

KIRKLAND ALERT

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Senate Judiciary Committee Holds Hearing on William Baer's Nomination to Head the U.S. Department of Justice's Antitrust Division

The Senate Judiciary Committee yesterday held an hour-long hearing on President Barack Obama's nomination of William J. Baer to be Assistant Attorney General in charge of the Department of Justice's Antitrust Division ("DOJ"). The Antitrust Division is responsible for reviewing mergers, bringing civil litigation on behalf of the United States, and enforcing the criminal aspects of the antitrust laws. Mr. Baer, former director of the Federal Trade Commission's ("FTC") Bureau of Competition and longtime head of Arnold & Porter LLP's antitrust practice, is extremely well-qualified for the position given his stature in the antitrust community and his decades of antitrust experience.

In a brief opening statement, Mr. Baer promised vigorous enforcement of the antitrust laws. He also introduced the Committee to his family and current FTC Chairman Jon Leibowitz, former FTC Chairman Timothy J. Muris (now with Kirkland & Ellis), and former Assistant Attorney General James F. Rill, each of whom Mr. Baer had invited to attend.

Two senators attended the hearing, Senator Herbert H. Kohl (D-Wisconsin and Chairman of the Antitrust Subcommittee) and Senator Michael S. Lee (R-Utah and Ranking Member). Mr. Baer largely avoided addressing specific issues, instead promising to be fair-minded and pledging that he has no pre-set enforcement targets.

- Following long-standing practice of the two agencies to refrain from commenting on each other's investigations, Baer demurred when asked to state his view on the FTC's investigation of Google. The FTC, like the European Commission, is reportedly investigating alleged monopolization practices of Google, including biasing its search function to disadvantage competitors' products.
- Declining to address whether there is too much industry consolidation in the United States, Baer indicated that merger reviews were highly fact-intensive and centered on the unique characteristics of the specific industry at issue.
- Expressing sympathy for the goals of Senator Kohl's legislation to strip railroads of their antitrust exemption, Baer demurred on whether he would support the legislation.
- Declining to indicate whether he supports No Oil Producing Exporting Cartels ("NOPEC") legislation, Baer observed that there are significant diplomatic considerations implicated by the bill. The NOPEC legislation seeks to amend the Sherman Act to permit the DOJ to bring actions against foreign states — such as members of the Organization of Petroleum Exporting Countries ("OPEC") — for collusive practices in setting the price or limiting the production of oil.

During the course of the hearing, Mr. Baer shared his views on several topics of importance to the business community and the antitrust bar:

- Consistent with recent testimony of officials from the DOJ and the FTC, Mr. Baer expressed concern about recent International Trade Commission exclusion orders under Section 337 regarding alleged abuses

of the standard-setting process. The issue is whether and to what extent members of Standards Setting Organizations (“SSOs”) who make commitments to license standards-essential patents on reasonable and non-discriminatory terms (“RAND”) may seek exclusion orders at the ITC. The FTC and DOJ have opined that, absent exceptional circumstances, an ITC exclusion order should be unavailable for standards-essential patents. The agencies reason that an exclusion order on a standards-essential patent would constitute anticompetitive conduct. The question of the effect of a RAND obligation on an exclusion order is currently pending at the ITC in a case in which Motorola sued Apple for patent infringement based on a number of Apple’s electronic devices.¹

- Mr. Baer disagreed with the Supreme Court’s decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), which holds that vertical price restraints are not per se illegal. He also expressed support for Senator Kohl’s efforts to overturn that decision legislatively. The primary basis for Mr. Baer’s position is that *Leegin* has created uncertainty for the business community and has created tensions between federal antitrust jurisprudence and state laws. Notably, he did not invoke the traditional reasons for per se illegality, namely that the practice is always or almost always anticompetitive.
- Mr. Baer promised to make engaging with his international counterparts a top priority of the Antitrust Division. Cross-border cooperation is particularly important for multi-jurisdictional

mergers, as more than 45 countries now have pre-merger notification regimes. Clear communication among the various reviewing agencies lessens the likelihood of conflicting outcomes and inconsistent remedies. One recent example of inconsistent outcomes involved Seagate’s acquisition of Samsung’s hard drive division, wherein the FTC and European Commission quickly cleared the deal, while China imposed remedies.

- Senator Lee asked about controversial statements from former AAG Christine Varney that the Chicago School should “be retired” and that false positives do not exist. Mr. Baer praised the Obama Administration’s antitrust enforcement, but he refused to disparage the Chicago School of Economics and said that he agreed that antitrust regulators must be mindful of the risks to innovation and consumer welfare posed by over-enforcement of the antitrust laws. Baer said that antitrust enforcement works best when it is non-partisan and based on sound economics.
- Mr. Baer affirmed that the purpose of antitrust is to protect consumers, not competitors, and explained that he is a strong advocate of deregulation.

The Committee has not yet disclosed when it will vote on Mr. Baer’s nomination.

¹ *Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers and Components Thereof*, Inv. No. 337-TA-745, Comm’n Decision to Review in Part, 77 Fed. Reg. 38826 (June 29, 2012).

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