

US Antitrust Issues 2011 Trends

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Overview

- Introduction
- Cartel Enforcement
- Merger Review
 - New Horizontal Merger Guidelines
 - U.S. Department of Justice (DOJ)
 - Federal Trade Commission
- Civil Non-Merger Investigations
 - Monopolization/Abuse of Dominance
 - Section 5 of the FTC Act
 - Resale Price Maintenance
- Private Damage Claims

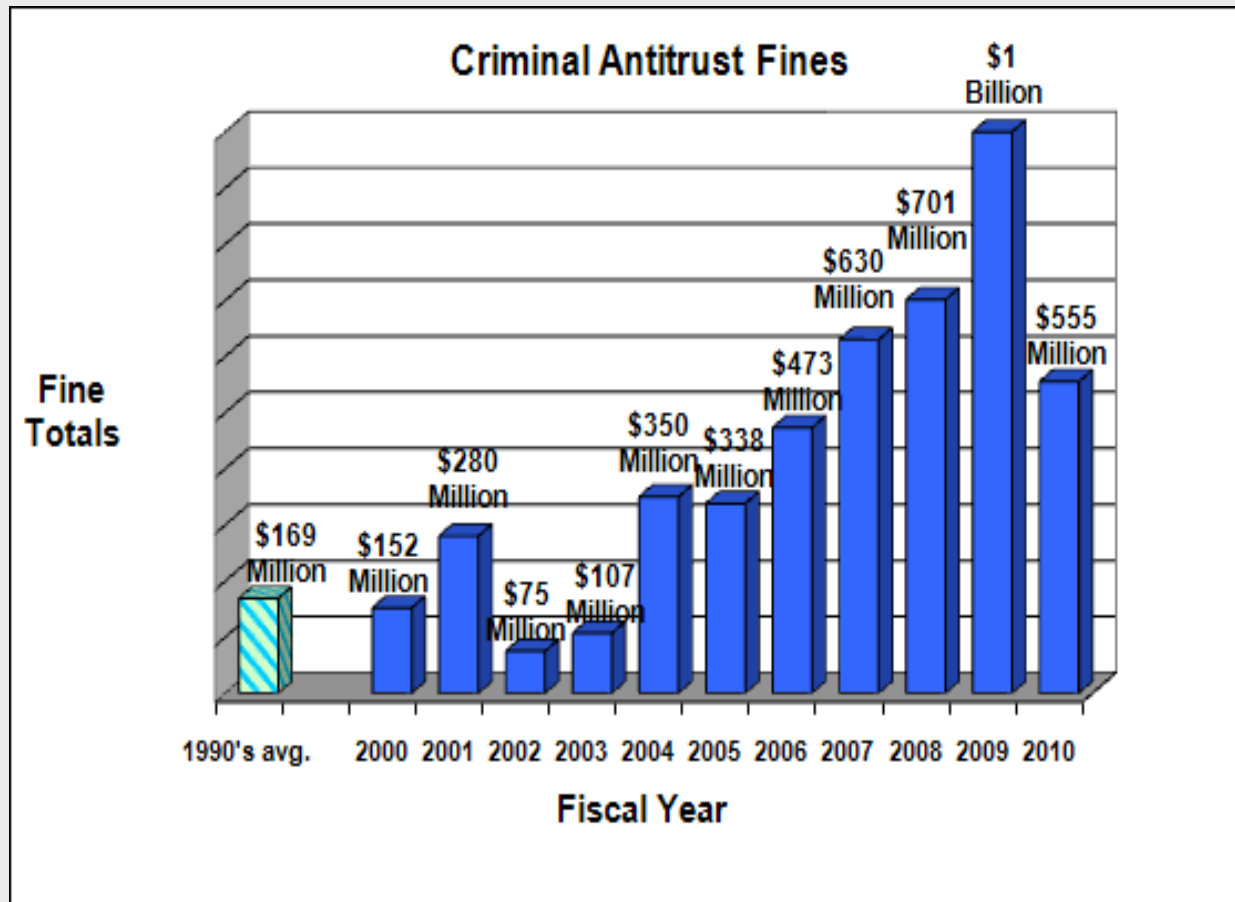
Introduction

- Antitrust Enforcement in the Obama Administration
 - More aggressive in generating antitrust theories of harm.
 - More creative in exploring possible impacts of mergers and allegedly anticompetitive conduct.
 - More aggressive in seeking remedies and settlements in close cases
 - Not more aggressive in blocking or litigating cases, civil or criminal?
 - This may be changing in light of recent mergers challenges:
 - NASDAQ/NYSE (U.S. stock exchanges)
 - Verifone/Hypercom (Point-of-Sale terminals/credit card payment machines)
 - Tyson Foods/George's (chicken processors)
 - H&R Block/TaxACT (Digital Do-It-Yourself Tax Preparation Products)
 - Since April 1, DOJ has blocked or sought divestitures on 10 mergers

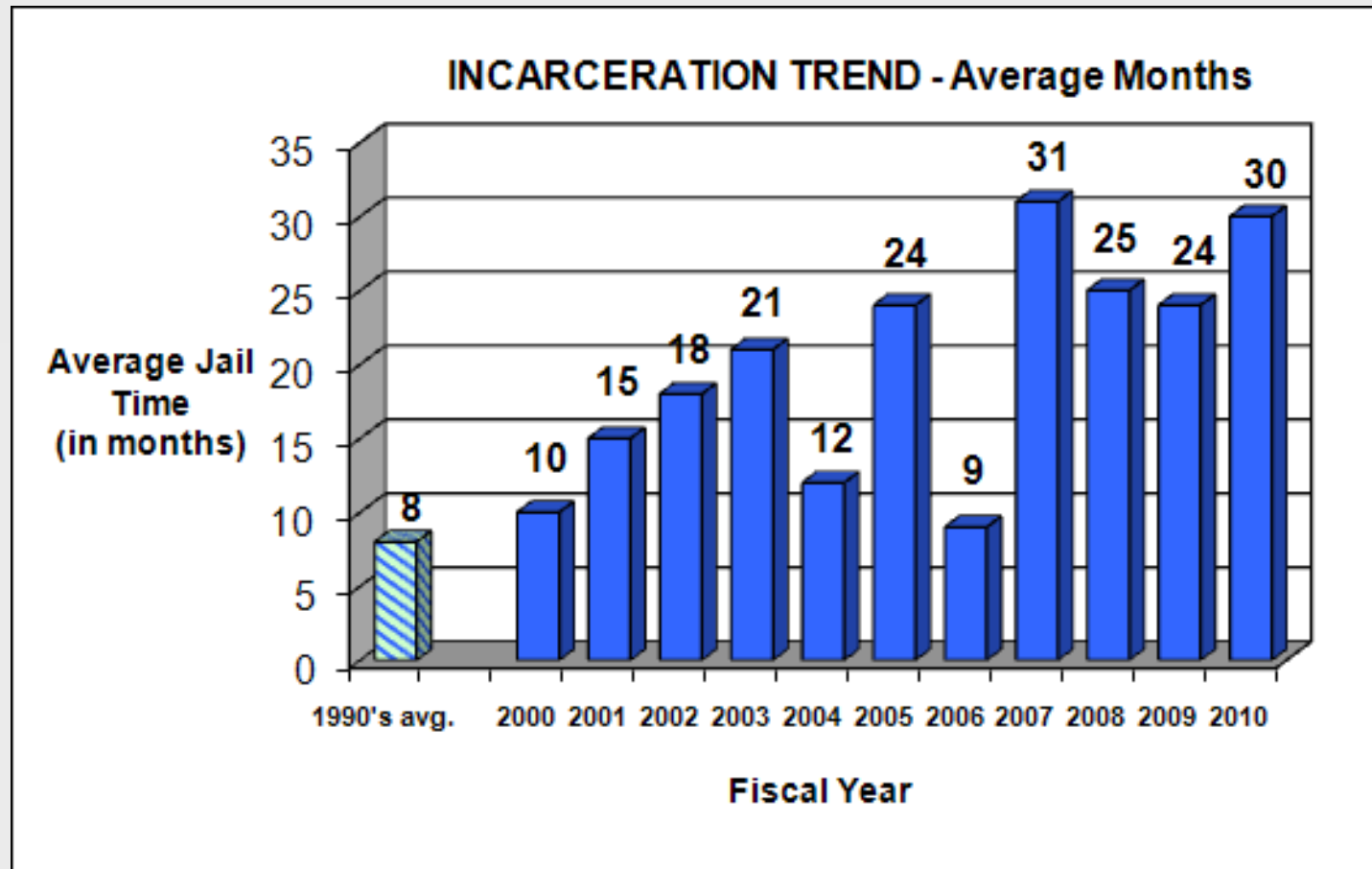
Cartel Enforcement– Recent Trends

- **Consistent Pattern of Enforcement**
 - Cartel enforcement immune to changes in political leadership
 - Comparisons to EU Cartel Enforcement
- **Maturing of Cartel Enforcement**
 - Leniency applications may be leveling off after initial rush to file
 - Authorities focusing on stronger cases and more cooperation upfront by immunity/amnesty applicant
- **Globalization of Cartel Enforcement**
 - Over 50 countries have immunity programs
 - Problems with inconsistent approaches
 - Threat of information leaking from one jurisdiction to the next
- **Greater Willingness to Decline Prosecution or Limit Penalties Where Other Jurisdictions Take the Lead**
 - Marine Hose, two UK executives charged in U.S. and UK and allowed to served their entire sentence in UK
 - French citizen charged in U.S. and allowed to serve part of his prison term in France.

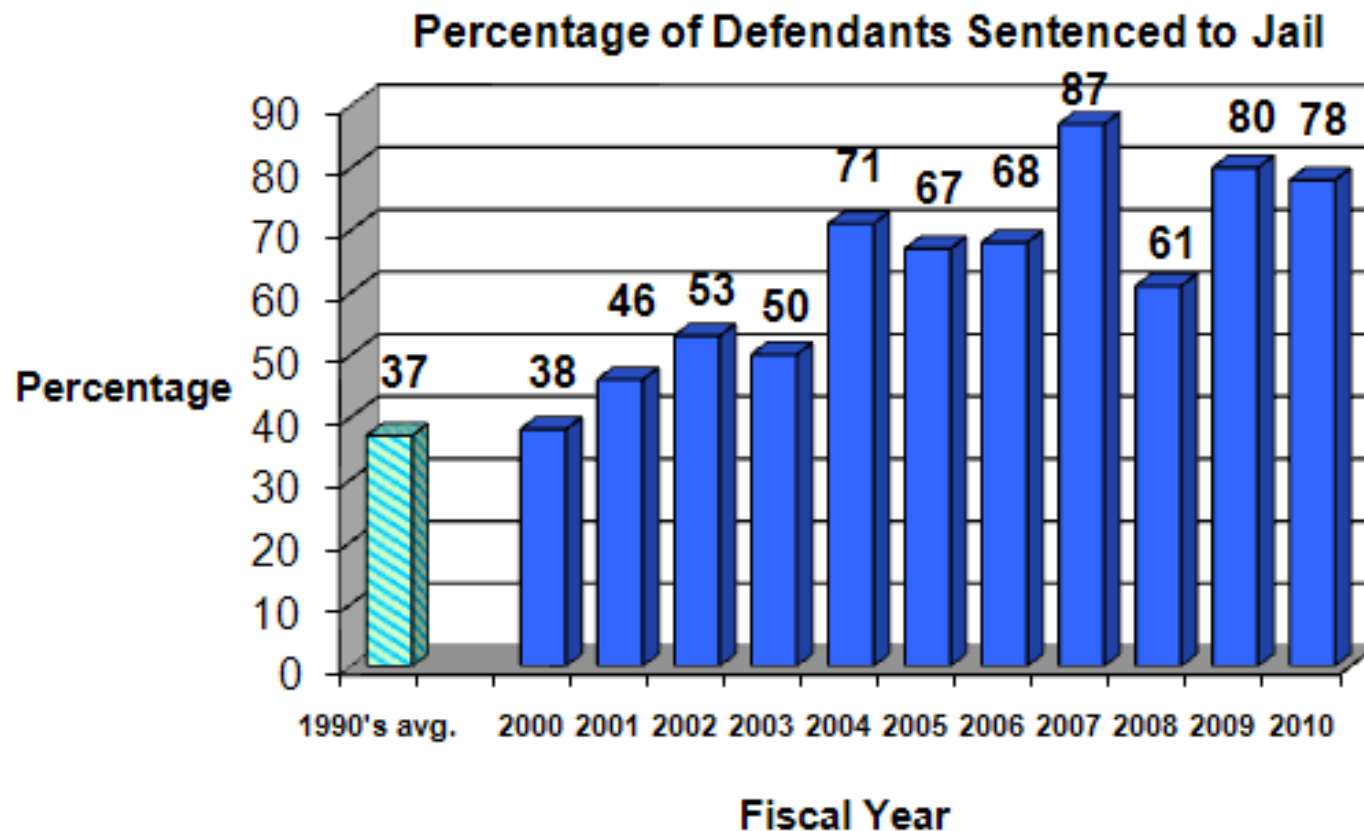
Cartel Enforcement Statistics - Fines



Cartel Enforcement – Longer Prison Sentences



Cartel Enforcement – More Defendants Sent to Prison



Cartel Enforcement – Leniency/Immunity Agreements

- **Still The Most Significant Source of New Cartel Cases**
- **Costs**
 - Need to report to more jurisdictions (all or none approach)
 - Reporting is not cost free
 - Legal fees (including follow-on cooperation commitments)
 - Business distraction
 - Civil damage claims
 - Retaliation by Other Members of the Industry
- **Benefits**
 - No Criminal Penalties in US and Lower or No Fines Elsewhere
 - Companies that report Second can be Penalized Harshly (e.g. Hoffman La Roche \$500 million, LG \$400 million, Samsung \$300 million)
 - No Executives Go to Jail or Restricted from Travel
 - Ability to Resolve problem Sooner and Get Back to Business
 - (e.g. AU Optronics)
 - If You Don't Report Someone Else Will (Do you trust your competitor?)

Industries Already Affected By Cartel Enforcement

- Air & Water Transportation (cargo/passenger)
- Computer Components/ Consumer Electronics
- Banking & Financial Industry
- Food Industry
- Oil & Gas
- Automobile Parts
- Chemical
- Home Appliances
- Government Procurement
- Cement/Ice/Paper

Cartel Enforcement - Aggressive Investigative Techniques

- **Use of Other Criminal Statutes**
 - Obstruction of Justice
 - Mail/Wire Fraud Statutes
- **Extradition**
 - Ian Norris
- **Covert Surveillance**
 - Audio and Video Recording
- **Search Warrants**
- **Border Watch**
 - Track travel into the U.S.
- **Interpol Red Letter Notices**

Increased interest in cartel conduct abroad “affecting” domestic markets

- DOJ
 - Expanding view of extraterritorial reach of U.S. antitrust laws
 - With manufacturing moving overseas, DOJ is pushing to capture indirect effects of cartels
 - e.g., *LCD* (products bought and sold overseas but placed in computers and TVs shipped to U.S.); Chunghwa; and Hannstar
 - FTAIA – Courts are interpreting scope of antitrust law narrowly
 - What will be the effect for criminal cases
- UK and EU
 - EU following the same line as the US (*LCD*)
 - EU focused on “stay at home” arrangements reducing competition in the European markets (non-entry)
 - How will the UK OFT (European criminal enforcement) look at conduct outside the UK?

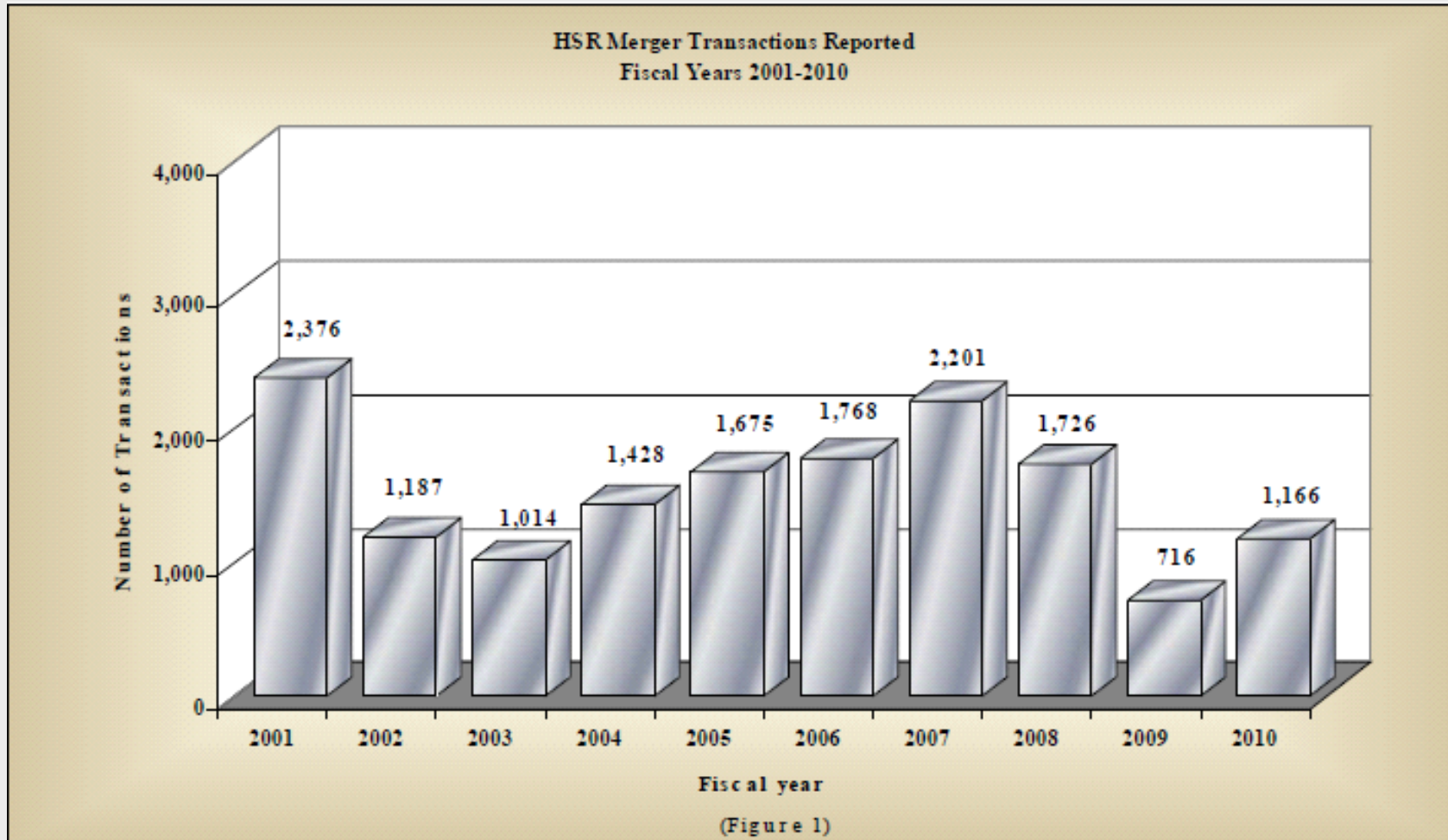
Common Gaps In Compliance Programs that Lead to Increased Risk of Cartel Conduct

- **Mergers** (inadequate due diligence)
- **Foreign Subsidiaries** (in countries without strong compliance cultures)
- **Revolving Door Among Competitors** (employees switch from one competitor to the next)
- **Inadequate Training**
 - E.g. Engineers moved to sales position without training
- **Cost Cutting Measures Reduce Compliance Training**
 - Economic downturn is period of highest risk for cartel conduct
- **Other Improper Conduct**
 - E.g. Foreign Corrupt Practices Act (FCPA) -- Bribery

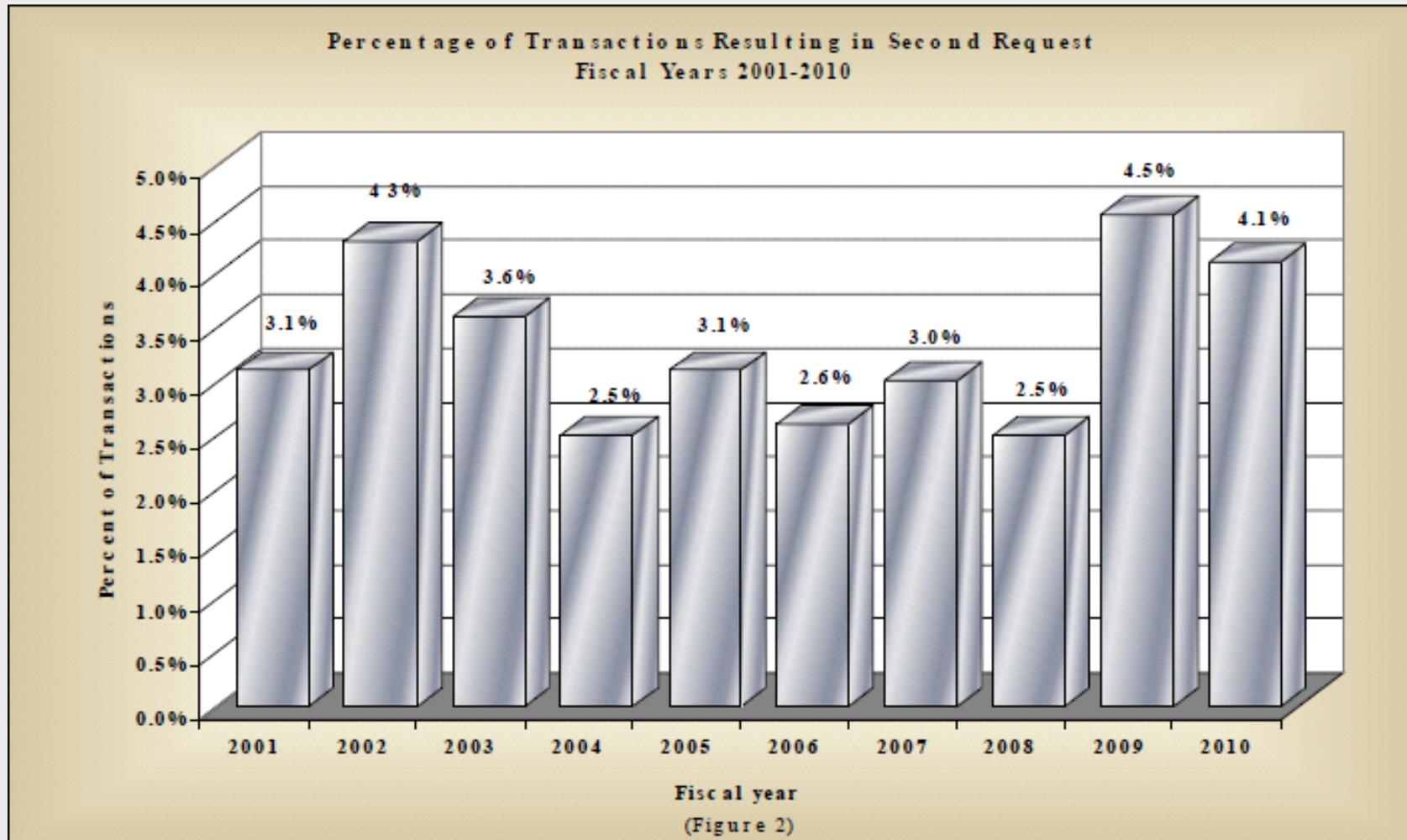
Merger Enforcement

- **The Government Agencies:** DOJ/FTC Share Merger Review Responsibilities
- **The Relevant Law:** Section 7 of the Clayton Act prohibits mergers if “in any line of commerce . . . In any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”
- **Current Merger Activity**
 - Number of Merger Filings Since the Start of the Financial Crisis Have Fallen Dramatically – But Beginning to Rebound
 - Percentage of Mergers Subject to Significant Review are Increasing

Merger Enforcement: Mergers Are Down But Rebounding



Merger Enforcement: Percentage of Second Requests Are Increasing



2010 Horizontal Merger Guidelines

- **Horizontal Merger Guidelines**

- Replaced 1992 Guidelines (revised in 1997)
- Stated Purpose was to Reflect Current Practice of the Agencies
- Revised HHI Concentration Levels to Reflect Agency Practice
- Decreased Emphasis on Market Definition
- Greater emphasis on
 - Competitive Effects (“Natural Experiments,” Market Shares, Head-to-Head Competition, Disruptive Role of Merging Party)
 - Flexible Approach (creating less certainty in determining outcomes)
 - Economic tools: diversion ratios, margins,
 - Upward Pricing Pressure: diverted units x margin – efficiencies
 - New or Expanded Concepts: Powerful Buyers, Bargaining & Auctions, Innovation, Mergers Between Buyers, Partial Acquisitions and Potential Competition

Merger Enforcement - DOJ

- **Two Noteworthy Trends**
 - Non-horizontal and Vertical Mergers
 - Regulatory Remedies
- **Examples**
 - **Google/ITA** (search engine/travel pricing software)
 - **NBC/Comcast** (media content/distribution)
 - **Ticketmaster/Live Nation** (ticketing services/concert promotion)
 - **Intel/McAfee** (CPU chips/security software)
 - **Oracle/Sun** (enterprise software/hardware)
- **Unique “Regulatory” Remedies**
 - Requirement to sell/license to competitors at fair, reasonable, nondiscriminatory terms
 - Make available any product upgrades to competitors
 - Continue to improve the purchased product and don't reduce R&D
 - Create internal firewalls between business divisions to prevent competitive information from being communicated between businesses
 - Require arbitration to resolve price disputes with competitors
 - DOJ will monitor compliance for 5 to 10 years

Merger Enforcement - FTC

- Possibly More Aggressive than DOJ
- FTC's Home-court Procedural Advantages
 - Lower Burden of Proof on Preliminary Injunction (*FTC v. Whole Foods Market, Inc.* 548 F.3d 1029 (D.C. Cir. 2008))
 - Part III: Administrative Adjudication with Review by FTC Commissioners
- FTC Has Tried to Block More Mergers than DOJ with Mixed Results – Due to Problems With Market Definition
 - *FTC v. Lundbeck, Inc.* 2010 WL 3810015 (D. Minn. 2010) (pharmaceuticals)
 - *FTC v. LabCorp*, 2011 WL 5310 (C.D. Cal. 2011) (clinical laboratory testing)
 - *FTC v. Promedica Health System*, 2011 WL 1219281 (N.D. Ohio 2011) (Hospitals)

Merger Enforcement: Other Trends

- Consummated and Non-HSR Merger Challenges
 - DOJ: Dean Foods (school milk) and George's (chicken processors)
 - FTC: Lundbeck (pharmaceuticals)
- Globalization of Merger Enforcement
 - Over 100 jurisdictions have merger notification laws
 - Increased Cooperation with Other Jurisdictions in Merger Reviews
 - Cisco/Tandberg (close collaboration between U.S. & EC)
 - Request for Waivers from Merging Parties
- DOJ – New Tools for Working Jointly With Other US Agencies
 - AT&T/T-Mobile – DOJ/FCC created first joint investigative team

Civil Nonmerger Enforcement

- Monopolization (Section 2 of the Sherman Act)
 - DOJ Rescinded Previous Administration's Section 2 Report
 - DOJ Filed First Monopolization Case in Over 10 years
 - Intel Monopolization Case (Section 2 & Section 5 of FTC Act)
 - Consent Decree: Intel can't require customers to (1) buy exclusively from Intel; or (2) not buy from a competitor; and (3) prohibits below cost bundling of products
 - Possible Google Investigation (FTC v. DOJ)
- Other Civil Enforcement Efforts
 - American Express, MasterCard & Visa (agreements prohibiting merchants from providing discounts for use of certain cards)
 - Blue Cross Blue Shield of Michigan (most favored nation (MFN) clause in health care/hospitals markets)
 - Adobe, Apple, Google, Intel, Pixar & Lucasfilm ("No Poaching" Agreements for Employees)

FTC Section 5: “unfair methods of competition . . . and unfair and deceptive acts . . are hereby declared unlawful.”

- FTC Cannot Enforce Sherman Act and Must Rely on Section 5 to Address Certain Anticompetitive Conduct
 - Due to Judicial Limits Placed on the Sherman Act the FTC is Trying to Reinvigorate its Enforcement of Section 5
 - Section 5 Also Limits Follow-on Class Actions/Damage Claims
- Recent Section 5 Cases
 - Invitation to Collude
 - *In re U-Haul Int’l, Inc.* (2010) (attempted collusion on truck rentals)
 - Industry Standard Setting/Deception
 - *In re Negotiated Data Solutions (“N-Data”)* (2008)(obtaining patents covered by industry standard and then demanding higher royalties)
 - *In re Rambus Inc.* (2002) (failure to disclose patents covered by industry standard)
 - Monopolization
 - *Intel* (2010)(exclusionary conduct, refusal to deal, bundling)

FTC – Efforts to stop “pay-for-delay”

- Patent settlements between pharmaceutical brand manufacturers and generics that lead to patent holder maintaining exclusivity on the patent and delay generics
 - No. 1 Priority of the FTC
 - Losing Battle in the Courts
 - 2nd Circuit Cipro Decision – No Supreme Court Review
 - Other circuits have rejected FTC position
 - FTC continues to prosecute patent settlements with generics
 - Androgel (11th Circuit)
 - Cephalon (3rd Circuit)
 - Losing Battle in Congress
 - Bills to make “pay-for-delay” presumptively illegal have not been successful
 - With change of political party in U.S. House of Representatives – passage of law unlikely

FTC – Petroleum Market Manipulation – Prohibits Fraudulent or Deceptive Conduct

- False or misleading public announcements of planned pricing or output decisions
- False or misleading statements to federal, state, or local governments about current inventory or refinery operating status
- False or misleading representations about the price or volumes of past transactions to a private price reporting service
- Fraudulent or deceptive transactions designed to disguise the actual liquidity or price of a particular asset or market for that asset
- Intentionally omitting material information about refinery production, or operational status of a refinery, terminal, pipeline

Civil Non-Merger – Resale Price Maintenance

- USSC Overturned Rule that Minimum Resale Price Maintenance was *per se* Illegal – Now Rule of Reason
 - *Leegin Creative Leather Products, Inc. v. PSKS Inc.* (2007)
- Result – Little has Changed
 - Several States Still Bar Minimum Resale Price Maintenance
 - California, Maryland, New York (?)
- California Case: *People v. Bioelements Inc.* (2010)
 - Cosmetics manufacturer entered contracts that **required** customers to sell products on the internet at suggested retail price.
 - Bioelements settled and agreed to: (1) stop fixing resale prices for its products; (2) inform distributors that contracts at issue were void; (3) pay \$51,000 civil penalty and attorneys' fees.
 - Similar action taken against DermaQuest (another cosmetics firm)
- Some Efforts in Congress to Repeal *Leegin*

Civil Damage Claims – New Challenges

- Courts Have Made it More Difficult to Bring Cases
- Motion to Dismiss
 - *Twombly/Iqbal* (Plausibility test)
- Class Certification
 - Higher Evidentiary Standard
 - Greater Reliance on Economists and Econometric Evidence
- Costs to get to trial are much greater
 - Fewer private antitrust cases filed
 - Plaintiffs will look to government action before filing civil claims (plea agreements, consent decrees)
- Most cases are dismissed before trial

Questions & Answers

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