

Special Report

The Party's Over On Enforcement

Obama To Get Tough On Antitrust

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As a presidential candidate, Barack Obama accused the Bush administration of supporting the weakest antitrust enforcement in half a century and promised to enact a new, more consumer-focused philosophy. Four months into office, President Obama appears ready to put his beliefs into practice.

The ramifications for business will be substantial.

The Bush administration subscribed to the so-called Chicago School approach to antitrust, which holds that government regulation makes too many mistakes and that relying on the self-correction mechanism of private markets is a safer course of action. Under Bush guidelines, the federal government's goal was to stop flagrant abuses, but avoid interference in the rough and tumble of beneficial competition. For seven years, the administration did not bring a single case under the Sherman Antitrust Act, but did look at price-fixing, collusion and bid-rigging.

Varney Cites Rationale

The Obama administration's philosophy was spelled out this month by Christine Varney, the assistant Attorney General in charge of the Antitrust Division.

In a speech before the Center for American Progress, a liberal think tank that has long advocated stricter antitrust measures, Varney made it clear that there would be a break with the Bush philosophy, which she said advocated extreme hesitancy in the face of potential abuses by monopolistic firms. Varney said that the Bush policy "lost sight of an ultimate goal of antitrust laws—the protection of consumer welfare."

"The failing of this approach," she elaborated, "is that it effectively straitjackets antitrust enforcers and courts from redressing monopolistic abuses, thereby allowing all but the most bold and predatory conduct to go unpunished and undeterred. We must change course and take a new tack."

Varney, an FTC commissioner in the Clinton

administration and a lawyer specializing in Internet and technology issues, specified that she intends to look more carefully at vertical mergers between producers and suppliers. "We must consider the overall state of competition in the industries in which we are reviewing potentially anticompetitive conduct or mergers," she said.

Varney added that the administration would not back off antitrust enforcement because of the weak economy, arguing that severe recessions offer incentives for dominant companies to engage in predatory behavior.

Even as Varney spoke, on-line search giant Google confirmed it is under two separate investigations. First, it is in discussions with the Federal Trade Commission about overlapping directorships with Apple, an issue that both companies thought had been put to rest by the safe harbor provision permitting such directorships if companies do not compete for income in overlapping businesses. Also, the Justice Department is looking into Google's recent deal with publishers in the burgeoning digital book business.

Despite her tough talk, Varney did vow that she would not be out for blood for blood's sake. "We need to be careful not to swing back too far the other way," she cautioned. Many antitrust lawyers expect a return to the Clinton-era antitrust policies, which were viewed as strict, but not vindictive.

Will Have Major Impact

Whatever the precise calibration of enforcement, the changes in antitrust policy are likely to have a major impact not only domestically but internationally. In general, relatively cautious U.S. antitrust efforts have made the European Commission the dominant voice in what constitutes anticompetitive business practices. This has driven some companies to shop around for the most lenient jurisdiction. Under Varney, that may stop.

Supporters of the Obama approach argue that it will be of particular help to small firms. Under

the Bush antitrust doctrine, these supporters say, smaller firms had to prove that the effects of anti-competitive activity by larger firms were disproportionately greater than the benefits. The burden was on the small firm to show that the big firm was hurting the economy.

On the other hand, while the number of cases brought by the federal government may vary according to the philosophy of the sitting president, the courts ultimately decide the outcome. And, traditionally, the courts have been wary of ruling that companies are monopolies per se. Witness the outcome in the Microsoft case that threw out a lower court judge's decision and permitted the company to remain intact.

Business Lobbies Hold Fire

Business lobbies in Washington have been careful so far not to antagonize Varney or the Obama administration, saying circumspectly that they expect fairness, adherence to past court decisions and an understanding of difficult economic conditions.

They won't have to wait long to find out which way the wind is blowing. Presidents must have their budgets and legislative proposals approved by Congress, but antitrust policies are their purview and may be implemented immediately.

Implications For Business

- Take the Obama administration at its word. In calculating the economics of any M&A decisions, factor in the potential cost, time and reputational damage of strict antitrust scrutiny.
- Be prepared to use aggressive communications and influential third-party supporters to publicize the benefits of any M&A transaction to consumers.
- Expect politics and populism to play a decisive role going forward whenever mergers, acquisitions and divestitures are challenged by the

administration.

- Keep in mind that jobs will trump all other considerations while the economy continues to stumble. On the antitrust front, avoid acquisitions or divestitures that threaten to result in sizeable domestic job losses.