

Basics Of Antitrust Pennsylvania Bar Institute February 18, 2010

JOE MILLER
ANTITRUST DIVISION
US DEPARTMENT OF JUSTICE

THE VIEWS EXPRESSED HEREIN ARE MY OWN AND DO NOT PURPORT DO
BE THOSE OF THE ANTITRUST DIVISION OR THE US DEPARTMENT OF
JUSTICE

Overview of Antitrust Division Organization

- **Front Office: Assistant Attorney General, Five Deputy Assistant Attorneys General**
 - Appellate, Policy, Foreign Commerce, Operations
- **Civil enforcement: Six litigating sections with jurisdiction over certain commodities**
 - Litigation I: health care, insurance, pulp and paper, beer, consumer goods, dairy
- **Criminal enforcement: National Criminal section, seven field offices**

Antitrust Division's Role in Enforcement of the Law

- **Federal Trade Commission**
- **Growth area for enforcement: foreign jurisdictions**
 - Advisory role for the United States
- **State AG's offices**
- **Private suits – largest volume of litigation**
 - Most litigation non-substantive: standing, antitrust injury, class certification, etc.
- **A law enforcement agency, but more**
 - Limited number of civil suits filed, very few litigated to judgment
 - Influence courts and other jurisdictions through guidelines, amicus filings, speeches – a leader in the law

Antitrust Division Priorities

- Active criminal program
 - Role of leniency program, incentives to self-report
- AAG Varney has revoked the last administration's "Section 2" Report – signals increased scrutiny of single firm conduct
- Section 1 – willingness to explore vertical theories
- Contrast with last administration's hierarchy: criminal, merger, civil non-merger

**What Do I look for to Start an Investigation?
How to allocate scarce resources?**

- Market power is the central organizing principle of antitrust.
 - Labels (vertical, horizontal, per se, quick look, etc.) can obscure rather than aid understanding. Where's the consumer harm?
- Will the investigation, litigation, competition advocacy, amicus brief, have a major impact? Advance or clarify the law?

Wendy Wants to Know: What's *Really* Going to Get My Client Into Trouble?

- Criminal violations should be easy to spot: price fixing, bid rigging, allocating customers, etc.
 - Telltale sign: consciousness of guilt. Not an element of the offense but a sure sign something's amiss.
- "Trouble" includes lengthy investigations. They are very expensive and painful for your client even when we don't challenge the conduct.
 - Exercising significant market power to suppress competition
 - Entering into an agreement with a competitor to alter a significant term of competition? Using "market power logic"?
