

Reproduced with permission from Antitrust & Trade Regulation Report, for the author, 11/04/2016. Copyright © 2016 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

ELECTION**Trump Antitrust Policy? A Wild Card**

BY MICHAEL SALZMAN

Donald Trump's stunning, come-from-behind election victory has people all over the world asking: "How will this affect me and my interests?" Yes, even antitrust practitioners are asking this question.

The Trump election campaign focused on a few themes — limitations on immigration, opposition to international trade agreements perceived to undermine U.S. industry and U.S. wages, the rights of gun owners, and potential rapprochement with Russia among them — but antitrust policy was not one of them. This is hardly surprising, as antitrust is almost never a topic in U.S. presidential politics. Usually, at the presidential level, the issue is simply the degree to which the candidate positions himself as "pro-business" or as more inclined to regulate business activity. It is typically left to the president's appointees to translate the approach into a concrete policy and enforcement agenda.

Mr. Trump's pronouncements do not make it easy to place him on the antitrust spectrum running from laissez-faire "pro-business" to highly interventionist. Even though he proposed to lower taxes on businesses and reduce regulation of business, he also spoke pas-

sionately against Wall Street and free trade. Notably, he received little campaign support from Big Business groups and executives. So Trump's policy statements do not themselves offer clear guidance to where his Administration will go on antitrust. It is also important to recall that he was a Democrat, praising President Bill Clinton's performance in office, not that many years ago.

Nor does a look at the President-Elect's circle offer much help in predicting who his appointees will be. While several lawyers involved in the campaign have experience in private antitrust litigation, generally on the defense side, none of them is primarily an antitrust lawyer with a record on antitrust policy questions. So it is anyone's guess whom he will nominate as head of the Department of Justice Antitrust Division or chairperson of the Federal Trade Commission.

Still, there are several markers that suggest that the new President would instinctively want his antitrust program to be activist — even if we cannot say in which particular direction. At a minimum, Trump has seemed in the past to have regarded antitrust litigation as a useful tool. First, we know that in his long career as a businessman, the President-Elect was comfortable using the courts — he has been a prolific plaintiff himself. Notably, he was active on the plaintiffs' side in the private antitrust case brought by the fledgling United States Football League against the National Football League in the 1980s. At the end of the day, the plaintiffs essen-

Michael Salzman is a partner in the Antitrust Group at Hughes Hubbard & Reed in New York.

tially failed: the jury awarded them a token \$1 in damages.¹ He also once settled an FTC claim that he had failed to comply with the Hart-Scott-Rodino premerger notification rules.²

Also reflecting Trump's disposition to see antitrust litigation as a potential instrument of power was his May 2016 comment when displeased by coverage in the Washington Post — owned by Jeff Bezos of Amazon. His reaction: "[Bezos is] using the Washington Post . . . for political purposes to save Amazon in terms of taxes and in terms of antitrust. He thinks I'll go after him for antitrust. Because he's got a huge antitrust problem because he's controlling so much, Amazon is controlling so much of what they are doing."³

Most recently, on October 22, Trump pledged to block the proposed takeover of Time Warner by AT&T.⁴ (At the same time, he also said his Administration would "look at" breaking up the Comcast cable-and-broadband company's 2011 acquisition of NBC Universal — the television network and movie company.) Time

Warner and AT&T are not significant horizontal competitors, but Time Warner does license its programming content for distribution on AT&T's DirecTV satellites and cell phones. So this statement could, theoretically, be seen as evidence of the incoming President's approach to vertical mergers. But in fact his opposition more likely simply reflects a deep suspicion of powerful media companies. Indeed, he explained his opposition this way: "As an example of the power structure I'm fighting, AT&T is buying Time Warner and thus CNN, a deal we will not approve in my Administration because it's too much concentration of power in the hands of too few." Whether Trump would feel the same way — or have any view at all — about a merger in the oil field services business (for instance, the proposed combination of Baker Hughes with GE's oil and gas service business announced on October 31), pharmaceuticals, or any other industry remains to be seen.

Given his eclectic views on a range of economic issues outside his handful of priorities, it may be months or even years before a distinctive Trump approach to antitrust enforcement can be discerned. Or, quite possibly, President Trump may appoint as enforcers people with known and pronounced views, and leave antitrust largely to them. If that occurs, the picture may quickly clarify. For that reason, antitrust observers will be looking very closely at the Trump team's appointment process.

¹ Trump's Antitrust Experience is as a Plaintiff, <http://ftcwatch.com/trumps-antitrust-experience-is-as-a-plaintiff>.

² Trump's Encounters With Antitrust Law, <http://ftcwatch.com/trumps-encounters-with-antitrust-law>.

³ <http://www.cnbc.com/2016/05/13/trump-says-amazon-has-a-huge-antitrust-problem.html>.

⁴ <http://money.cnn.com/2016/10/22/media/donald-trump-att-time-warner/>.