney General. From 1988 through 2009, Ms. Brill served as Vermont’s Assistant Attorney General for Consumer Protection and Antitrust, where she represented Vermont in a wide variety of matters, including privacy, fair credit reporting, health care, multi-state tobacco settlements, and antitrust. Ms. Brill’s primary focus has been in consumer protection, and she has served as Vice-Chair of the Consumer Protection Committee of the American Bar Association Section of Antitrust since 2004. Ms. Brill’s past antitrust experience includes representing Vermont in the DOJ’s antitrust challenge of the Verizon/Rural Cellular merger in 2008⁵ and the EchoStar/Hughes Electronics merger in 2002.⁶ Ms. Brill was also listed as an amicus in Vermont’s support of the DOJ’s judgment against Visa and MasterCard in 2003.⁷

Background on Edith Ramirez

Edith Ramirez is currently a partner at Quinn Emanuel’s Los Angeles office. Ms. Ramirez’s practice focuses on complex business litigation matters, including intellectual property litigation, entertainment/media litigation, and appellate litigation. Ms. Ramirez has past antitrust experience through her successful defense of Scotts Co., where private plaintiffs claimed that Scotts had engaged in monopolization and other restraints of trade. Ms. Ramirez worked with President Obama in law school, where both served as members of the Harvard Law Review from 1990–1991. In 2008, Ms. Ramirez served as the Obama campaign’s Latino outreach director in California.

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- 4 Christine Varney, Assistant Attorney General, U.S. Department of Justice Antitrust Division, Address at the Center for American Progress: Vigorous Antitrust Enforcement in this Challenging Era (May 11, 2009), *available at* <http://www.americanprogress.org/events/2009/05/antitrust.html>.
- 5 U.S. v. Verizon Communications, Complaint, *available at* <http://www.usdoj.gov/atr/cases/f233900/233928.htm>.
- 6 U.S. v. Echostar Communications, Complaint, *available at* <http://www.usdoj.gov/atr/cases/f200400/200409.htm>.
- 7 U.S. v. Visa International Corp., Docket No. 02-6074 / 02-6076 / 02-6078 (2d. Cir. 2003), *available at* <http://www.usdoj.gov/atr/cases/f201200/201283.htm>.

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