

# The Obama Administration's Reinvigoration of Antitrust and White Collar Crime Enforcement:

## How Your Company Can Be Prepared

February 19<sup>th</sup>, 2009

# Agenda

- Welcome & Introduction – Gerry Alexis
- Expected Impact of the Obama Administration
  - Agency Investigations – Jason Yurasek
  - Agency & Private Litigation – David Chiappetta
  - FTC Considerations – Troy Sauro
  - Merger Enforcement – Gerry Alexis
  - Criminal Enforcement – Joel Levin
  - International Activity – Marta Miyar Palacios
- Get Your House in Order – Panel

# Welcome & Introduction

Gerry Alexis

# Disclaimer

- This seminar is not intended to provide legal advice in relation to any particular transaction or matter. The following presentation is based on our observations and experiences, not inside information. The program is meant to discuss anticipated enforcement trends and general strategies to address them.

# Enforcement of Last Eight Years

- Bush Administration accused of being lax on antitrust enforcement
  - Fewer merger challenges
    - Whirlpool Corp./Maytag Corp.
    - XM Satellite Radio/Sirius Satellite Radio
  - No dominant firm actions brought by DOJ
    - FTC and DOJ notable disagreement on Section 2
    - DOJ criticized foreign dominant firm enforcement
  - DOJ focused on cartel enforcement

# Promises of Obama Administration

- Obama campaigned to
  - "reinvigorate antitrust enforcement"
  - "step up review of merger activity"
  - "aggressive action to curb . . . international cartels"
- Expect
  - More merger investigations and challenges
  - Renewed emphasis on conduct
  - Focus on consumer-impact industries
  - Continued aggressive cartel enforcement

# Context of Current Economy

- Potentially more mergers
- More incentives for collusion
- Balancing of interests: antitrust enforcement vs. economic revival

# Agency Investigations

Jason Yurasek

# Expected Agency Activity

- Department of Justice, Antitrust Division
  - Led by former FTC commissioner, Christine Varney
  - Expect increased activity in civil and merger investigations
  - Aggressive cartel prosecutions
- Federal Trade Commission
  - Speculation FTC will be led by new chairman, Jon Liebowitz
  - Expect increased administrative and merger investigations

# Agency Investigations

- Conduct
  - Collusive conduct: price-fixing, bid-rigging, market manipulation, market allocations
  - Single-firm: monopolization, attempted monopolization, tying, price squeeze, exclusive agreements
- Mergers
  - Reported per HSR Act
  - Unreported but anticompetitive effects
- Violation of consent decrees

# Agency Investigations

- Civil (DOJ)
  - Civil discovery including e-discovery
  - Agency files civil litigation in federal court
- Administrative (FTC)
  - Civil discovery including e-discovery
  - Agency conducts fast-track hearing
- Criminal (DOJ)
  - Criminal discovery (grand juries, subpoenas, search warrants, wiretap, informants, etc.)
  - Indictment filed in federal court

# Expect Increase in Investigations

- Emphasis on Conduct
  - Greater suspicion of collusive activity in economic downturns
  - Greater interest in the abuse of standard-setting
  - More rigorous enforcement of anti-monopoly law
- Re-examination of the appropriate balance between IP rights and antitrust
  - Domestic and international jurisdictions
- Closer scrutiny of mergers

# Potential Hot-Button Industries

- Obama-identified targets
  - Health Care
  - Media
  - Energy/Petroleum
  - Consumer impact
- Related to economic/financial crisis
  - Construction/Housing (price-fixing, bid-rigging)
  - Mortgages/lending
  - Public works projects

# Potential Hot-Button Issues

- Licensing
  - Patent pools and joint licensing
  - Standard setting
- Leveraging IP
- Competitor Joint Ventures

# Agency & Private Litigation

David Chiappetta

# DOJ Civil Litigation

- In striking balance in enforcement policy, the Bush DOJ focused on risks of over-deterrence
  - Particularly true on monopolization challenges
  - DOJ issued report on enforcement of Monopolization under Sherman Act that set high bar for scrutiny
- Resulted in a policy divergence between with FTC
  - FTC Commissioners criticized DOJ Monopolization report for “plac[ing] a thumb on the scales in favor of firms with monopoly or near-monopoly power”

# DOJ Civil Litigation

- DOJ has not pursued civil litigation to enforce §2 of the Sherman Act (Monopolization)
  - Obama criticized the Bush DOJ for bringing no monopolization cases
- In criticizing Bush DOJ, Obama stated: "We're going to have an antitrust division in the Justice Department that actually believes in antitrust law."
  - Significant increase in DOJ litigation
  - Potential harmonization with FTC
  - Expect clear, strong policy statements

# FTC Civil Litigation

- But also expect more aggressive FTC
  - Several concurring opinions in 2008 from a minority of commissioners, pushing for more aggressive merger challenges
    - Obama to appoint another commissioner
    - Those who were in the minority will be able to form a majority with the new Obama appointees
  - New FTC Chairman Jon Leibowitz has stated "the commission should use disgorgement in antitrust cases more often"

# Overall Impact

- Increase in litigation involving single-firm conduct
  - Increased pursuit of companies alleged to have abused their market power
  - More aggressive merger challenges
- Increased agency responsiveness to consumer and/or customer concerns and complaints
- More litigation focused on certain key industries
- Follow-on litigation from state enforcement agencies and private plaintiffs

# Follow-On Litigation: State Agencies

- Increased state agency enforcement
  - As enforcement climate intensifies, potential rejuvenation among state antitrust authorities
    - State attorneys general (e.g., TicketMaster/LiveNation)
    - NAAG coordination and cooperation
  - Synergies between federal and state agencies
    - e.g. joint pursuit of Microsoft in the 1990's

# Follow-On Litigation: Private Plaintiffs

- Increased private civil litigation
  - Agency enforcement often followed by private civil litigation – consumer class action
  - Example: Reddy Ice Holdings
    - March 2008, DOJ launched price-fixing probe
    - By May 2008, over 70 private civil lawsuits in multiple jurisdictions
    - Share price tumbled from \$26 to 35¢

# Follow-On Litigation: Private Plaintiffs

- Increase in private litigation may be fueled by hungry plaintiffs' bar
  - Shut out of other areas
- May also see increased state court forum for private litigants
  - Federal bench is populated with Bush appointees
  - State claims for federal antitrust violations
    - California's Business & Professions Code §17200

# Special Considerations Regarding the Federal Trade Commission

Troy Sauro

# FTC Jurisdiction

- Bureau of Competition
  - Civil enforcement of antitrust laws
  - Section 5: general and incipient violations of the antitrust laws
- Concurrent civil jurisdiction with DOJ, Antitrust Division
  - Administrative and merger enforcement
  - Industry split agreement not always followed
    - FTC – Petroleum, Computer Hardware, Healthcare, Pharm & Biotech
    - DOJ – Agriculture, Computer Software, Defense, Telecomm

# FTC Litigation

- Hearings before Commissioners
- Review by federal courts
- Own procedures and rules
- Different standards on some issues
  - Whole Foods – preliminary injunction

# Proposed New FTC Rules

- Fast - track commission cases
  - Shortens time to answer from 20 to 14 days
  - Limits length of trial to 30 days
  - Sets 70 day deadline for ALJ's initial decision
- Changes to procedure to streamline trials
  - Commission to decide dispositive motions
  - Standard protective order (likely to prevent protracted disputes)
  - Greater use of hearsay evidence
- Could go into effect early in Obama Administration

# FTC Composition

- Four current commissioners; one vacancy
  - Commissioners Leibowitz (D), Jones-Harbour (I) (term ends Sept. 2009), Rosch (R), Kovacic (R) (current Chairman)
- Obama appointments
  - Will name Chairman
  - Fill the current commissioner vacancy
  - Second vacancy to fill in September 2009
- Party allocation rules provide for maximum of 3 commissioners from one party

# Expected FTC Direction

- Wider use of Section 5
- Greater use of FTC administrative proceedings
- Strengthened enforcement of Section 2
  - FTC response to DOJ's Section 2 report
  - Strong policy statements
- Possible Democrat majority of commissioners

# Merger Enforcement

Gerry Alexis

# Expect Active Merger Enforcement

- Greater scrutiny of HSR Act compliance
- More merger investigations
- More Second Requests for information
- Increased demands for divestitures or other "fix-its"

# HSR Compliance

- HSR threshold \$65.2 million (as of 2/12/2009)
  - "Assets" include exclusive IP licenses
  - Complex exemptions create a potential minefield
- Failure-to-file investigations
  - "Avoidance" Challenge
    - Need an independent business justification for structure that "avoids" a HSR Filing
- Increased gun-jumping vigilance

# More Merger Investigations

- Informal requests for information during 30 day waiting period
  - Data requests (win/loss)
  - Document requests (strategic, market analysis, intelligence)
  - Informal interviews
- Calls to customers
- Calls to competitors

# More Second Requests for Information

- Voluminous document/data request
- Impact
  - Can delay closing for 4-6 months
  - Can cost \$5 million or more
  - Can kill a deal

# Increased Demands for Divestitures and "Fix-It-First" Remedies

- Anticipate demands and address in Purchase and Sale Agreement
- "Brainstorm" internally about "fix-it" options that do not destroy value of deal

# Criminal Enforcement

Joel Levin

# White Collar Enforcement in the Bush Administration

- Post- 9/11 Shift to Terrorism and Intelligence
  - More than 1800 FBI agents (nearly 1/3 of all agents in criminal programs)
- Criminal referrals by FBI to federal prosecutors dropped 26%
- Financial institution fraud cases dropped 48%
- Insurance fraud cases dropped 75%
- Securities fraud cases dropped 17%

# Antitrust Criminal Enforcement

- Bush DOJ stepped-up criminal cartel enforcement actions
  - Secured high antitrust fines
    - \$3.5 bil in last 8 years from 120 corp. and 160 individuals
  - Secured more jail sentences than ever before
- Obama has affirmed his dedication to fighting cartels

# Foreign Corrupt Practices Act

- December 15, 2008: Siemens pled guilty to criminal violations as part of \$800 mil settlement with DOJ and SEC
- February 11, 2009: Halliburton and former subsidiary, KBR, announced \$579 mil settlement with DOJ and SEC
- February 11 2009: ITT settled action for self-reported FCPA violations by disgorging \$1 mil and paying \$250,000 penalty

# Obama Pronouncements

- "Let's, first of all, understand that the biggest problem in this whole process was the deregulation of the financial system."
- "The problem is we still have an archaic, 20th century regulatory system for 21st-century financial markets."
- Washington was "asleep at the switch" and Madoff scheme "was made possible in part because the regulators who were assigned to oversee Wall Street dropped the ball."

# Obama Appointments

- Attorney General, DOJ: Eric Holder
  - "The Justice Department must wage an aggressive effort against financial fraud and market manipulations. As taxpayers are asked to rescue large segments of our economy, they also have a right to demand accountability for wrongdoing that only DOJ can provide."
- SEC Chairman, Mary Schapiro
  - "First and foremost . . . I will move aggressively to reinvigorate enforcement at the SEC. With investor confidence shaken, it is imperative that the SEC be given the resources and the support it needs to investigate and go after those who cut corners, cheat investors, and break the law."

# White Collar Legislative Initiatives

- **Schumer-Shelby Bill – S. 331**
  - Proposed to dedicate \$110 million annually to add hundreds of new investigators and prosecutors to financial fraud units at DOJ, FBI, SEC
  - Schumer: "Our white collar crime divisions are under-staffed, under-funded, and overwhelmed."
- **Congressional Oversight Panel – Jan. 29, 2009**
  - Proposes to give the Fed the power to gather information about the inner workings of banks, investment firms, insurance companies, hedge funds, etc.
- **Fraud Enforcement and Recovery Act of 2009**
  - Strengthens statutes to combat mortgage and other financial fraud

# What We Can Expect

- Political imperative – bad economic times - desire to bring those accountable to justice
- Tighter regulation - likely to lead to more white collar enforcement
- Massive bailouts - will be an outcry for accountability
- Budgetary/financial incentives in pursuing white-collar crime – can bring some money into the government coffers
- Bad economic times likely to reduce turnover in U.S. Attorney's Offices and enhance capability to handle white-collar cases

# Expected Focus of Obama White Collar Crime Enforcement

- Regulated financial industries and institutions
- Frauds against the government (contracting frauds, health care frauds)
- Securities frauds
- Environmental crimes
- Corporate frauds
- Foreign Corrupt Practices Act cases
- Continued Anti-Cartel Enforcement

# International Activity

Marta Miyar Palacios

# International Cooperation

- Increased US cooperation with international competition agencies
  - Cross-border information sharing and collaborations
  - Multi-national investigation plans/activities
    - e.g. Coordinated execution of search warrants and/or dawn raids
- Increased US leadership to encourage cooperation among agencies

# Harmonization

- US to reassert itself as global antitrust leader
  - Increase domestic enforcement
  - Increase cooperation for global enforcement
- Harmonize US and global competition policies
- Assist foreign nations with development of antitrust/competition policy and enforcement
- Participate in global policy organizations
  - International Competition Network

# Harmonization

- Resale Price Maintenance
  - Current law diverges from EU
  - Potential legislation to repeal Leegin
  - Potential efforts to establish standards for evaluating resale price maintenance
  - Reworking of Colgate doctrine

# Get Your House In Order

## Practical Tips for Today's Businesses

# Get Your House in Order

- Watch Your Language
- Be Mindful of Collusive Activity
- Conduct Compliance Audit
- Review Existing Compliance Programs
- Be Prepared for E-Discovery
- Establish Deal Strategy
- Avoid Second Request

# Conclusion

# Appendix

# Antitrust & Unfair Competition Litigation

Whether confronted with the need to defend against a private antitrust action or respond to a competitor's unfair and anticompetitive conduct, businesses turn to Perkins Coie's experienced Antitrust & Unfair Competition counsel to vigorously protect and pursue their rights.

Antitrust litigation and investigations involve potentially high stakes that can result in treble damages, civil or criminal fines and penalties, consent decrees, divestiture, an injunction forcing fundamental business changes or even incarceration. Even if ultimately successful, the manner in which the litigation or investigation is managed and conducted can have significant consequences to your customer, supplier, employee and investor relations. We are familiar with these concerns and are committed to working with our clients to protect and care for their business as well as their legal needs.

Our attorneys have experience representing manufacturers, retailers, distributors, and research and development companies across the market spectrum, from market leaders to new entrants. We have particularly in-depth experience working with technology companies on issues arising from the intersection between intellectual property and antitrust. If a governmental investigation is pending, we have the resources, breadth and experience to assist clients nationwide in investigations by the Department of Justice, Federal Trade Commission and state attorneys general.

Our attorneys work in close cooperation with in-house counsel and the business team to gain a thorough understanding of your company and the industry. With our breadth of experience we frequently have professionals who are already highly knowledgeable about technological innovations, market dynamics and industry trends in any given market. With this background and experience we are able to craft strategies and approaches that are targeted, cost effective and highly attuned to the strategic needs of your business.

# Investigations & White Collar Defense

Perkins Coie represents corporations and individuals in all stages of government investigations and white collar criminal matters. Our attorneys have earned a reputation for effectiveness based on early and thorough investigation of the facts, sophisticated legal strategies and vigorous advocacy. As a result, many of our clients are never charged with crimes, and some of our greatest successes have come in matters that never became public. But when it is necessary to stand and fight, our attorneys have successfully tried cases in federal and state courts throughout the country.

Many of our attorneys have experience as government prosecutors or in similar positions, including former U.S. attorneys and assistant U.S. attorneys, district attorneys and other state prosecutors, SEC trial counsel, regulatory enforcement attorneys and counsel to national political campaigns. Our broad experience allows us to represent clients effectively in the many different arenas where modern investigations and white collar matters play out, including the grand jury, federal and state courts, congressional hearings, regulatory enforcement proceedings, and civil fraud cases. We are especially skilled at developing and implementing strategies to resolve complex, multi-front matters. Many of our lawyers also have national security backgrounds and security clearances that allow them to deal with classified information and other sensitive matters.

Our attorneys also regularly represent companies and board committees in internal investigations and compliance matters. Companies conduct internal investigations for many reasons: to respond to whistleblower complaints; to address concerns from government officials or auditors; to detect and deter criminal misconduct; and to support sound decision-making. Whatever the purpose, our clients engage us to conduct reliable internal investigations that comply fully with applicable laws and regulations, as well as to advise them concerning the design and implementation of effective compliance programs.

In addition to representing corporations and employees, we often represent public officials and others in Congressional investigations and in criminal investigations involving allegations of public corruption or campaign finance law violations.

Perkins Coie is a leading law firm in matters like these, having represented government officials and elected officials, including members of Congress, congressional committees, witnesses in House and Senate hearings and many others in high-profile matters.

# Presenters

**Geraldine (Gerry) M. Alexis** – Gerry focuses her practice on antitrust and trade regulation. She has conducted several bench and jury trials and handled very high-profile merger cases. Gerry also represents clients before the Department of Justice, the Federal Trade Commission and state antitrust enforcement agencies in mergers, acquisitions, joint ventures and other government antitrust investigations, with an emphasis on obtaining accelerated clearances from the relevant government agency. Gerry draws upon her deep antitrust experience before the courts and governmental agencies to counsel numerous companies on the antitrust aspects of joint ventures, distribution contracts, IP licenses and other transactions. From 1979 to 1981, she served as an attorney-advisor in the Office of Legal Counsel, U.S. Department of Justice where she received a special commendation for outstanding service.

<http://www.perkinscoie.com/galexis/>

**Jason A. Yurasek** - Jason is a litigation partner in the firm's San Francisco office. His experience covers a wide array of commercial litigation matters, including antitrust, business torts, and intellectual property and trademark litigation, as well as matters involving complex state and federal class actions. He has both prosecuted and defended claims on behalf of clients involving cutting-edge antitrust issues, including cross-over issues related to antitrust and intellectual property. Jason's intellectual property practice involves patent, trade secret and trademark litigation and he has vigorously prosecuted intellectual property rights on behalf of clients.

<http://www.perkinscoie.com/jyurasek/>

**David P. Chiappetta** - David is a litigation partner in the firm's Menlo Park office. His practice primarily involves the litigation of complex commercial disputes and class actions, with a focus on antitrust and unfair business practice claims, contract disputes, intellectual property matters, and professional responsibility claims. David also provides counseling on issues relating to antitrust law, and represents his clients before government enforcement agencies in mergers, acquisitions, joint ventures, and investigations.

David has represented major corporate clients in a wide range of cases. While frequently able to resolve disputes for his clients expeditiously through court-filed motions, aggressive negotiations or a combination of the two, he also has the experience to litigate cases through trial and appeal when necessary.

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# Presenters

**Joel R. Levin** - Joel Levin is an Of Counsel in the firm's Investigations & White Collar Defense practice. Prior to joining Perkins Coie, Joel spent more than twenty-eight years as a federal prosecutor in three offices – Chicago, San Francisco and Milwaukee. He was Chief of the Criminal Division in the U.S. Attorney's Office in San Francisco from 1995 - 1997 and immediately prior to joining the firm, he served as Chief of the Financial Fraud and Special Prosecutions Section in the U.S. Attorney's Office in Chicago. During the course of his career, Joel specialized in the investigation and prosecution of complex fraud and financial crimes. Joel was also part of the trial teams, led by Perkins Coie partner Patrick M. Collins, that successfully prosecuted former Illinois Governor George Ryan and Ryan's former Chief of Staff, Scott Fawell. Joel has tried in excess of forty federal trials, both civil and criminal, including cases involving multi-million dollar investment frauds, securities violations, racketeering enterprises, arson, bankruptcy fraud, health care fraud and tax violations.

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**Marta Miyar Palacios** - Marta Palacios is an Of Counsel in the firm's Litigation practice. Marta focuses her practice on antitrust counseling and litigation, specializing in international competition and merger reporting regimes. She has represented clients on a variety of antitrust and commercial litigation matters, including national class action antitrust litigation, state and federal criminal antitrust investigations, multinational merger clearance as well as merger clearance matters in front of the Department of Justice and Federal Trade Commission. She has also participated in antitrust appeals before the Eleventh Circuit and the U.S. Supreme Court. In addition, Marta counsels clients on a variety of antitrust matters including joint ventures, joint licensing, standard-setting organizations, marketing strategies, competitor collaborations and other commercial activities and arrangements.

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**Troy P. Sauro** - Troy Sauro is an associate in the firm's Litigation practice. He focuses his practice on antitrust litigation, counseling and compliance, as well as all facets of electronic discovery. Troy has represented clients on a variety of antitrust matters such as litigation and merger clearance matters in front of the Department of Justice and Federal Trade Commission as well as briefing antitrust issues in bankruptcy and general litigation. He has extensive experience negotiating with the DOJ and FTC in responding to Civil Investigative Demands and Second Requests on behalf of clients. He also provides antitrust counseling on various issues, including distribution agreements, involvement in standard-setting organizations and price fixing.

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