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REGULATION

An inside look at the increasingly harsh antitrust landscape

M&A lawyer and former DOJ official William Kolasky discusses what most bugs today's trustbusters.

By William McConnell © Updated on May 05, 2016, 04:04 PM ET



With regulators challenging more and more big mergers, The Deal sat down with an expert who has worked both sides of the fence to get a clearer sense of what's going down at the **Department of Justice** and **Federal Trade Commission** and why. **William Kolasky** served in the **DOJ's** Antitrust Division from 2001 to 2002 as the deputy assistant attorney general in charge of international antitrust and policy enforcement and is now a partner at law firm **Hughes Hubbard & Reed LLP**.

The Deal: The percentage of deals challenged by the regulators has more than doubled since the Reagan era. Have the regulators truly gotten more aggressive over that time?

Kolasky: There's been some fluctuation from year-to-year and administration-to-administration through the last 40 years. A number of factors account for this. One of most important is the type of acquisition the agencies are seeing. From 2004-to-2008 many of the deals were private equity and were financially driven. When you have a merger wave powered by those financial motives you're naturally going to see somewhat lower

percentage of deals challenged. I don't think one can assume an increase in the percentage of deals being challenged necessarily reflects more aggressive policy. It could also reflect that over the last eight years since the financial crisis we're seeing more and more deals motivated by structural factors—mergers between companies in the same industry. That will always raise more antitrust concerns. In addition, a number of major industries have now consolidated down to the point where further merger activity among leading firms is likely to raise serious antitrust issues. We now have more deals with four competitors going to three and three to two. The biggest merger challenges in the last five years illustrate that—**AT&T-Mobile**, for example, would have been a classic four-to-three merger in wireless.

Do Democratic and Republican administrations have different approaches to merger enforcement?

I hate to over simplify between Democrats and Republicans but I think when Obama came into office he promised more vigorous antitrust enforcement. I think both the **FTC** and the Justice Department heard that message and are taking very seriously their obligation to enforce the antitrust laws against anti-competitive mergers. At the margins it's possible that some deals being challenged now would not have been during Bush II, but by and large the view in the antitrust bar is that there is not really much difference in approach.

It may come as surprise to many but the George W. Bush administration challenged a greater share of proposed mergers than the Clinton Administration. That administration's reputation for being soft on deals came after it had to regroup from some high-profile losses.

The enforcers have gotten more sophisticated over time and have learned from mergers they've let go through and then saw prices rise. They recognized a need to be more vigilant. I was in the [DOJ] Antitrust Division during first few years of the Bush administration and we challenged several large, highly visible deals and blocked several of them. The loss in **Oracle-PeopleSoft** was a real setback. The agencies went to school on that and studied how to improve their performance in court. They started to see the fruits of that in 2010 with **H&R Block-TaxAct** case where the DOJ really showed its improvement in court. That applies equally to the FTC, as shown by its win in the **Sysco-US Foods** litigation and its turnaround litigating hospital merger cases.

What has changed over time in regards to the regulators reliance on customer testimony, economic data, efficiencies and other factors the antitrust regulators take into account during a merger review?

The courts now understand the need to go beyond structural presumptions and look more at the competitive dynamics of a market and whether the government is telling a good story of how a merger will enable the combined firm to raise prices or facilitate collusion among a market's remaining firms. The evidence is now more nuanced than it used to be.

Are you surprised by the current merger wave?

The way it's happening is puzzling. Just at the same time the government is doing better in court you see companies proposing mergers that in the past might not have been brought before the agencies because a challenge seemed likely. I don't know what advice is being received but a number of these have been successfully challenged. It seems to some of us on the outside that a challenge to these deals was predictable.

Part of what may be happening is a shift in enforcement policy—the agencies have started going after big mergers, arguing that there is a broad national market for large customers. In these types of deals, you can no longer settle the government's concerns with a divestiture

of a few local properties. That was key in the AT&T-Mobile fight. The companies' lawyers probably felt they could get it through because DOJ had previously focused on narrow local markets when reviewing wireless mergers.

With this new way of looking at things it became harder to settle deals in which the regulators assert there is a national market for the companies' products. That's what happened in Sysco-US Food and, to some extent, in **US Airways-American**.

What do you think will be the most important trends in merger enforcement this year?

There will be increasing scrutiny at both agencies as to proposed structural remedies. Both are looking at the outcome of previous divestiture orders and whether they worked or not. Going forward they will be asking hard questions before acting and taking longer to study them. Merger reviews generally are taking much longer than they used to. The cost of complying with merger reviews is also increasing substantially. We always warn clients considering deals to build plenty of time into their closing schedule. Even after the regulators' issues have been identified they will need time to negotiate a remedy.



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