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Restoring Trust in Antitrust Enforcement

David Balto May 2009

Introduction and summary

Antitrust enforcement is the cornerstone of a competitive marketplace. When that enforcement is docile or misdirected—as it was for much of the Bush administration—consumers suffer. During that administration, the Antitrust Division of the Department of Justice embraced a minimalist course; it acted largely to reduce the scope of enforcement and the use of antitrust statutes in private litigation. This minimalist approach was based in significant part on the "Chicago School" theory that antitrust enforcement makes mistakes more often than it helps correct market failures and markets almost always lead to the best result. When companies abuse market power to exclude competition, Chicago School proponents argue, the market will self-correct because market power is temporary and entry barriers are minimal.

This belief in the near-perfect market—and its proscriptive value—was severely shattered by the worst recession that the U.S. economy has seen in decades. The U.S. gross domestic product has recently declined at rates not seen since the first quarter of 1982, and the national unemployment rate has surged to 8.5 percent and continues to climb. Americans of all age groups, race, and education are being hit hard by this recession, and the economic outlook for the future remains bleak. The Center on Budget and Policy Priorities has estimated that the number of Americans living in poverty will increase by as much as 10.3 million by the end of this recession.[1]

This Bush recession is a wake-up call to re-examine, and even leave behind, the assumption that markets are self-correcting and have no need for regulation. To give just one example, the development of new and dangerous financial products has frequently led to unstable outcomes in the absence of proper regulation. In January 2009, the Congressional Oversight Panel determined:[2]

> *Financial markets are inherently volatile and prone to extremes. The government has a critical role in helping manage public and private risk. Without clear and effective rules in place, productive financial activity can degenerate into unproductive gambling, while sophisticated financial transactions, as well as more ordinary consumer credit transactions, can give way to swindles and fraud.*

Republican Federal Trade Commissioner Tom Rosch said in a recent speech, that "if not dead [the Chicago School] is on life support…. [M]arkets are not perfect; imperfect markets do not always correct themselves; and business people do not always behave rationally."[3]

In this context, it is important to understand the failures of the previous administration's minimalist approach to antitrust enforcement and its effects. Over the past eight years, the Antitrust Division brought no enforcement actions against companies that dominate their markets, or so-called dominant firms; it went more than five years without bringing a merger challenge to federal court; it adopted an amicus program that sought almost exclusively to narrow the scope of antitrust law; and it adopted an unnecessarily adversarial attitude toward other enforcement officials, especially its sister antitrust agency, the FTC.

The results in many markets are not surprising. A lack of merger enforcement has led to oligopolistic market structures, which foster coordination, higher prices, and diminished services. Moreover, the lack of merger enforcement has created many entities that are "too big to fail" and thus, candidates for government bailout. A lack of enforcement among dominant companies has led to less innovation and economic growth. The general lack of enforcement may lead business to believe the cop has left the beat, perhaps leading to greater efforts at coordination and price fixing as well as predatory conduct.

The Antitrust Division under the Obama administration must address several key challenges to restore the balance between healthy market competition and antitrust enforcement. This paper details why this balance is necessary to restore competition and promote economic recovery. Four specific objectives will set the division on a path to success:

- **Create a progressive Antitrust Enforcement Program tailored to the economic downturn.** We learned from the Great Depression that lax antitrust enforcement during tough economic times can contribute to prolonged hardship. For this reason, the division should develop a plan for the current downturn so that antitrust enforcement can play a vital role in removing market barriers and permitting new firms to enter markets, thereby increasing job opportunities and leading to economic growth.

- **Reverse the constriction of the antitrust laws.** Antitrust law has been severely weakened over the past eight years. The division should reverse this trend through its enforcement actions, amicus program, and by assisting the courts in clarifying legal standards to protect the ability of private parties to pursue antitrust litigation.

- **Abandon the Justice Department's dominant firm report.** The Bush administration's dominant firm report made it easier for monopolists to fend off legal challenges and engage in exclusionary conduct that will dampen innovation and economic growth. The Antitrust Division should abandon this report.

- **Restore the ability to litigate mergers.** During the past administration, the division litigated many fewer cases than normal, weakening its ability to litigate effectively and secure meaningful relief in merger enforcement cases. This timidity must be reversed.

The results of the lack of enforcement over the past eight years surface in all sectors of the economy. By examining three industries—those of health care, agriculture, and telecommunications—we can see exactly what has happened in the absence of enforcement, and provide recommendations for correcting the damage that has been done.

A new course for antitrust enforcement is essential as part of the administration's efforts to revitalize the economy. An economic downturn makes competition enforcement even more vital as consumers have suffered from higher prices, lower output, and fewer services in increasingly concentrated markets lax antitrust enforcement has weakened the economy as markets have become more concentrated, leading to higher prices and less service. We hope this paper contributes to helping design this new course for antitrust enforcement.

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