

Questions Abound: FTC Antitrust Actions Under the New Administration

By Julian Perlman, a Partner of Phillips Nizer LLP

Many executives and antitrust practitioners have pondered what the new Trump administration will mean for the Federal Trade Commission, which (along with the Justice Department) oversees competition, including merger review, and consumer protection. Such questions are certain to persist as the New York Post has reported that the proposed merger of Cabela's and Bass Pro Shops may be delayed to allow the Federal Trade Commission to further review the potential competitive effects of the proposed \$5.5 billion transaction.

Who Will Lead the FTC?

Importantly, just three commissioners are currently heading the FTC, following the departures of former Commissioners Joshua Wright and Julie Brill, namely, Chairwoman Edith Ramirez, Maureen Ohlhausen and Terrell McSweeney. Given Chairwoman Ramirez's impending departure from the FTC, President-elect Trump will have the opportunity to appoint (with Senate confirmation) three out of the five FTC commissioners, including a new chair, for seven-year terms.

It appears likely that Maureen Ohlhausen will be appointed the new chair of the FTC—she is the only Republican currently on the Commission (in addition to Chairwoman Ramirez, Commissioner McSweeney is also a Democrat). Irrespective of who ends up chairing the FTC, the President-elect will almost certainly have to nominate at least one Democrat to the Commission, as no more than three commissioners may be from the same political party. These commissioners will not only set antitrust enforcement and consumer protection priorities and policies, but also review potential mergers, such as the proposed Cabela's merger, for anti-competitive effects.

Will Trump's Past Antitrust Experience Inform FTC Policy?

It seems equally likely that the President-elect's own experiences with merger review would inform how the FTC will conduct business under his Administration. Nearly thirty years ago, in March 1988, the DOJ announced its intention to sue Mr. Trump for evading the notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), which requires that parties to certain potential mergers, acquisitions, or other transfers of securities or assets, make a detailed filing with the FTC (or DOJ) prior to engaging in any such transactions.

This permits the FTC to determine whether those transactions will adversely affect commerce and consumers under the antitrust laws. Generally speaking, the HSR Act is triggered where the parties and transaction are of sufficient size, and with some exceptions, permits the government 30 days in which to assess the potential effect of the proposed transaction on competition. If the HSR thresholds are met, reporting the transaction to the authorities is required.

The allegations against Trump were part of an increased effort by the federal authorities to crack down on the usage of certain Wall Street maneuvers involving stock options that allowed corporate raiders to secretly assemble large blocks of stock without disclosing their holdings or first obtaining necessary clearances required under federal law. The DOJ alleged that Trump had used this tactic to violate the HSR Act on at least two different occasions, both in 1986. In conjunction with Bear, Stearns & Co., Trump allegedly used a technique that allowed him to bypass the HSR Act as he acquired large blocks of Holiday Corp. and Bally Manufacturing Corp.

Allegedly, Bear acquired the stock but did not transfer ownership to Trump; rather, Bear would assemble the blocks of stock pursuant to options agreements with the corporate raider, who would not officially buy and take ownership of the securities until after federal clearance was given. While the DOJ lawsuit was settled for \$750,000, Trump denied any wrongdoing. Characterizing the settlement as an effort to avoid litigation, Trump described the dispute as a highly technical disagreement between the federal authorities and the business community.

By contrast, in January 1988, the President-elect made a takeover bid for Federated Department Stores, Inc. In compliance with the HSR Act, Trump requested permission from the FTC and DOJ to purchase

at least \$15 million of Federated stock, representing at least 15 percent of Federated's then outstanding 89.65 million shares. Similarly, in 1989, Trump also complied with the HSR Act's disclosure requirements when he sought to acquire more than \$15 million in stock of Tiffany & Co.

The future is unpredictable—ironically, the New York Post is also reporting that security at Trump Tower is adversely affecting Tiffany & Co.'s sales at its Fifth Avenue flagship, the very company Mr. Trump sought to acquire in the past. What is certain is that the Commissioners of the FTC will have a significant impact on its enforcement priorities, including merger review, and the President-elect has a unique opportunity to shape that agency for years to come with his future appointments.

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