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CHANGE?: MERGER ENFORCEMENT IN THE NEW ADMINISTRATION

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I. Introduction

Promises of change were a dominant theme in the 2008 presidential election. The election season culminated in the election of President Barack Obama, who promised throughout his campaign to "bring about real change in Washington."[1] One of the least publicized, but nonetheless important, components of that platform concerned the Bush administration's approach to antitrust enforcement, and merger challenges in particular. President Obama called the Bush administration's record in these areas one of the weakest of any administration in the last half century.[2]

Indeed, the Bush administration's enforcement record has been a popular target for criticism. Perhaps the co-bull's-eyes of that target are the administration's decisions not to contest the Whirlpool/Maytag merger in 2006 or the XM/Sirius merger in 2008. In the case of Whirlpool and Maytag, the Antitrust Division of the Department of Justice (DOJ) declined to challenge the merger despite post-merger concentration of roughly 70 percent in the market for residential washers and dryers.[3] Likewise, the XM and Sirius merger, combining the United States' only two satellite radio providers, went unchallenged over calls by more than 70 members of Congress to block the deal.[4] These and similar deals caused critics to quip, "[t]he federal government has nearly stepped out of the antitrust enforcement business, leaving companies to mate as they wish."[5]

Capitalizing on calls for reform, President Obama vowed to "step up review of merger activity and take effective action to stop or restructure those mergers that are likely to harm consumer welfare."[6] Many commentators view his recent appointment of antitrust veteran Christine Varney to head his DOJ Antitrust Division as the first step toward that end.[7] Ms. Varney served as President Clinton's Commissioner at the Federal Trade Commission (FTC) from 1994 to 1997 and has a reputation as an aggressive enforcer. Indeed, she has already announced the withdrawal of the Bush-era monopolization guidelines. Although this announcement does not directly affect mergers, it further supports her reputation as an aggressive enforcer. The combination of her record and President Obama's ambitions for change make an increase in merger challenges appear almost inevitable.

As the DOJ and FTC veterans of recent years can attest, however, challenging a merger is no longer synonymous with blocking it. If the Obama administration becomes substantially more aggressive in challenging mergers, it will be interesting to see whether that aggression is rewarded with greater success in court.

Indeed, discussion of whether the DOJ and FTC were less *active* in litigating merger challenges during the Bush administration should not displace recognition that the agencies were also less *successful* in litigating merger challenges. Although one may speculate as to the reasons for this lack of success, one driving factor has no doubt been a transition in courts' approach to such challenges. Gone are the days when the government simply alleged a relevant product market and obtained an injunction by proving that the merger would result in a prohibited market concentration. Courts now demand precise market definitions backed by proof, and strong evidence that the merger would result in anticompetitive effects in that market. Thus, if the Obama administration intends to effect real change in merger enforcement, it must refine the government's approach to merger litigation to meet the courts' more stringent requirements. After examining the recent developments in federal courts' approach to merger challenges, we offer two steps the administration might take to reverse the trend of recent merger litigation losses.

II. Changes in Merger Enforcement Over the Past Several Decades

Historically, the government's decision to challenge a proposed merger led almost immediately to settlement by the parties or abandonment of the merger altogether. Companies were reluctant to engage the government, in part because of the enormous costs generally associated with doing so. Through various investigatory and subpoena capabilities, the FTC and DOJ have the means to impose on companies serious burdens, which, in turn, lead to substantial losses both of money and time – neither of which are particularly plentiful in the middle of a merger. But even setting aside the costs, companies were reluctant to litigate these challenges because,

as Justice Stewart once explained, "in litigation under s 7, the Government always wins."[8] Accordingly, few companies fought back, and even fewer won.

The government's success in litigated cases was at least partly attributable to the relatively low threshold for obtaining injunctive relief. As the Supreme Court explained, "[t]he dominant theme" of Section 7 of the Clayton Act "was a fear of what was considered to be a rising tide of economic concentration in the American economy."[9] To obtain injunctive relief – which is usually the death knell of a proposed merger – the government, in effect, needed only to show that a merger would "produce[] a firm controlling an undue percentage share of the relevant market . . . ." This test, referred to as the structural presumption, "lighten[ed] the burden of proving illegality" by "dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects."[10]

In recent years, courts have moved away from a strict structural-presumption approach to merger challenges.[11] They now employ a totality-of-the-circumstances approach, which focuses less on concentration and more on a fact-specific analysis of likely competitive effects in a market.[12] This "new" approach "involves many judgment calls and a great deal of balancing of the evidence," which, in turn, "gives a great deal of discretion to the courts."[13] Furthermore, it places greater demands on the government than in years past to prove that its proposed market definition is in fact the appropriate product or geographic market, and that the challenged merger would hamper competition in that market. Although, initially, the outcomes of litigated cases remained the same though the standard had changed, in recent years the courts' increased role has begun to influence outcomes.

What is clear, however, is that since *Sungard*, courts have become increasingly stringent in what the government must do to obtain injunctive relief – particularly, with respect to its proposed market definition and proof of anticompetitive effects within that market.

III. Key Merger Cases During Bush Administration

The courts' increased involvement became prominent in the early years of the Bush administration, when the FTC and DOJ suffered an unprecedented string of high-profile losses. The first in the government's string of defeats occurred in 2001 when SunGard Data Systems successfully defended against the DOJ's attempt to enjoin its acquisition of a competing firm.[14] The DOJ's loss marked its first in the D.C. District Court, the agencies' "home court," in eight years.[15] Additional losses followed. Whether they all stemmed from *Sungard* is unclear. What is clear, however, is that since *Sungard*, courts have become increasingly stringent in what the government must do to obtain injunctive relief – particularly, with respect to its proposed market definition and proof of anticompetitive effects within that market. Although the government continues to enter merger challenges with much leverage, with every defeat that leverage is chipped away. Below we discuss what steps the new administration might take to stop the bleeding. But, first, we briefly examine the wound.

A. *United States v. Sungard*[16]

In 2001, the DOJ sought to enjoin SunGard Data's acquisition of Comdisco, Inc., arguing that the marriage would substantially lessen competition for shared hotsite services for customers with large and midrange computer processing centers. A shared hotsite service is one of several disaster-recovery services that enable the restoration of computer applications at another location in the event that a natural disaster or other major event renders the customer's primary data center unavailable. Shared hotsite services provide companies a shared remote facility with a wide variety of computer capabilities that allow companies to replicate their computer center at a separate location. Because multiple companies share the space, a shared hotsite is a cost-effective means of disaster recovery. SunGard, Comdisco, and IBM provided the vast majority of shared hotsite services to the approximately 7,500 North American customers.[17] Other disaster-recovery services include, among others, internal hotsites, which provide the same capabilities as a shared hotsite, but are owned internally; and quick-ship services, which allow companies to ship their computer equipment to a designated location within a specified period of time.

The outcome of *Sungard* turned on the product-market definition adopted by the court. The government argued that the relevant product market was limited to shared hotsite disaster recovery services for mainframe and midrange computer processing centers. Under this definition, SunGard's acquisition of Comdisco would result in the consolidation of roughly 71 percent of the market – the only other provider, IBM, would control the remainder.[18] SunGard, on the other hand, argued that the market included the entire continuum

of disaster recovery systems, such as internal hotsites and quick-ship services.

Both parties submitted numerous customer affidavits to bolster their respective product-market definitions. The government offered 50 affidavits from customers that stated that, because of cost concerns, they could not switch to a different product in response to a small but significant nontransitory increase in price (SSNIP). SunGard offered more than 90 customer statements that directly contradicted those offered by the government; in SunGard's proffered statements, customers attested their intention to switch forms of disaster recovery if the price for shared hotsites were to increase.

Ultimately, the court denied the injunction, stating that the government had failed to offer "sufficient evidence . . . to justify the exclusion of quick-ship services and internal hotsites from the market."[19] The court attributed its conclusion, in part, to concerns with customer testimony, which it described as "vague and confused."[20] First, the court noted that customer testimony was often inconsistent, particularly with respect to the financial viability of switching from one disaster-recovery service to another. Furthermore, the court said it was not clear whether the customers cited by the government were "representative of the entire universe of shared hotsite clients, especially given the significant differences among customers in terms of their size, the equipment that they use, and their business needs."[21] The court therefore concluded that "the central premise of the government's case – that there are 'a substantial number of customers for whom there are no competitive alternatives' . . . – ha[d] not been proven."[22]

B. *FTC v. Arch Coal, Inc*[23]

In 2004, the FTC lost an attempt to enjoin Arch Coal's proposed acquisition of Triton Coal Company. Triton and Arch Coal, along with five other companies, operated fourteen mines in the Southern Powder River Basin (SPRB) of Wyoming, the fastest growing coal-producing region in the nation. The FTC argued that the merger, if consummated, would likely increase coordination in SPRB coal.

At the hearing on the FTC's motion both parties agreed that SPRB coal was *a* relevant market within which to assess the competitive effects of the proposed merger. The FTC suggested, however, that the more accurate market within which to assess the merger was 8800 Btu SPRB coal (8800 Btu is the heat content, or heating value, of the coal). In support of its proposed definition, the FTC relied on testimony and statements from objecting customers that 8800 Btu coal was their preferred choice.

The FTC also relied heavily on customer testimony and statements to support its ultimate conclusion that the proposed merger would lead to anticompetitive effects. Several utility companies expressed their concern that further consolidation, and thus market concentration, would lead to higher prices.

The court found the FTC's arguments unconvincing. First, it stated that the FTC had failed to provide sufficient evidence that 8800 Btu coal constituted the relevant product market. Although, as the court acknowledged, evidence showed that many customers preferred 8800 Btu coal to, say, 8400 Btu coal, "virtually all the utilities acknowledged that they can and do purchase and consume both 8800 and 8400 Btu coal, and that they actively solicit and consider both in their coal bidding procedures."[24] Therefore, the FTC failed to establish through customer evidence that Btu 8800 and Btu 8400 were not interchangeable and had to be viewed as products in distinct markets.

Next, the court determined that the FTC's customer witnesses lacked sufficient knowledge regarding the potential efficiencies stemming from this transaction: "the substance of the [customer] concern . . . is little more than a truism of economics: a decrease in the number of suppliers *may* lead to a decrease in the level of competition in the market. Customers do not, of course, have the expertise to state what *will* happen in the SPRB market, and have not attempted to do so."[25] Accordingly, the court concluded that the government had failed to meet its burden and denied its motion for injunctive relief.

C. *United States v. Oracle Corp.*[26]

The DOJ suffered another high-profile defeat in 2004 when it sought to enjoin Oracle's acquisition of PeopleSoft, Inc. Oracle and PeopleSoft sold enterprise resource planning (ERP) software. ERP software is designed to handle a full range of an enterprise's activities, such as human relations management (HRM) and financial management systems (FMS). The DOJ alleged that the HRM and FMS offered by Oracle, PeopleSoft, and SAP were the only such "high function" products, and that "high function" HRM and FMS products compete in a market that is distinct from all other ERP products.

In support of its proposed market definition the DOJ offered testimony from 10 customer witnesses. The government's customer witnesses testified that outside of Oracle, PeopleSoft, and SAP, no other vendor could fill their FMS- and HRM-software needs. Therefore, the DOJ asserted that an Oracle-PeopleSoft merger would "constrict this highly concentrated

oligopoly to a duopoly of SAP America and a merged Oracle/PeopleSoft."[27]

Oracle argued, in effect, that "high function" software did not exist. It explained that there is "not a sufficient break in the chain of FMS and HRM substitutes to warrant calling 'high-function' software – meaning SAP, Oracle and PeopleSoft [FMS and HRM] products – a market unto themselves."[28] Instead, it continued, the relevant product market consists, at least, of the entire continuum of HRM and FMS software, including mid-market vendors.

Oracle, too, offered customer testimony in support of its proposed market definition. Contrary to the government's witnesses, Oracle's witnesses testified that they had alternatives to the HRM and FMS software offered by Oracle, PeopleSoft, and SAP, including other ERP vendors, outsourcing, and in-house solutions.

The court sided with Oracle, concluding that the government had failed to meet its burden regarding the relevant product market. Key to the court's decision was the government's customer evidence. With respect to the relevant product market, the court noted that "each [customer witness] testified, with a kind of rote, that they would have no choice but to accept a ten percent price increase by a merged Oracle/PeopleSoft. But," it continued, "none gave testimony about the cost of alternatives to the hypothetical price increase a post-merger Oracle would charge . . . ." Oracle's witnesses, on the other hand, "testified about concrete and specific actions that they had taken and been able to complete in order to meet their firms' information processing needs, apart from relying on the three ERP vendors that [the government] contend[s] are a market unto themselves."[29] The court also questioned whether the government's witnesses were representative of the numerous enterprise customers: "Drawing conclusions about an extremely heterogeneous customer market based upon testimony from a small sample is not only unreliable, it is nearly impossible."[30] Because the DOJ failed to show that the merger was likely to lessen competition in a relevant product market, the court directed judgment in favor of Oracle.

D. *FTC v. Whole Foods Mkt., Inc.* [31]

The most recent defeat for the FTC came in 2007 when it challenged Whole Foods Market, Inc.'s proposed acquisition of Wild Oats Markets, Inc. Although the district court was later reversed by a panel for the U.S. Court of Appeals for the D.C. circuit, its decision is nevertheless reflective of the broader approach increasingly adopted by courts.[32]

Whole Foods and Wild Oats are grocery stores with a specific emphasis on natural and organic foods. Whole Foods, based in Austin, Texas, and Wild Oats, based in Colorado, have a combined 304 stores in North America and the United Kingdom. In February 2007 the companies announced that they intended to merge. The FTC sought to enjoin the merger shortly after the announcement, asserting that a merger of the "only two nationwide operators of premium natural and organic supermarkets in the United States" would substantially harm competition.[33]

As with the cases above, "this case hinged – almost entirely – on the proper definition of the relevant product market."[34] The FTC argued that the relevant market consisted of "'premium natural and organic supermarkets' consisting only of the two defendants and two other non-national firms."[35] It asserted that for Whole Foods' and Wild Oats' core customers – i.e., "customers that have decided that natural and organic is important, lifestyle of health and ecological sustainability is important" – a SSNIP would not, and could not, push them to a competitor.[36]

Whole Foods offered a much broader market definition. It asserted that the two companies were "merely differentiated firms operating within the larger relevant product market of 'supermarkets.'"[37] In support of its proposed definition, Whole Foods introduced evidence that many of its customers cross-shop at the more traditional supermarkets, that traditional supermarkets have expanded and grown their natural and organic offerings, and that Whole Foods and other supermarkets regularly check their prices against each other.[38] Whole Foods argued that its and Wild Oats' attempts to differentiate themselves from other supermarkets were insignificant because they all compete for the same customers and dollars. Accordingly, Whole Foods asserted that a SSNIP would be unprofitable.

After a thorough review of the evidence, the court agreed with Whole Foods. It concluded that conventional supermarkets should be included in the relevant product market because they have repositioned themselves and could act to constrain Whole Foods post-merger. In reaching this conclusion the court pointed to Whole Foods' evidence of competition with other supermarkets (e.g., customers cross-shopping, increased organic offerings at traditional supermarkets, and price-checking). Although the court acknowledged a SSNIP would not likely push the "core" or inframarginal customers to conventional supermarkets, it stated that a focus on those customers was misplaced.[39] It explained that focusing on the merger's "effect . . . on marginal customers is more important

than the effect on such core customers, as it is the marginal consumers for whom the stores must and do compete most vigorously."[40] The FTC was also wrong, it continued, to focus on differentiation as a basis on which to define the market. The fact that supermarkets seek to differentiate themselves from one another by emphasizing certain products or services does not address the relevant question for product market definition. Because the FTC failed to properly define the relevant production market, the Court denied its motion for injunctive relief.

IV. Lessons Learned

The takeaway from these recent cases is this: Courts have become increasingly unwilling to simply defer to the government's assessment of proposed mergers, and have begun to analyze the effects of the mergers themselves. Consequently, they demand, now more than ever, sharp market definitions and concrete proof of anticompetitive effects in those markets. Therefore, the Obama administration must change the way government addresses these issues in court as it prepares to march down the road of increased merger enforcement. We offer some suggestions below.

A. Defining the Relevant Market

The first step the Obama administration can take toward increased success in court is to focus on crafting more concrete market definitions. The *Sungard* court perhaps said it best when it remarked, "Not only is the proper definition of the relevant . . . market the first step in this case, it is also the key to the ultimate resolution of this type of case, since the scope of the market will necessarily impact any analysis of the anticompetitive effects of the transaction."[41] To ensure that its proposed definition holds up in court, the administration must: (1) focus on the interchangeability of products, not on consumer preference, when crafting its product-market definition; and (2) focus on the effect a SSNIP would have on the marginal customer, not the inframarginal customer.

1. Focus on Interchangeability of Products, Not Consumer Preference

First, in crafting a product-market definition the government must focus on the interchangeability of products, rather than customer preference for one product over another. The Supreme Court stated decades ago that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."[42] Despite this clear pronouncement, the cases above demonstrate the government's repeated failure to pay sufficient heed to this direction.

Whole Foods is a good example. Recall that the government in that case asserted that the relevant product market was the one for natural and organic foods, and identified in support of its claim several customers that stressed the importance of such specialized foods to their health and lifestyle. It wholly failed, however, to recognize that a substantial portion of Whole Foods customers, perhaps including many of those the government used to support its own market definition, were already cross-shopping at traditional supermarkets. In other words, customer preference notwithstanding, the evidence clearly established "that many customers could and would readily shift more of their purchases to any of the increasingly available substitute sources of natural and organic foods."[43]

Likewise, in *Arch Coal* the government's market definition was substantially undercut when customers testified that, despite their preference for Btu 8800, they could use and had used Btu 8400 in the past. In fact, these customers testified that they actively solicited and considered both in their bidding procedures.[44] Thus, not only did evidence show that Btu 8800 and 8400 were interchangeable, it showed that 8800 and 8400, like the supermarkets in *Whole Foods*, directly compete for the same customers and dollars.

The bottom line is that "[c]ustomer preferences toward one product over another do not negate interchangeability."[45] Customer preference may be marginally relevant to a customer's willingness to substitute one product for another, but, when push comes to shove, cost and functionality rule the day – especially in today's economy. In the event of a SSNIP, customers will turn immediately to a reasonably interchangeable product, provided one exists. This economic reality keeps companies from raising prices above competitive levels. "Because the ability of customers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the 'relevant market' rests on a determination of available substitutes."[46]

Accordingly, the Obama administration must reframe the government's recent emphasis on customer preferences to address the interchangeability of products when defining the relevant product market. This will help both in determining which mergers to challenge and in succeeding in those that are challenged.

2. Focus on the Marginal Customer, Not the Inframarginal Customer

Next, and related to interchangeability, the government must focus on the effect of a SSNIP on the marginal customer rather

than the inframarginal, or core, customer. At the end of the day, the pertinent question asks what effect a merger will have on the average consumer.

Again, *Whole Foods* is a good example. In crafting its market definition the FTC distinguished its "casual" customer from those who have made organic a lifestyle. It focused on the latter group, its inframarginal customer, and suggested that the proper focus was on the effect the merger would have on them. The court explained, however, that

> [a] fundamental problem with the FTC's reasoning is that it addresses whether Whole Foods has *any* customers who are so dedicated to that store's product array and other qualities that they would not switch *any* of their purchases to another supermarket if Whole Foods began to compete less vigorously by raising prices or decreasing quality. The question is whether *enough* customers would switch *enough* of their purchases that a post-merger price increase or quality decline would be unprofitable for Whole Foods.[47]

Although the district court in *Whole Foods* was ultimately reversed, *Arch Coal* makes this same point. There the government alleged that the relevant market included only 8800 Btu coal. The court held that this proposed definition was too restrictive, and held that the market should include all SPRB coal (8800 Btu and 8400 Btu). Although it acknowledged some customers "can only purchase either 8800 or 8400 Btu coal, but not both, regardless of economics," the court concluded that it "need not find that *all* buyers will substitute one commodity for another."[48] In other words, the proper focus is not whether there are *any* customers that would not switch in the event of an SSNIP, but instead whether there were *enough* that would.

Courts have good reason for stressing the effect of a SSNIP on marginal customers. Ultimately, the government must prove that enough of a certain customer base will not, or can not, switch to competitors if the merger is permitted. If the government looks hard enough, it could likely find in nearly every merger an inframarginal, or core, customer base around which to craft a proposed market definition. Focusing on inframarginal customers, almost by definition, places the focus on customers that will not switch in the event of a SSNIP. Were courts to allow the government to craft its definition around the inframarginal customer, they would, in effect, provide the government a tool with which to block nearly every merger. Such a result is clearly undesirable, and courts do well not to permit the government such control.

Thus, given the courts' views on the inframarginal customer's import, the government will present a much stronger case – indeed, a winnable one – if it can show that marginal customers will not switch to competitors post-merger in the event of a SSNIP. It must carefully select the customers which will define the relevant market. No longer is it sufficient to present a few customers that will testify that the challenged parties provide the only choice for a particular product.

B. Proving the Case

The next step the Obama administration could take to improve its success in court is to offer better evidence to prove the relevant market and the proposed merger's likely anticompetitive effects within that market if approved. Given the fact-intensive, totality-of-the-circumstances approach now so dominant in courts, the government cannot simply rely on boilerplate customer affidavits stating that the proposed merger will likely harm competition – "unsubstantiated customer apprehensions do not substitute for hard evidence."[49] To be sure, customer evidence remains a crucial component the government's case. But, to be effective, such evidence must clearly and unequivocally prove the relevant market and the likely anticompetitive effects a merger would have in that market. Therefore, to bolster its claims, and thus increase its success in court, the government must: (1) ensure that the customer testimony and statements offered in support of its position is unequivocal and representative of the parties' entire customer base; and (2) offer evidence from customers who have clear knowledge of circumstances surrounding the proposed transaction.

1. Unequivocal and Representative Customer Testimony

The government must identify and offer customer testimony that adequately represents the merging companies' entire customer base and proves unequivocally the effect of a SSNIP. As we saw above, both are crucial to the outcome of the case.

First, the government must prove that the customer affidavits it offers are representative of the customer population. The *SunGard* case best illustrates the government's failure in this regard. In *SunGard*, the government offered 50 affidavits from customers stating that they could not switch to a different product as a result of a SSNIP. SunGard, however, responded with more than 90 customer statements that directly contradicted the government's. The court concluded, "Without more information, the Court simply cannot determine whether these 50 declarations are representative of the shared hotsite client base." To be clear, the court is *not* saying that the party with the most customer statements

wins, or even that more customer statements would have helped the government in *Sungard*. Rather, the court is saying that customer testimony and statements are helpful only insofar as they fairly represent the parties' entire customer population. Parties can always find customers to support their respective positions. But to be effective they must prove with evidence beyond the boilerplate typically contained in affidavits, that those customers' views are representative of the overall customer base.

Next, the government must ensure that its witnesses' testimony is unequivocal. This suggestion has two components. The first should be obvious: the government must ensure that its witnesses will proffer testimony that supports its case and that they stick with it. Surprisingly, this was not the case in *Sungard*. There, recall, the court called the customer testimony "vague and confused," and noted that "several customers who were interviewed by one party then changed their position when interviewed by the opposing party."[50] Similarly, in *Arch Coal* customers testified that they preferred Btu 8800 coal, but could use 8400 coal, and, in fact, considered 8400 in the bidding procedures. Before calling a witness, it is important that the government confirm that the witness's testimony supports its case. The second component is almost just as obvious: the government must ensure that it educates the witness on the issues and how his or her testimony relates to those issues. If the witness understands the issues and how his or her testimony fits with those issues, he or she will be less likely to offer contradictory evidence on cross-examination.

There is little doubt that customer testimony will continue to be important in merger enforcement litigation. Thus, it is important for the Obama administration to properly identify customers that are representative of the entire customer base and ensure that their testimony cannot be easily contradicted.

2. Knowledgeable Customer Testimony

Next, the customers that are identified must demonstrate sufficient knowledge of the circumstances surrounding their testimony.

The government has made this mistake in recent litigation defeats. For example, in *Arch Coal*, the government offered the testimony of several customers to support its claim that the proposed merger would have anticompetitive effects. The court, however, discounted the testimony when it was clear that the customers did not have sufficient knowledge of the efficiencies resulting from the merger – simply recounting "truism[s] of economics" will not suffice.[51] Similarly, in *Oracle*, both sides offered customer testimony regarding whether there were alternatives to the products provided by Oracle. In contrast with the government, Oracle provided testimony from customers that had undergone "concrete and specific actions" in searching for alternatives.

As these cases demonstrate, it is not only the substance of the customers' testimony, but the basis underlying that testimony, that is pertinent in merger enforcement litigation. Thus, the Obama administration must do more than identify customers that represent the customer base and present unequivocal evidence. The government must also establish that those customers fully understand the facts necessary to proffer their respective opinions.

V. Conclusion

There is very little doubt that President Obama seeks to change the government's approach to merger enforcement. But doing so will be difficult. Merger investigations take a great deal of time and resources. And if the administration increases challenges as promised, the necessary resources will be multiplied. The result could be more, thinly staffed investigations to which the agencies will be able to devote substantially less attention and resources. To the extent merger investigations lead to litigation, that means agencies will be forced to devote fewer litigators to the matter than in the past. These factors, combined with recent courtroom defeats – and, thus, increased willingness by the parties to take cases to court – could pose challenges for the new Adminstration's antitrust agenda.

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1 Julie Bosman, *The Ad Campaign: Obama Face-to-Camera With Iowa*, NY TIMES (Sept. 20, 2007).

2 *See Statements of Senator Barack Obama for the American Antitrust Institute*, Sept. 27, 2007, *available at* http://www.antitrustinstitute.org/archives/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.

3 Jonathan B. Baker and Carl Shapiro, Reinvigorating Horizontal Merger Enforcement, AEI-BROOKINGS JOINT CENTER FOR REGULATORY STUDIES, Jun. 2007, at 23.

4 *See* Anne Broache, *XM-Sirius merger wins Justice Dept. approval*, Mar. 24, 2008, *available at* http://news.cnet.com/8301-10784_3-9902023-7.html ("More than 70 members of Congress from both political parties had also urged that the deal be shot down, arguing that it was contrary to public interest.").

5 Dennis Berman, *The Game: Handicapping Deal Hype and Hubris*, WALL ST. J., Jan. 16, 2007, at C1.

6 John Eggerton, *Barack Obama's Media Agenda: An Exclusive Interview*, BROADCASTING & CABLE, Jun. 15, 2008.

7 *See, e.g.*, Sean Gates and Tej Srimushnam, *A new direction?*, THE DEAL MAGAZINE, Feb. 5, 2009, *available at* http://www.thedeal.com/newsweekly/community/a-new-direction.php; *see also* Sean Gates and Tej Srimushnam, *New Directions in Antitrust Enforcement: Obama Appoints Christine Varney to Head DOJ Antitrust Division*, Jan. 2009, *available at* http://www.mofo.com/news/updates/files/15173.html.

8 *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

9 *Brown Shoe Co. v. United States*, 370 U.S. 294, 315 (1962).

10 *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963).

11 *But see infra* note 32.

12 *See, e.g., Fed. Trade Comm'n v. Foster*, No. CIV 07-352 JB/ACT, 2007 U.S. Dist. LEXIS 47606, at *98 (D.N.M. May 31, 2007) ("Thus, while the FTC has convinced the Court that the current market is concentrated, that the merger will increase market concentration, that Giant and Western are competitors, and that these circumstances give rise to a presumption of anti-competitive effect, the presumption is a weak one.")

13 Baker and Shapiro, *supra* note 3, at 6.

14 *United States v. Sungard Data Systems, Inc.*, 172 F. Supp. 2d 172 (D.D.C. 2001).

15 J. Mark Gidley and David A. Balto, *Leveling the Playing Field in Antitrust Merger Litigation*, THE M&A LAWYER, June 2002.

16 *United States v. Sungard*, 172 F. Supp. 2d 172 (D.D.C. 2001).

17 *See id.* at 175.

18 *Id.* at 181.

19 *Id.* at 183.

20 *Id.*

21 *Id.* at 192.

22 *Id.* at 193.

23 *Fed. Trade Comm'n v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004).

24 *Id.* at 121.

25 *Id.* at 146.

26 *United States v. Oracle Corp.*, 331 F. Supp. 2d 1078 (N.D. Cal. 2004).

27 *Id.* at 1107.

28 *Id.* at 1148.

29 *Id.* at 1133.

30 *Id.* at 1167.

31 *Fed. Trade Comm'n v. Whole Foods Mkt., Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007).

32 See *Fed. Trade Comm'n v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008), *reh'g en banc denied*. A splintered panel (Judge Brown wrote the opinion, Judge Tatel concurred, and Judge Kavanaugh dissented) for the D.C. Circuit reversed the district court's ruling in what many consider a very pro-government opinion. It is not yet clear whether the more forgiving analysis of the Court of Appeals will suffice to alter this trend.

33 *Whole Foods*, 502 F. Supp. 2d at 5.

34 *Id.* at 7 (quotation marks omitted).

35 *Id.* at 8.

36 *Id.* at 23.

37 *Id.* at 8.

38 *See id.* at 29-35.

39 *Id.* at 35.

40 *Id.* at 23.

41 *United States v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 181 (D.D.C. 2001).

42 *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

43 *Whole Foods*, 502 F. Supp. 2d at 36.

44 *Arch Coal*, 329 F. Supp. 2d at 121.

45 *Oracle*, 331 F. Supp. 2d at 1131.

46 *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 46 (D.D.C. 1998).

47 *Whole Foods*, 502 F. Supp. 2d at 35.

48 *Arch Coal*, 329 F. Supp. 2d at 122.

49 *United States v. Oracle Corp.*, 331 F. Supp. 2d 1078, 1131 (N.D. Cal. 2004).

50 *Sungard*, 172 F. Supp. 2d at 183.

51 *Arch Coal*, 329 F. Supp. 2d at 146.