



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

David A. Balto July 2011

Center for American Progress



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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.

Increased antitrust enforcement in four critical markets

The Obama administration's two antitrust enforcement chiefs, Justice Department Assistant Attorney General Christine Varney and Federal Trade Commission Chairman Jon Leibowitz, have made their mark in Washington in four critical markets—health care, pharmaceuticals, agriculture, and financial services. These four markets are particularly critical to our economic recovery and faced numerous competition challenges.

The handful of enforcement actions in the health care sector had little impact on systemic anticompetitive conduct in the industry. In particular, there was no significant competition or consumer protection enforcement against health insurers. Enforcement in the pharmaceuticals market faced an often overly skeptical and unreceptive judiciary. There was almost no antitrust enforcement in agriculture markets. And anticompetitive conduct in financial services markets, ignored during the Bush administration, was a catalyst to the clear market failures that ultimately plunged our nation into the dire economic straits we are still climbing out of today.

Before we delve into the specific industries, there is one clarifying note. Justice and the FTC both have the power to bring enforcement actions under the antitrust laws, so the agencies typically separate jurisdiction by industry, especially for merger review. The FTC usually handles antitrust enforcement in the consumer goods and pharmaceuticals industries while Justice deals with agriculture, telecom, and financial services. And not all industries are divvied up, for instance health care. This explains why some of the analysis in this paper is exclusively about one agency.

So let's begin our review of what Justice and FTC inherited from the Bush administration and their own records over the past two years, starting with health care.

Improving antitrust enforcement and policy in the health care sector

Antitrust enforcement plays a critical role in the efforts to control costs and enhance innovation in health care markets. Sound antitrust enforcement in the health care sector relies on two important principles:

- Allocating enforcement resources to areas of the health care system that have the greatest impact on consumers
- Providing clear guidance and advice so that health care providers can collaborate

The Bush administration failed on both fronts.

Case in point: Of the 31 enforcement actions in the health care sector brought by the FTC during the Bush administration, all were against health care providers, and almost exclusively against doctors, but there is little evidence that these actions produced significant competitive benefits because often these providers had little ability to increase prices. Indeed, almost 40 percent of these cases were brought in rural markets,¹ exacerbating the existing challenge of retaining and attracting qualified professionals to those underserved areas. None of the cases resulted in private cases seeking damages for injured consumers.

During that same time period, Justice brought no meaningful enforcement actions against anticompetitive or fraudulent conduct by health insurers. There were over 400 health insurer mergers, and Justice only sought to restructure two of the mergers. There were no challenges to any mergers or anticompetitive conduct by health insurers. The ensuing merger wave hurt small businesses, consumers, and health care providers. As a result, more than 90 percent of all metropolitan health insurance markets are highly concentrated. The health care debate documented how this extreme concentration results in higher prices, millions of uninsured consumers, and a pattern of egregious conduct by health insurers.

Moreover, both the FTC and Justice fell short of articulating clear guidelines on antitrust policy in the health care sector. Cognizant of drastic changes in the nature of the health care industry, Justice and the FTC held a series of joint hearings, solicited comments, and re-solicited the same comments.² The culmination of these extensive efforts was a 360-page report, but little in the way of updated federal antitrust policy for the health care industry.³ Moreover, when parties sought advice on prospective collaborations, they faced a time-consuming and

cumbersome process. As a recent CAP study demonstrated, during the Bush administration parties seeking advice typically had to wait more than 436 days for a response from the FTC and pay over \$100,000 in legal fees.

The failures of the Bush administration antitrust enforcement contributed to the market failures, especially in health insurance market, that led to the critical regulatory reforms under the Patient Protection and Affordable Care Act. The lack of antitrust enforcement against health insurers led to higher prices, more anticonsumer insurance provisions, greater payment delays, less coverage, and poorer service.

Restoring balance to health care antitrust enforcement

Under the Obama administration, federal antitrust authorities are back on track for each of the dual goals. The administration is efficiently allocating scarce agency resources by restoring balance to enforcement actions in the health care sector. Rooting out anticompetitive conduct and preventing further consolidation of health insurers offers the greatest potential for producing tangible results for consumers in terms of lower prices, higher quality, and increased choice.

In October 2010, for example, the antitrust division of the Justice Department filed a civil antitrust suit against Blue Cross Blue Shield of Michigan, the dominant health insurer in Michigan, alleging that the most favored nation clauses within their provider agreements, which required health care providers in the Blue Cross Blue Shield of Michigan's network to charge other commercial health insurers prices that were higher or at least equal to what they charged Blue Cross Blue Shield of Michigan, stifled competition and resulted in higher health insurance prices for consumers. The litigation is currently ongoing, as the United States District Court for the Eastern District of Michigan recently denied Blue Cross Blue Shield of Michigan's motion to dismiss.

Justice also stopped further consolidation within the health insurer market where it posed competitive concerns.⁴ In March 2010, for example, Blue Cross Blue Shield of Michigan abandoned its plans to purchase Physicians Health Plan of Mid-Michigan, a small but important health insurer in the state.⁵ The deal was scuttled after Justice informed the companies that it would file a lawsuit to block the merger.⁶ Its analysis showed that the combination of Blue Cross Michigan, who controlled almost 70 percent of the market in Lansing, and Physician's Health, who had approximately 20 percent of the market, would lead to higher prices, lower

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levels of service, and decreased quality for health care consumers.⁷ This case demonstrates the Obama administration's commitment to stopping undue consolidation in health insurance markets and sends a strong signal further consolidation in concentrated markets will not be tolerated.

Nonetheless, the antitrust enforcers under the Obama administration are still calling balls and strikes fairly amid their increased scrutiny of health care consolidation. Both Justice and the FTC have closed several investigations after analysis indicated there was little risk of competitive problems, especially involving mergers of hospital systems where consolidation was necessary in declining markets.⁸ But where the potential impact of eliminating anticompetitive conduct by dominant providers is high, the agencies have stopped problematic conduct.

In February 2011, for instance, Justice filed a complaint against United Regional Health Care System, based in Wichita Falls, Texas, for allegedly abusing its monopoly power in the local market for inpatient hospital services by imposing exclusionary contracts on commercial health insurers.⁹ This was the first case brought by Justice or the FTC against anticompetitive conduct by a provider alleged to have significant market power in more than 17 years, and shows an appropriate focus on the competitive issues raised where a single provider dominates a market. The parties reached a settlement agreement that prohibits United Regional Health Care System from conditioning its prices or discounts on whether or not a particular health insurer contracts with United Regional Health Care System's rivals. The proposed settlement agreement is currently pending approval by the court.

Similarly, the FTC has demonstrated stronger antitrust enforcement against potentially problematic hospital mergers. There has been a reinvigoration of the FTC's confidence in challenging problematic mergers in court. At the beginning of this year, for example, the FTC sued ProMedica Health Systems, based in Toledo, Ohio, alleging that its acquisition of a rival hospital in the city would substantially harm competition in the general acute-care inpatient hospital services market as well as the inpatient obstetrical services market.¹⁰ The FTC took ProMedica to court seeking an injunction of the merger.¹¹ It alleged the merger would give ProMedica a nearly 60 percent market share for general acute care services, reducing the number of competitors from four to three, and that the merger would result in an 80 percent market share in obstetrical services, reducing the number of competitors from two to one.¹²

The FTC has demonstrated stronger antitrust enforcement against potentially problematic hospital mergers.

In March, a district court granted a preliminary injunction blocking ProMedica from further consolidating operations with St. Lukes Hospital, ProMedica's proposed merger partner.¹³ The District Court for the Northern District of Ohio ruled that ProMedica and St. Luke's Hospital must abide by the current hold-separate agreement until all legal proceedings, including appeals, by the FTC are complete.¹⁴ The case is currently in litigation before an FTC administrative law judge.

Articulating clearer policy toward health care antitrust enforcement

In addition to improving balance in enforcement actions, antitrust enforcers under the Obama administration has also made headway in articulating a clearer, more balanced policy on provider collaboration under the nation's new health care law, the Affordable Care Act. These initial steps are key to implementing the new law between now and 2014, when most changes will be fully in effect.

In conjunction with proposed rules released by the Department of Health and Human Services earlier this year, Justice and the FTC issued a joint proposed policy statement regarding the competition issues posed by so called Accountable Care Organizations.¹⁵ Under the new health law, physicians, hospitals, and other health care providers are encouraged to reduce cost by, among other things, integration in health care delivery systems.

One option to reduce costs is to form an Accountable Care Organization to manage and coordinate care for Medicare beneficiaries. The proposed policy statement clearly defines an "antitrust safety zone" under which health care providers can come together without running afoul of antitrust laws, discloses what criteria will trigger mandatory review, and details the review process.¹⁶ In addition, guidance sets solid commitments to provide guidance on a timelier basis, hopefully avoiding unnecessary time delays as in the Bush administration.

The proposed policy statement strikes a balance between allowing providers to reduce costs through use of Accountable Care Organizations and preserving competition within these markets. Justice and the FTC solicited comments on the proposed policy statement through May of this year and are expected to release the final version later this year.

Two-pronged attack on anticompetitive conduct in the pharmaceuticals industry

In few markets is competition enforcement as critical as pharmaceutical markets. Increases in pharmaceutical costs are a major driver in increased health care costs, which is why assuring competition in these markets is of vital importance. But assuring competition is a much more difficult proposition in pharmaceutical markets since pharmaceuticals boast protected intellectual property rights and often are afforded statutory monopolies. Such monopolies are, of course, appropriate unless secured or extended through exclusionary conduct. In addition, the structure of pharmaceutical markets typically results in less than a handful of competitors, so mergers can pose even more significant competitive problems.

Fortunately, the FTC over the past two years focused tremendous attention to competition in pharmaceutical markets and that attention has resulted in real world benefits for consumers. Its merger enforcement team is pursuing numerous enforcement actions to prevent mergers that otherwise might lead to higher prices or less innovation. Typically, these enforcement actions result in significant divestitures in those markets where there are significant overlaps in competition.

In September 2010, for example, the FTC issued a consent order against Novartis AG in its proposed \$28.1 billion acquisition of Alcon, Inc—the only other suppliers of specific injectable miotics in the United States.¹⁷ Due to the anticompetitive effects of limiting opportunities for new market entry, the consent order required Novartis to divest its rights and assets in its injectable miotics product to Bausch & Lomb, Inc., an eye-health company entering the injectable miotics market.

Another recent example of the FTC's strong merger enforcement program is Pfizer Inc.'s \$68 billion acquisition of Wyeth Pharmaceuticals Inc. in 2009. Pfizer's proposed acquisition included Wyeth's animal health division. The FTC alleged that the merger would lead to a reduction in competition in 21 U.S. markets for animal health products and higher prices to consumers. To address these competitive concerns the consent order required Pfizer to divest the acquired U.S. animal health products business in all competitively overlapping areas to Boehringer Ingelheim Vetmedica, Inc.¹⁸

Clearly, the most critical issue facing antitrust enforcers are practices by branded and generic pharmaceutical companies that keep lower-cost generic drugs off the market. Generic drugs are one of the most significant tools in helping to control

healthcare costs. Generic drugs typically cost 90 percent less than their brand-name equivalent. The increased utilization of generic drugs has been a major tool, both to increase consumer access to drugs and more effectively control healthcare costs.

Unfortunately, like any regulatory system, the Hatch-Waxman Act, which was designed to hasten generic drug entries into the market place while giving brand-name manufacturers specific patent protection to encourage research, provides opportunities for market participants to game the system. One such practice is pay-for-delay settlements in which a branded manufacturer pays a generic competitor to stay out of the market. These settlements can have a profound impact on competition as found in an earlier CAP study.¹⁹ The FTC has determined that these settlements cost consumers over \$3.5 billion annually in higher prices.

In recent years, brand-name companies have paid their generic rivals millions of dollars to drop lawsuits challenging patent validity and to refrain from entering the market. The amount of these exclusion payments can and sometimes do exceed what the generic company would have earned by entering the market. Because the first generic company that challenges a patent has the exclusive right to begin generic entry—because it has a 180-day period of exclusivity—these settlements keep all generic companies from competing in the marketplace.

The FTC has used the full range of its powers to combat these pay-for-delay settlements. As Commissioner Leibowitz noted in a September 2010 speech at the Georgetown Law Center, “one of the FTC’s top priorities over the past year has been putting an end to pay-for-delay pharmaceutical settlements.”²⁰

The FTC has brought several cases attacking individual settlements and those cases are currently in litigation. In February 2008, it sued Cephalon, Inc. for entering into pay-for-delay settlements to prevent generic competition to Provigil, a drug used to treat sleep disorders, and which accounted for more than 40 percent of the company’s total sales.²¹ The complaint alleged that four generic manufacturers—Teva Pharmaceuticals USA, Inc., Ranbaxy Pharmaceuticals, Inc., Mylan Pharmaceuticals, Inc., and Barr Laboratories, Inc.—were involved in patent litigation over the only remaining patent covering Provigil, and that Cephalon paid the generic manufacturers over \$200 million to abandon the patent litigation and agree to refrain from selling a generic version of Provigil until 2012.²² On March 29, 2010 that court denied Cephalon’s motion to dismiss. The case is currently pending before the U.S. District Court for the Eastern District of Pennsylvania.

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Following the Cephalon suit, in January 2009, the FTC sued Watson Pharmaceuticals, Inc., Par Pharmaceutical Companies, Inc., Paddock Laboratories, Inc., and Solvay Pharmaceuticals, Inc., challenging agreements in which Solvay allegedly paid generic drug makers Watson and Par to delay generic competition to Solvay's branded testosterone-replacement drug AndroGel.²³ The complaint charged that the defendants knew that, if Watson or Par were to enter the market with less expensive generic versions of AndroGel, then Solvay's AndroGel sales would plummet and consumers would benefit from the lower prices. Therefore, to eliminate this threat, Solvay paid Watson and Par a share of its AndroGel profits in exchange for abandoning their patent challenges and agreeing to delay generic entry until 2015.²⁴ The district court granted the defendants' motion to dismiss the complaint and the case is currently on appeal before the 11th Circuit Court of Appeals.

The FTC has used its full panoply of powers to attack these pay-for-delay settlements. In addition to litigation, the FTC has actively advocated for legislation to amend the antitrust laws to prevent pay-for-delay settlements. It has used its research powers to analyze the full impact of pay-for-delay settlements and currently assesses the harm from these settlements at about \$3.5 billion annually. Finally, the FTC along with the Department of Justice have regularly filed amicus briefs in private antitrust cases seeking to get the courts to adopt a rule of law condemning these pay-for-delay settlements.²⁵

Greater attention to agricultural competition

It is important for the two federal antitrust enforcement agencies to learn to work more effectively with both federal and state regulators to help find solutions to competitive and consumer protection problems. Perhaps the most important observation by any antitrust enforcer in the past several years has been the comments of Assistant Attorney General Varney that, in many cases, a competition problem may not necessarily have an antitrust enforcement solution and that the department must work proactively with regulators to address these issues.²⁶

Indeed, antitrust enforcement may have limited tools to adequately challenge ongoing anticompetitive conduct. Moreover, in many cases, a regulatory solution may be a more effective way of dealing with competitive problems in the market than a narrow antitrust enforcement action. Thus, antitrust enforcers must work to strengthen regulation through competition advocacy so that it fully protects consumers.

Nowhere is the observation about the importance of antitrust enforcers and regulators working together more important than in agriculture markets. There are chronic competitive problems in agricultural markets—particularly dairy, beef, and poultry—where increasingly consumers pay more while farmers receive less while agricultural processors reaps outsized profits. These problems have grown only worse in the past year, especially in dairy, where countless farmers increasingly face the prospects of closing their farms that have been in their families in decades.

The failure to adequately enforce the antitrust laws in the agriculture sector during the Bush administration has led to a situation today that is analogous to the deplorable state of the U.S. agriculture industry during the late 19th century—which was one of the motivating factors behind enacting the Sherman Act in the first place.²⁷ Agricultural processing markets are a fertile territory for deceptive and exclusionary practices. Often agricultural processors are vertically integrated, giving them the ability to control supply permits and thus to manipulate the price for food products.

Federal antitrust laws can deal with these issues, in part, if they are enforced. But the antitrust laws are limited in scope. The Packers and Stockyards Act regulates deceptive and egregious practices by processors, but its enforcement has been periodic at best. Also problematic, mergers in the agriculture industry often fall under the transaction size reporting threshold established by the Hart-Scott-Rodino Act, which currently sits at \$66 million, and it is more challenging to challenge acquisitions that have not been reported under the act.

The Obama administration faced the problems in agricultural markets head on. In August 2009, the Department of Justice and the U.S. Department of Agriculture announced a series of five workshops examining the state of competition in agriculture markets. Both Agricultural Secretary Tom Vilsack and Attorney General Eric Holder attended all five hearings, and they heard directly from scores of farmers and processors.

The workshops demonstrated the rediscovered value of having regulators and antitrust enforcers work hand in hand and addressed several competition issues in agricultural markets, including monopsony—where a market has a limited number of powerful buyers—and vertical integration.²⁸ The primary goal was to learn and listen from those with real world experience in the agricultural sector. And they were a huge success. There were more than 3,500 participants through the first four workshops.²⁹

With a fresh understanding of the issues facing America's farmers, the antitrust division at the Department of Justice and the Department of Agriculture are now better equipped to execute their respective missions. The workshops helped build a strong partnership between the two departments and they have instituted a joint task force to tackle these issues.³⁰ Not only will this partnership will help both agencies accomplish their respective missions, it will also serve as a template for future alliances between the Division and other regulatory agencies.

These efforts also resulted in newly invigorated enforcement. In January 2011, for example, Justice challenged Dean Foods Company's consummated acquisition of Foremost Farms USA's Consumer Products Division.³¹ Justice alleged that the acquisition would substantially lessen competition in the dairy market in Wisconsin and neighboring states.³² The parties have reached a settlement conditioned on divestiture of a dairy processing plant, which is currently pending the court's approval.³³

And in May 2011, Justice continued its vigorous protection of competition in the agriculture sector by filing a complaint in the United States District Court for the Western District of Virginia, challenging George's Foods LLC's acquisition of a poultry processing plant from Tyson Foods, Inc.³⁴ Justice alleged that the transaction would substantially lessen competition in the buyer-side of the market for poultry produced by Virginia and West Virginia growers.³⁵ The parties have reached a settlement agreement which is conditioned on George's making capital improvements to a chicken processing plant that will lead to significant increase in the number of chickens that will be processed at the facility, giving George's a financial incentive and ability to increase demand for local poultry producers.³⁶

It is also noteworthy that the monetary value of both of these challenged transactions fell well below the Hart-Scott-Rodino Act threshold. Although Justice was never precluded from challenging transactions not reportable under that law, past administrations have been hesitant to do so, especially in the agriculture sector. These cases demonstrate that the Obama administration recognizes the competitive problems plaguing the agricultural sector and the need for greater scrutiny of problematic conduct and mergers.

With a fresh understanding of the issues facing America's farmers, Justice and USDA are now better equipped to execute their respective missions.

Greater enforcement in the financial services markets

Of course, the financial crises of the past several years were caused by several market failures in financial service markets. Under the Obama administration, antitrust enforcers have made significant contributions to correcting the failures in these markets by stepping up enforcement actions and promoting competition by providing guidance to other federal agencies on proposed regulations. Let's turn first to the administration's enforcement efforts.

Stepping up enforcement in financial markets

Justice is pursuing a stronger enforcement role regarding consolidation and anti-competitive practices in financial services markets. As a member of the Financial Fraud Enforcement Task Force—a coalition of federal law enforcement, investigatory, and regulatory agencies formed to combat financial fraud by those who would seek to take advantage of efforts at economic recovery—the agency was instrumental in uncovering and prosecuting perpetrators of a bid-rigging conspiracy involving investment agreements for municipal bond offerings. To date, the ongoing investigation has resulted in criminal charges against 18 former executives of various financial services companies and one corporation. Nine of the 18 executives charged have pleaded guilty.³⁷

The municipal bond market investigation is not limited to individual traders. The global financial services company UBS AG recently reached a settlement agreement with Justice in connection with the bid-rigging conspiracy.³⁸ Under the agreement, the Switzerland-based financial institution accepts responsibility for the illegal, anticompetitive conduct of its former employees and agreed to pay a total of \$160 million in restitution, penalties and disgorgement.³⁹ This follows on the heels of a similar settlement agreement between Justice and Bank of America Corp., under which Bank of America agreed to pay a total of \$137.3 million in restitution to federal and state agencies for its participation in the bid-rigging conspiracy.⁴⁰ And, as this paper was heading to the press, Justice announced yet another settlement agreement pertaining to the municipal bond investigation, this one with JPMorgan Chase & Co., where JPMorgan agreed to pay a total of \$228 million to federal and state agencies.⁴¹ Together, the three restitution payments collected so far as part of the municipal bond market investigation under the Obama administration significantly exceed the total of all restitution received during the entire Bush administration in antitrust cases.

Justice's actions in the financial sector are not limited to its participation in the Financial Fraud Enforcement Task Force. If we have learned one lesson from the financial crisis, it is that "too big to fail" is a recipe for disaster. Fortunately, Justice has stepped up merger enforcement in financial services. The best example is the challenge to a proposed deal by NASDAQ and IntercontinentalExchange to acquire the New York Stock Exchange, worth approximately \$11.3 billion, which was scuttled after Justice threatened a lawsuit to block the merger. If consummated, the deal would have given NASDAQ control over NYSE's stock listings business, stock trading venues and market data licensing operations. Justice determined that NYSE and NASDAQ are the only competitors in several businesses vital to the success of U.S. equity markets; they are the only two providers of stock auction services that are used every day at the open and close of trading, as well as at certain other times of market imbalance; and they are effectively the only companies in the United States providing corporate stock listing services.

In addition, NASDAQ and NYSE are the two largest competitors providing certain real-time proprietary equity data products. These products reflect, for example, the prices and quotes on the several NASDAQ and NYSE stock exchanges as well as information and data collected by the NASDAQ and NYSE trade reporting facilities for trades occurring off the stock exchanges. In determining that the consummation of this merger would be anticompetitive, Assistant Attorney General Varney concluded:

... the acquisition would have removed incentives for competitive pricing, high quality of service, and innovation in the listing, trading and data services these exchange operators provide to the investing public and to new and established companies that need access to U.S. stock markets.⁴²

Also in May of this year, Justice filed a complaint to block the proposed acquisition by H&R Block Inc. of TaxACT, a digital do-it-yourself tax preparation software provider.⁴³ Justice alleges that the proposed deal would substantially lessen competition in the nascent U.S. digital do-it-yourself tax preparation software market, resulting in higher prices and reduced innovation and quality for products that are used annually by millions of American taxpayers.⁴⁴ The merger would combine the second- and third-largest providers of digital do-it-yourself tax preparation products and eliminate TaxACT, a company that has aggressively competed with H&R Block and disrupted the U.S. digital do-it-yourself tax preparation market through low pricing and product innovation. Justice alleges the merger would lead to higher prices, lower quality, and reduced innovation.⁴⁵

In addition, the agency alleges by taking control of the TaxACT business, which has been a maverick in the market, it would be easier for H&R Block to coordinate on prices, quality, and other business decisions with the other remaining industry leader—Intuit, Inc., which makes personal finance programs such as Quicken and TurboTax.⁴⁶ The matter is currently pending in the United States District Court for the District of Columbia. The Division is set to file their motion for preliminary injunction by August 1, 2011.

Justice has not limited its enforcement efforts in the financial services sector to merger cases. In October 2010, Justice filed suit against Visa, Inc., MasterCard International, Inc., and American Express Co. for their alleged anticompetitive conduct in the general purpose card market.⁴⁷ Justice's complaint against the credit card companies, which was filed the same month as the action against Blue Cross Blue Shield of Michigan, alleged that restrictions the credit card companies place on merchants who accept their card unreasonably restrains competition in violation of Section 1 of the Sherman Act.⁴⁸ The restrictions prohibit merchants from promoting or encouraging its customers use a competing brand through discounts or at the point of sale, and even preclude merchants from suggesting a preference for a particular card brand. Visa and MasterCard have settled the matter with Justice, which is currently pending approval of the court.⁴⁹ Both companies have agreed to not enforce the challenged restrictions and discontinue including those restrictions in their contracts with merchants going forward. Justice is still pursuing the action against American Express.

Promoting competition in financial services by supporting stronger regulation

The antitrust agencies can play a vital role in guiding regulators to make regulations fully effective to prevent or correct failures in the market. Justice has grappled with this challenge in providing valuable guidance to the financial services regulators. With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress responded to the recent financial crisis by broadly reforming the nation's financial regulatory system. As part of these reforms, Congress established for the first time comprehensive regulation of the derivatives sector. This effort was important because certain kinds of derivatives played a central role in the onset of the financial crisis. The Dodd-Frank Act requires the financial regulatory agencies to enact rulemakings on a range of derivatives issues.

The antitrust agencies can play a vital role in guiding regulators to make regulations fully effective to prevent or correct failures in the market.

In October, 2010, the U.S. Commodities and Futures Trading Commission and the U.S. Securities and Exchange Commission issued and sought comments on proposed rulemakings addressing potential conflicts of interest in the ownership and governance of key entities in the newly regulated derivatives landscape: derivatives clearinghouses and trading platforms. These proposed rulemakings are designed to prevent powerful derivatives dealers from controlling derivatives clearinghouses and trading platforms and using that control to unreasonably disadvantage their rivals and restrict competition. The proposed ownership and governance restrictions also have the potential to increase competition among clearinghouses and trading platforms.

Justice submitted comments on the CFTC and SEC proposals, strongly approving the agencies' efforts to improve governance practices, reduce systemic risk, and promote competition in the derivatives sector through their proposed rules. Justice, however, argued that the agencies' proposed rules should be strengthened in certain respects. In particular, Justice advocated for an aggregate cap on ownership of trading platforms by large dealers and for enhanced governance restrictions on both trading platforms and clearinghouses. Justice believes that, with its proposed enhancements, the CFTC and SEC rules will reduce the likelihood that members of derivatives clearinghouses and trading platforms will be able to control these entities to limit access or otherwise harm competition in the derivatives sector and will lay the groundwork for increased competition in these important markets.

This interaction between Justice and the SEC and CFTC is illustrative of how antitrust enforcers under the Obama administration are bridging the gap that has traditionally separated antitrust enforcers from other regulatory agencies. And, while it remains to be seen how Justice's comments will be received by the SEC and CFTC, the message to the SEC and CFTC and other federal agencies is clear: they do not need to sacrifice competition in order to accomplish their regulatory objectives.

Restoring a consistent approach toward single firm conduct

In September 2008, the Bush administration’s Justice Department released the highly anticipated report entitled: “Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act.” The report represented the high-water mark for the Bush era’s minimalist approach toward antitrust enforcement. The report gave a green light to a broad range of conduct by dominant firms, even where that conduct could harm consumers.

Perhaps the report’s most appalling suggestion was a requirement that antitrust plaintiffs must show anticompetitive effects “disproportionately” greater than procompetitive effects of alleged exclusionary conduct. This heightened burden on antitrust plaintiffs made it easier for monopolists to fend off legal challenges to their use of a dominant market position to foreclose competition, such as the most-favored-nation clauses at issue in the Blue Cross Blue Shield of Michigan matter discussed above.

Three commissioners of the FTC sharply criticized the report and refused to endorse it, citing two “overarching concerns.”⁵⁰ First, they noted that the report “is chiefly concerned with firms that enjoy monopoly or near-monopoly power, and prescribes a legal regime that places these firms’ interests ahead of the interests of consumers.”⁵¹ Second, the three commissioners felt that the report “seriously overstates the level of legal, economic, and academic consensus regarding Section 2” of the Sherman Antitrust Act.⁵²

On May 11, 2009, soon after her confirmation, the new assistant attorney general for the Justice Department’s antitrust division, Christine Varney, joined her three counterparts at the FTC in dismissing the Bush-era report. In her inaugural speech she stated that the report would no longer be Justice Department policy. This action demonstrated the Obama administration’s clear intent to unwind years of a laissez-faire mentality toward antitrust enforcement. As articulated by Varney:

*... ineffective government regulation, ill-considered deregulatory measures and inadequate antitrust oversight contributed to the current conditions . . . we cannot sit on the sidelines any longer.*⁵³

Rescinding the report also helped to restore certainty because it was a drastic departure from established Supreme Court precedent on Section 2 of the Sherman Act. The decision to rescind the report put the Justice Department's position back in the mainstream consistent with the courts and the FTC.

Since rescinding the report, Justice brought the first Section 2 case since 1999, the United Regional Health Care system discussed earlier. The actions against Blue Cross Blue Shield of Michigan and the credit card companies for alleged violations of Section 1 further demonstrate Justice's reinvigorated campaign against anticompetitive conduct by dominant firms. Most of the activity attacking dominant firms, however, have been at the FTC.

The most important case against a dominant firm in the Obama administration is the FTC's action against Intel Corp. the giant chip manufacturer.⁵⁴ The FTC alleged that Intel engaged in anticompetitive tactics to shut out its rivals in the microchip market, including coercing and bribing the world's largest computer manufacturers to use Intel's chips alone. Of particular significance is the market for graphic processing units, or GPUs, a relatively new technology with the potential to overtake and replace central processing units as the source of a computer's processing capability. The FTC alleged that to forestall the threat from this lower cost, more powerful computing alternative, Intel engaged in deception, degraded connections between GPUs and microprocessors, refused to deal with a key GPU manufacturer (Nvidia Corp.), and unlawfully bundled Intel's GPUs with its microprocessors, resulting in below-cost pricing.

Additionally, the FTC alleged that Intel's anticompetitive conduct violated Section 5 of the FTC Act, which prohibits unfair methods of competition and deceptive acts and practice in commerce.⁵⁵ The use of Section 5 in particular was appropriate in that it allowed the FTC to address Intel's efforts to forestall innovation, such as in the GPU market. Ultimately, the FTC settled the action with Intel after eight months of administrative litigation. According to the FTC, the settlement "will help restore competition that was lost as a result of Intel's alleged past anticompetitive tactics. At the same time, the settlement will leave the company room to innovate and offer competitive pricing."⁵⁶

The FTC through its action against Intel sought to open up critically important computing markets to new competition, through which new innovation could lead to new or improved processing capabilities or greater access to these products through lower prices.

Following Intel, in March 2010 the FTC settled charges against another dominant firm, Transitions Optical, Inc., for the alleged violation of Section 5 of the FTC Act by using exclusionary contracts to maintain its monopoly in photochromic lenses.⁵⁷ The FTC alleged Transitions imposed exclusive dealing policies on its lens makers, retailers, and wholesaler labs, foreclosing rivals from key distribution channels and leading to higher prices, reduced innovation, and fewer choices for consumers. As a result of these restrictive policies, Transitions lenses account for over 85 percent of the photochromic lenses sold in the United States, and new entrants offering competing photochromic lens treatments could not find outlets for their products. Under the consent order, Transitions agreed to end existing exclusive dealing arrangements and refrain from entering into new ones.

The FTC's use of Section 5 in the Intel case and other recent matters demonstrates why it is a critical tool to attack problematic practices of dominant firms. Section 5 has advantages over the Sherman Act. Section 5 is a broader statutory mandate and can attack unfair or deceptive trade practices that do not rise to the level of a violation of the Sherman Act. It permits the FTC to attack conduct that has the potential to harm competition, since it prohibits conduct that may lead to competitive harm.

Moreover, Section 5, unlike the Sherman Act, does not carry as onerous penalties, such as treble damage liability to private parties. Since it is the exclusive province of the FTC, it permits an expert administrative body to articulate standards of law in complex and rapidly evolving markets.

Assessing vertical integration in the high technology, Internet, and communications sectors

The Obama administration has also made it a priority to better understand the competitive implications of vertical integration in the high technology, Internet, and communications sectors. In the Bush administration these types of issues received relatively little attention. Very few mergers in these markets were challenged in the Bush administration and no vertical mergers were challenged. This lack of enforcement was unfortunate. Vertical acquisitions can often strengthen barriers to entry and reinforce market power, which means these acquisitions can ultimately dampen economic growth.

This is a critical concern in high-tech, Internet, and communications markets that are so essential to our country's economic growth. Justice in particular has struggled with developing an effective framework for assessing the competitive concerns raised by vertical integration in high-tech and web-based markets. The Obama administration's progress toward articulating a coherent framework for reviewing this issue represents a sensible course for navigating these uncertain waters.

The vertical merger guidelines are largely out of date.

Why traditional antitrust doctrine falls short when vertical integration occurs in these industries

Part of the problem is that the 1984 merger guidelines, developed during the Reagan administration, contain the most recent articulation of policy on vertical mergers by Justice and the FTC. These guidelines, which are over a quarter century old, were developed prior to the Web 2.0 world, which means they did not anticipate the proliferation of web-based technologies, such as social networking, blogging, and video-sharing sites, which raise issues such as interoperability, user-centered design, and collaboration amongst competitors. To any reasonable observer they are largely out of date.

Broadly speaking, there are three areas of concern from vertical mergers. First, vertical integration will raise entry barriers or foreclose nonintegrated firms from a market in which the merged firm would operate. Second, vertical integration may

raise competitors' costs in an anticompetitive manner or reduce the incentives of either the merged firm or its rivals to compete. Finally, a monopolist in one market may acquire a rival in a complementary market to raise entry barriers in the primary market and maintain its monopoly in its primary market.⁵⁸

In contrast to the dynamics of markets for durable goods under which the legal standards for assessing vertical mergers developed, markets in the technology, Internet, and communications sectors are generally more complex and unique. In these markets competitors must often share relationships, and the need for interoperability is crucial. Particularly problematic is the fact that the primary driver of competition in these markets is innovation. Consequently, high-tech markets are more likely to be Schumpeterian, meaning that competition is often “for the market” as opposed to the more conventional form of competition “within the market.” Adding to the complexity, technology markets often have some aspect of network effects, meaning that one user has either positive or negative effect on the value of a product to other users of the product. As noted by Ryan Marth, these network effects increase the potential for vertical integration to create “platform bottlenecks” that competitors can use to stifle innovation.⁵⁹

Cultivating a new approach

The Obama administration is implementing a measured, sensible, innovative approach for analyzing vertical integration in the technology sector. First, the two federal antitrust enforcers are recommitted to intense, case-by-case scrutiny of potentially anticompetitive conduct, including vertical integration. Second, the Obama administration articulated the importance of striking balance between the need to block or impose conditions on transactions that raise competitive concerns and the need to foster businesses' ability to obtain efficiencies that comes with combining various levels of production. Third and finally, unlike the Bush administration, the Obama administration is increasing the use of creative merger remedy solutions, specifically conduct remedies—which prescribe some aspect of the merged firm's post-consummation business conduct—to directly mitigate the anticompetitive effects of vertical mergers while preserving the desired efficiencies.

The remedies in the Comcast-NBC and the Google-ITA transactions demonstrate these principles in action. In October 2009, Comcast Corporation, the nation's largest cable company, announced the proposed acquisition of the NBC Television Network and the cable networks of NBC Universal, Inc., which includes Bravo, USA, and E!, from General Electric Company. Those opposed to

the deal claimed that the merger would present anticompetitive effects because Comcast could use its control of NBC Universal content to harm competition in the video distribution market. After a thorough inquiry, the antitrust division at Justice in collaboration with the Federal Communications Commission reached a consent decree with the two parties.

Justice, wary of the legitimate threat to competition but cognizant of the merger's potential benefit to consumers, developed an innovative mix of conduct-based and structural remedies. Principally, the settlement agreement requires Comcast to license NBC Universal content to online video distribution firms so that consumers have a choice of where to view and purchase the content. The settlement includes several other provisions, including: a prohibition on Comcast retaliating against any of its affiliated content providers for licensing content to a Comcast competitor; relinquishment of Comcast's management rights in Hulu, a leading online video distribution firm; and an agreement not to include licensing terms with programmers or distributors that limit online video distributors' access to content.

Similarly, in July 2009, Google Inc. announced its bid for ITA Software, Inc., which provides software used by airfare comparison and booking websites. Like Comcast acquiring control of NBC Universal, Google's acquisition of ITA raised concerns that Google would use its control of ITA as an unfair competitive edge for any flight comparison site that Google may introduce in the future. Justice closely scrutinized the transaction and concluded that there was the potential for anticompetitive effects. But instead of seeking to block the merger, it reached a settlement with the two parties that contained several innovative provisions.

Under the terms of the settlement, Justice allowed the merger on the condition that Google continues to license ITA software on commercially reasonable terms. To eliminate the concern that Google will degrade quality in ITA products, the settlement also requires Google to continue to invest in ITA at current products at levels commiserate to the level that ITA had invested in recent years and is also required to continue developing ITA's next-generation travel search product. Google is also required to implement a firewall to ensure data collected from ITA customers is not used by Google, and to maintain a complaint-reporting mechanism so Justice can be apprised of potential abuse.

Developing innovative combinations of structural and conduct remedies to deal with the competitive concerns raised by vertical mergers in the high technology, Internet, and communications sectors is a positive development for anti-

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trust enforcement. Past administrations would have simply given up on trying to address issues that these complex mergers present, and then depending on their ideology would have either blocked the merger or let it proceed free of any encumbrances. As Varney has ably articulated, “[F]ortunately, the antitrust laws do not require a binary choice.”⁶⁰

Under the Obama administration’s leadership, federal antitrust authorities have instituted a new approach to dealing with these increasingly common vertical mergers in the tech sector that is a positive development for businesses, consumers, and ultimately, competition.

Improving the antitrust process

Despite an avowed emphasis on eliminating anticompetitive conduct, the Obama administration also is moving forward on making the antitrust review processes as streamlined as possible for businesses. The Obama administration's improvements to the antitrust processes are two-fold.

First, there has been marked progress toward increased transparency and certainty in domestic antitrust actions, which ultimately helps businesses self-regulate by being able to effectively incorporate the risk of a resulting antitrust action when making strategic decisions about their business's activities. Second, given the increasing degree of globalization, the Obama administration recognizes the increased interjurisdictional cooperation, collaboration, and convergence amongst the antitrust enforcers of different countries. Let's examine each of these improvements in turn.

Increasing certainty and transparency at home

Transparency and certainty in the processes of federal antitrust enforcers are among the Obama administration's highest priorities. In just a little over two years' time, the Obama administration made significant headway in giving businesses, practitioners, judges, and regulators increased insight into federal antitrust enforcers' framework for reviewing potential anticompetitive conduct.

In August 2010, for example, Justice and the FTC jointly released updated Horizontal Merger Guidelines, which outline the principal analytic techniques, practices and policy of Justice and the FTC. The new guidelines replaced those in place since 1992, and were the culmination of a series of workshops with over 100 panelists, including practitioners, consumer advocates economists, industry executives, and academics. The inclusion of consumer advocates was particularly notable, since they were not included in prior competition workshops.

A recurring theme from the workshops was that there are gaps between the 1992 guidelines and actual agency practices. These gaps are problematic for several reasons. Gaps can lead to unfair surprise, increase uncertainty for businesses and ultimately run counter to the Obama administration's goal of transparency. These gaps can also cause problems in the courts, which often use the guidelines as persuasive authority.

The 2010 Horizontal Merger Guidelines address these and several other issues. First and foremost, they emphasize that the analytical techniques expressed within are not steps in some one-size-fits-all methodology. Instead, merger analysis is very fact-specific, which means the application of these concepts will vary with the context of the merger. As analogized by then-Deputy Assistant Attorney General for Economics at Justice Carl Shapiro, this principle represents the evolution of the two federal antitrust agencies from a worldview similar to that of Isaiah Berlin's "hedgehog," who sees the world through the lens of a single defining idea (mergers that increase market concentration are inherently bad) to that of a "fox," who draws on a wide variety of experiences and for whom the world cannot be understood by a single framework.⁶¹

In short, by acknowledging that horizontal mergers are best understood as shades of gray instead of black-and-white, the tailored approach under the Obama administration will ultimately improve accuracy of federal antitrust authorities. Disclosure of this framework fulfills the need for transparency and certainty.

A second major change is that the new Horizontal Merger Guidelines realign the stated application of the so-called Herfindahl-Hirschman Index with actual agency practices. HHI is a gauge of market concentration and is calculated by summing up the squares of the individual firms' market shares. The realignment consists of two components. First, the new guidelines emphasize that while HHI analysis is useful, it is not a "rigid screen to separate benign mergers from anticompetitive ones."⁶² Second, the HHI thresholds were adjusted upwards to reflect the HHI levels that the antitrust agencies' experience more likely indicates a potential for anticompetitive effects. Although never conclusive in and of themselves, the new, higher HHI benchmarks will help protect businesses from the unnecessary scrutiny they would have received under the old regime.

Third, the new Horizontal Merger Guidelines included a more robust discussion of the competitive concerns arising from mergers. Too often the prior guidelines were perceived as a one-size-fits-all checklist, and if a certain factor was not pres-

ent one would assume that a merger was unlikely to be anticompetitive. The new guidelines reflect that the risk of coordinated effects extends beyond conduct that would in and of itself violate the antitrust laws.

Additional substantive changes include, among others, adding a section explaining what specific types of evidence the agencies consider when assessing likely competitive effects of mergers, and a new section on the interplay between merging competitors and a powerful downstream buyer. This last section is particularly important for agriculture and health care markets where monopsony issues—issues arising from markets having only one buyer—may be the most troubling competitive concern, as was detailed in the first section of this paper.

The new guidelines, however, are merely one of several examples of how the Obama administration is increasing transparency and certainty for businesses. In June 2011, for example, Justice released a new Guide to Merger Remedies, which replaced the last guide issued in 2004 under the Bush administration. With the new Guide to Merger Remedies, Justice accomplished several objectives. First, the guide articulates a clear policy for seeking remedies in vertical mergers. The remedy guidelines from the prior administration appeared to rule out the types of innovative remedies used in cases such as Google and Comcast detailed in the previous section of this report. Second, the new Guide to Merger Remedies gives Justice greater tools for addressing novel competitive issues raised in high-tech markets. One case in point: The 2011 Guide to Merger Remedies does away with the de facto denunciation of conduct remedies from the 2004 version—which was produced during the Bush administration—instead calling conduct remedies “a valuable tool” because they “can preserve a merger’s potential efficiencies, and, at the same time, remedy the competitive harm that otherwise would result from the merger.”⁶³

Justice must be mindful of several potential pitfalls to make sure its conduct remedies are fully effective. First, they must be careful to abide by their own rule to craft each conduct remedy on a case-by-case basis after careful analysis of the unique circumstances of the merger. Second, they need to make the remedy process a transparent and collaborative effort to ensure the conduct remedies effectively preserve competition and efficiencies of the merger. Third, they should not be overzealous in imposing conduct remedies. Blocking a merger or imposing stand-alone structural remedies remain viable options, and sometimes they are the only option that will preserve competition. Trying to fit a round peg in a square hole will not benefit anyone.

Justice must be mindful of several potential pitfalls to make sure its conduct remedies are fully effective.

Finally, Justice needs to effectively monitor firms to ensure they are complying with applicable conduct remedies without placing undue burdens on post-merger firms. To help on that front, the Justice Department's antitrust division recently created the Office of General Counsel. The primary responsibility of the new office will be monitoring and enforcing the settlement agreements. It is too early to tell whether the new focus on conduct remedies will be effective but it is a promising, fresh idea to protecting competition and preserving a merger's efficiencies.

Increasing cooperation, collaboration, and convergence abroad

In the increasingly global marketplace, the decisions of antitrust enforcers in one country can have repercussions across the world. Therefore, international cooperation, collaboration, and convergence are imperative to finding balance between effective policing of anticompetitive conduct and allowing companies to conduct business without unwarranted obstacles.

The Obama administration is working diligently to improve international collaboration in both policy and enforcement. In April 2009, for example, Oracle Corp. announced a \$7.4 billion bid for Sun Microsystems Inc. A merger of this size between two high-tech giants certainly warranted scrutiny, but Justice ultimately concluded that the proposed merger would be unlikely to have anticompetitive effects.

In November 2009, however, the European Commission took the opposite position, expressing concerns with the merger, which threatened to derail the deal. In response, Justice issued a press release emphasizing the reasons it has not raised any anticompetitive issues with the Oracle-Sun deal, acknowledging that the EC had taken an opposite view on the merger but adding that Justice "remains hopeful that the parties and the EC will reach a speedy resolution that benefits consumers."

In perhaps an unorthodox move, Justice detailed the specific reasons why it had ultimately concluded that there was little risk that the deal would have anticompetitive effects. It stated it will continue to "work constructively with EC and competition authorities in other jurisdictions to preserve "sound antitrust enforcement policies that benefit consumers around the world."

The unconventional rhetoric worked. A few months later, EC officials backed away from their initial opposition to the Oracle-Sun deal, granting unconditional approval of the transaction in January 2010. The Obama administration may have

The Obama administration is working diligently to improve international collaboration in both policy and enforcement.

stepped on some toes at the EC but ultimately used its bully pulpit to ensure the consummation of a merger that would ultimately benefit consumers.

The more recent Cisco-Tandberg deal demonstrates how the Obama administration has improved collaboration between Justice and the European Commission. In October 2009, Cisco Systems Inc., a leading producer of videoconferencing technology, announced an acquisition of the Norwegian firm Tandberg ASA, which also produces videoconferencing technology. Like the Oracle-Sun deal, Justice scrutinized the competitive effects and did not simply rubber-stamp the proposed merger. In a press release in March 2010, Justice announced it has closed its investigation and will not raise any objections to the merger. This conclusion, though, was premised on the commitments that the Cisco has made to the EC, specifically divestiture of the videoconferencing protocol. The structural remedy of divestiture will ensure interoperability, which in turn will mitigate the potential anticompetitive effects of the merger.

Through the division's joint efforts with the EC when reviewing the Cisco-Tandberg merger, the Obama administration accomplished several goals. First, the investigation was conducted through a unified process and ultimately resulted in a collaborative remedy, thereby making it much easier for the parties than individualized scrutiny by multiple antitrust enforcers and the potential imposition of conflicting remedies. Second, the Cisco-Tandberg remedy demonstrates the Obama administration acceptance that antitrust enforcement agencies in different jurisdictions are mindful of the effects remedies have beyond their own jurisdiction. Third, the Obama administration has cemented a framework—specifically for parallel merger investigations but also for cross-pollination of ideas generally—that will be helpful as mergers increasingly raise competitive issues in both the United States and the European Union. Finally, the process of establishing a partnership with the EC can serve as a template that can be duplicated with other competition enforcement agencies around the world.

The FTC has also increased cooperation with foreign counterparts. In May 2010, the FTC announced a settlement of the merger of Agilent Technologies, Inc. and Varian, Inc., both leading global suppliers of scientific measurement instruments.⁶⁴ During its investigation, the FTC coordinated enforcement efforts with the European Commission, Australia's Competition and Consumer Commission, and Japan's Fair Trade Commission, all of which also reviewed the merger.⁶⁵ This cooperation led to coordinated remedies, as the Japan's Fair Trade Commission closed its investigation after concluding that the FTC's and EC's required divestitures sufficiently addressed any anticompetitive concerns raised by the merger.⁶⁶

Beyond collaboration in enforcement, Justice and the FTC antitrust enforcers have also hosted counterparts from countries across the world, including Brazil, Canada, China, India, and Mexico to promote convergence. The Obama administration has taken particular steps to improve the relationship with Chinese competition agencies. These steps have led to a memorandum of understanding between the United States and China that is slated to be signed by U.S. and Chinese antitrust enforcers on July 27, 2011. The memorandum of understanding will serve as an initial commitment to procedural fairness and collaboration between the two countries and sets the stage for the type of parallel investigation and enforcement exemplified by the Cisco-Tandberg matter.

Conclusion: Accomplishments and a prospective outlook for antitrust reform

The Obama administration over the past two years has made some impressive changes in strengthening antitrust enforcement in these challenging economic times. It has been an important contribution to the administration's overall efforts to spur economic growth. To give just four examples:

- The FTC's Intel case opened economic opportunities in microprocessor and GPU markets by preventing exclusionary conduct that hampered current rivals and dampened innovation.
- Justice's Comcast case increased the opportunities for new forms of entertainment distribution and spurred competition in cable markets.
- Justice's and the Department of Agriculture's efforts in agriculture have increased opportunities for family farmers and reignited attention to practices that prevent them from getting a fair price for their products.
- The municipal bond market cases are providing restitution for communities/muni bondholders and adding pressure to reduce inflated retail fees.

Through these actions the antitrust enforcers have sent a clear signal that interference with competitive zeal that drives innovation, creates jobs, and fuels small business will not be tolerated.

But there is definitely more to be done. Here are several suggestions on improving antitrust enforcement:

- Resolve the jurisdictional overlaps between Justice and the FTC.
- Recognizing the role of the two antitrust agencies as regulators and make sure the remedy process is transparent and remedies are fully effective.
- Work proactively with other administration regulators to solve competitive problems.
- Issue a revised health care policy statement.
- Step up litigation.

Let's examine each of these suggestions briefly.

Resolve the jurisdictional overlaps between Justice and the FTC

Earlier this year there was considerable attention in the press regarding jurisdictional disputes between the two antitrust enforcers. As noted recently by *Washington Post* columnist Steven Pearlstein:

Google is hardly the only turf being fought over by the antitrust cops. Every big merger, it seems, is now the occasion for extended wrangling over who is going to review it. ... the rivalry is not new ... but in recent times the flare-ups have become more frequent, more ideological and, at times, more personal. For U.S. companies and regulators in other countries, it adds an unnecessary level of uncertainty and inconsistency to antitrust laws that, by their nature, are somewhat ambiguous to begin with⁶⁷

Pearlstein concludes: “we’d all be better off if antitrust regulators spent more time and energy protecting consumers and less protecting their own turf.”⁶⁸

As explained previously, Justice and the FTC typically separate jurisdiction by industry. Unfortunately, both agencies currently share jurisdiction over several industries including health care, high tech, and Internet-related markets. This joint jurisdiction often results in unnecessary delays and wasted resources. In addition, where critical segments of an industry are split—as in health care where Justice focuses on insurance and the FTC focuses on providers—the lack of a single enforcer may lead to a myopic approach to enforcement. Sometimes, though, having shared jurisdiction can be helpful, for example when three FTC commissioners did not approve of the Bush administration’s report on dominant firm conduct, which we explored at the beginning of this paper. But that is the exception and not the rule.

We are now in a period of extremely limited government resources and the antitrust enforcers must marshal those resources in a prudent and careful fashion. They should begin by resolving the issue of shared jurisdiction. They could do so by having frank, open discussions between the agencies on coordination of their enforcement efforts. And Congress, public interest groups and members of industries subjected to this type of dual jurisdiction should also have a seat at the table.

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Recognize the role of Justice and the FTC as regulators and make the remedy process more transparent and effective.

Both Justice and the FTC primarily perceive themselves as litigators. But that is a misperception. Less than a handful of merger or anticompetitive practice cases are litigated each year. The most important work of the agencies is investigating mergers, which are typically resolved through a negotiated settlement agreement. As in the Comcast/NBC deal and the Google/ITA deal, those agreements can have a profound impact on the structure of a market and the nature of future competition.

The merger decree process is in essence regulatory, but with few if any regulatory protections, especially for the public that is the beneficiary of the decree. There is no opportunity for market participants or interested consumers to get involved in the consideration of a proposed remedy and offer suggestions. The Department of Justice (though not the FTC) is subject to the Tunney Act, and consequently must secure comments from the public when a proposed settlement agreement is announced, but that process almost never results in a meaningful change to the terms of the agreement.

This is quite different than the process in the European Union where the competition enforcers must “market test” a proposed remedy with consumers and other market participants before adopting a potential remedy. Such a market-test approach would be of tremendous benefit to assure that merger remedies adequately restore competition. The Obama administration should adopt procedures similar to those of the European Union and undertake efforts to secure comments from consumers and market participants much earlier in the remedy process. This change would have a positive impact on the dynamics of the remedy negotiations because the FTC and Justice would be in a much stronger position in evaluating the adequacy of potential remedies.

In addition, both agencies should conduct a retrospective review of merger remedies in recent cases. The Clinton administration conducted a merger remedy retrospective which helped guide the agencies on how to structure and enforce remedies. A similar study is long overdue.

Work proactively with other administration regulators

As Assistant Attorney General Varney observed many of the competitive problems faced in the economy cannot be resolved by the antitrust agencies alone. Under her leadership, the antitrust division at Justice has prioritized working across the government with other regulators to identify regulatory solutions to solve these competitive problems. In her inaugural speech, Varney committed to making antitrust “among the frontline issues in the government’s broader response to the distressed economy,” and the division has fulfilled that commitment with an unprecedented level of competition advocacy with numerous federal agencies, as described earlier. This advocacy will have long-term benefits in helping regulators fashion solutions to address competitive problems where an antitrust remedy may not exist. Since advocacy may lead to industry-wide regulation, it may ultimately have an even greater impact than individual enforcement actions.

Antitrust enforcement can take many years and enforcement typically cannot change market structure. Thus, the structure of a market may be a given and the most antitrust can do is prevent unwarranted exclusionary practices.

In these situations antitrust enforcers must work with regulators to attempt to identify regulatory solutions to enhance competition in the market. Take health insurance. Clearly excessive concentration harms consumers. Congress implemented critical reforms to attempt to spur competition by creating health insurance exchanges, setting limits on premium increases, and other initiatives to improve health insurance transparency. The antitrust agencies must work closely with the health care regulators to assure these reforms are fully effective. More generally, it should be a critical priority of the antitrust enforcers to help find ways to work with regulators to improve regulation to correct markets that are not performing effectively. In this way the agencies should continue to contribute to the discourse in other areas of the government, similar to Justice’s approach in the financial markets.

Working proactively with other regulators will have long-term benefits in helping regulators fashion solutions to address competitive problems where an antitrust remedy may not exist.

Issue a revised health care policy statement

Justice and the FTC should update the 1996 Statements of Antitrust Enforcement Policy in Health Care to permit a greater degree of collaboration by health care providers. Unlike the previous administration, which only went halfway by issuing a report but failing to take any concrete actions, Justice and the FTC should commission an updated report and use the results from that report to develop a revamped statement on their views on antitrust and health care.

As was the case with the Obama administration's revised Horizontal Merger Guidelines and Guide for Merger Remedies, updating the Statements of Antitrust Enforcement Policy in Health Care will incorporate lessons learned over the past 15 years, account for the dramatic changes to the health care marketplace, and will improve certainty and transparency for businesses in the health care sector. There is significant room to provide opportunities for health care providers to collaborate, and the guidelines need revision in order to facilitate greater forms of collaboration.

Step up litigation

The two federal antitrust agencies will attempt to regulate through guidelines and consent decrees, but the matters with the greatest impact are those that are resolved in the courts. Certainly, the greatest accomplishments of Clinton administration enforcers were the cases brought against Microsoft Corp., Toys “R” Us, Visa, and MasterCard and the precedent established in those cases. Those cases struck down important market impediments that harmed consumers, creating vital legal precedents that have had a significant long-term impact on the law.

The Obama administration needs to do the same. To be sure, the two antitrust agencies have made some important steps in improving the use of litigation. The FTC is litigating a critical hospital merger case trying to prevent the creation of a dominant hospital system in Toledo, OH. And Justice is litigating important cases against Blue Cross of Michigan and American Express for exclusionary practices. Litigation is essential and can be utilized more effectively. One area the agencies should focus on is continuing to bring enforcement actions against health insurers' use of exclusionary practices in concentrated markets, which deters competition and leads to higher prices for consumers.

Crucial in enhancing litigation is the FTC administrative process. FTC cases are typically litigated before an FTC administrative law judge, and the FTC rules require a very expeditious process in resolving these cases. (As noted earlier the Intel case was settled after only 8 months of litigation.) Typically, an FTC administrative law judge must issue a decision in just more than one year after issuance of a complaint. This is remarkably faster than litigation in federal court and provides a critically important venue for prompt resolution of antitrust cases. In addition, FTC cases are ultimately decided by the Commission, which has far more antitrust expertise than a generalist federal court.

Solid leadership is the watchword

Under the Obama administration's leadership, the antitrust division of the Justice Department and the FTC implemented a progressive, sensible approach toward antitrust policy and enforcement. Some initiatives, such as bridging the gap between foreign and domestic antitrust enforcers, are already resulting in concrete, beneficial effects. For other proposals, such as the increased acceptance and use of conduct remedies, it is too early to judge their effectiveness. But there is still much work to be done as we detailed immediately above.

Ultimately, though, the Obama administration deserves credit for its fresh, open-minded attitude toward federal antitrust enforcement. That rejuvenated mindset will enable Justice and the FTC to more effectively accomplish their respective missions of promoting competition and providing guidance on antitrust laws and principles amid the ever-changing economic and competitive landscapes.

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About the author

David Balto is a Senior Fellow at American Progress focusing on competition policy, intellectual property law, and health care. He has more than 25 years of experience as an antitrust attorney in the private sector, the Antitrust Division of the Department of Justice, and the Federal Trade Commission. He is nationally known for his expertise in competition policy in retail, high-tech industries, health care, pharmaceuticals, medical devices, media, and financial services.

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