



FTC Chairman Jon Leibowitz and Assistant Attorney General Christine Varney

# Reinvigorating Antitrust Enforcement

The Obama Administration's Progressive Direction on  
Competition Law and Policy in Challenging Economic Times

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David A. Balto July 2011

# Introduction and summary

Our nation and our economy are at a critical juncture in antitrust enforcement. Increasingly, the markets that consumers depend upon the most—health care, pharmaceuticals, financial services, and agriculture, just to name a few—are becoming more and more concentrated as fewer and fewer competitors remain amid mergers and acquisitions that sharply reduce competition and as dominant companies in our economy take advantage of their position to abuse their market dominance. The bulwarks of the competitive marketplace, choice and aggressive rivalry, are increasingly diminished, with many of these markets plagued by deceptive conduct designed to mask the degree of concentration.

This was especially the case during the Bush administration, but fortunately President Barack Obama selected exceptional leaders for both the antitrust division of the Department of Justice and the Federal Trade Commission—the two agencies that handle antitrust issues in Washington—to turn the tide back in favor of consumers. Both Assistant Attorney General Christine Varney and FTC Chairman Jon Leibowitz bring a keen perception about the important role of antitrust enforcement as a bulwark to a competitive marketplace. Both are strong leaders who know how to make the most of the limited resources of their agencies, and both are supported by talented career lawyers and economists who are dedicated to the mission of protecting consumers.

The new leaders of the two antitrust agencies have been at the helm for just over two years. Their leadership shows a commitment to a progressive enforcement agenda that:

- Seeks to prevent anticompetitive practices that raise prices, reduce output, and dampen economic growth
- Works with other administration officials to try to enact and adapt regulations to fully protect competitive markets, especially in health care, financial services, and agriculture
- Makes the antitrust process more transparent and less burdensome for business

This approach to antitrust enforcement and engagement in competition issues across the government has contributed to the administration's efforts to promote innovation and job growth through the preservation of competitive forces in the market. Simply, rivalry spurs economic growth.

This paper provides a midterm assessment of the accomplishments of the Obama administration's top antitrust enforcers and then offers some suggestions about where even more progress could be made. The paper first identifies the accomplishments of the agencies in critical industries, including health care, pharmaceuticals, agriculture, and financial services, and then describes the key changes in the agencies' approaches to so-called "dominant firm conduct," where firms who account for a significant share of the market seek to exploit that position to fend off competition, and vertical integration, where a firm controls multiple levels of the production process.

The paper then examines the changes to antitrust process with the goal of making it more transparent and less burdensome for businesses. It concludes by identifying areas that the Obama administration should focus on in order to strengthen antitrust enforcement as a whole, among them:

- Resolving the jurisdictional overlaps between the antitrust division of the Department of Justice and the Federal Trade Commission so that antitrust regulation is more predictable and effective
- Recognizing the role of the two antitrust agencies as regulators as well as litigators and working to make sure the remedy process is transparent and remedies are fully effective
- Working proactively with other administration regulators to solve competitive problems best addressed through regulation
- Issuing a revised health care policy antitrust statement so that guidelines that are more than a decade old are updated to reflect the new health care law
- Stepping up litigation in those key areas of antitrust enforcement to clarify important areas of the law

These suggested reforms become self-evident when the paper first looks at today's antitrust landscape in light of the necessary changes delivered up by the Obama administration after the troubling Bush era of antitrust nonenforcement and then at what the current administration has accomplished but still has left to do.

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