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Bring Back Antitrust Law;
The new division should reverse past constriction and not shy from court.;
The Regulatory Lawyer: The New DOJ A Special Report

DAVID BALTO

P resident Barack Obama has put his economic team in place. But one of the remaining selections that may be important to economic recovery is the assistant attorney general of the Antitrust Division, where Obama has nominated Christine Varney, a former Federal Trade commissioner. The antitrust laws are the bulwark to our competitive system and competition is a vital element to our economic recovery.

Unfortunately, during the past administration the Antitrust Division went off on a minimalist course, largely trying to reduce the scope of enforcement and the use of antitrust in private litigation.

This minimalist approach was based on the "Chicago School" theory that markets almost always lead to the best result, antitrust enforcement often makes mistakes, market power is temporary, and entry barriers are minimal.

This belief in the near-perfect market was severely shattered by the economic downturn. But the consequences remain. Over the past eight years, the division brought no enforcement actions against dominant firms; went more than five years without bringing a merger challenge in federal court; adopted an amicus program that sought almost exclusively to narrow the scope of antitrust law; and adopted an unnecessarily adversarial attitude toward other enforcement officials.

That has to change. The 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.

What are the key challenges for the new head of the Antitrust Division?

Create a progressive antitrust enforcement program tailored to the economic downturn.

Some may suggest that antitrust enforcement should be minimalized because of the economic downturn. Those people believe that competition is a burden too great to bear when the market is suffering.

They could not be more wrong. Antitrust enforcement is even more vital when markets are shrinking, prices are rising, and market opportunities are falling.

First, cartel enforcement will be even more important as the economic downturn drives some firms to find the easy life by arranging treaties with their rivals. Second, firms may attempt to use the difficult economic times as a justification to consolidate with competitors in ways that would not have been imaginable under a more robust economy. This threatens to create entities with excessive market power that far outlasts the recession. Third, the temptation for dominant firms to gain market share by unlawfully excluding competitors may be greatest when they view it as a shortcut to preserving shareholders' sales expectations in tough times.

Moreover, the keys to reversing economic downturn are based on increasing competition. Antitrust enforcement can play a vital role in removing market barriers and permitting new firms to enter markets, thereby increasing job opportunity and leading to economic growth.

Reverse the constriction of the antitrust laws.

During the past administration, the Antitrust Division was a cheerleader for the belief that antitrust law would do more harm than good and should be exercised sparingly if at all. In its amicus program the past administration always argued on behalf of defendants (with one exception). It aggressively attacked the role of private antitrust enforcement. Moreover, before the Supreme Court, it declined to support the efforts of its sister agency, the Federal Trade Commission, to attack problematic pharmaceutical patent settlements. In some cases the Supreme Court took an even more minimalist approach than that suggested by the Antitrust Division.

The result? Antitrust law has been severely weakened as a device to protect the market from anti-competitive conduct.

The Antitrust Division should work actively to reverse the past constriction of the law. There are three tools to remedy this problem. First, the division should actively seek for opportunities to clarify the law in a fashion that expands the ability of private parties to protect competition through antitrust litigation. And, in those cases in which the division supports defendants, it should do so in a way that articulates a rational and balanced statement of what the law should be, keeping open the potential for the development of the law to promote competition.

Second, the Antitrust Division can begin to reverse this constricted review of the law through its own enforcement actions. For example, early in the past administration, the Republican leadership eliminated the division's civil task force. Established during the Clinton administration, the task force established a record of litigation admired throughout the Justice Department. The division brought major civil enforcement cases against Microsoft, American Airlines, Visa, MasterCard, and numerous other prominent companies. These cases eliminated exclusionary practices that harmed competition and millions of consumers. Bring the task force back.

Finally, where the courts have gone too far in narrowing the antitrust law, the division should work with Congress to reverse that trend. No better example comes than from the Supreme Court's decision two years ago in *Leegin Creative Leather Products v. PSKS*, which abandoned the rule that resale price maintenance was per se illegal. The results have been increased obstacles for discounters, especially Internet-based discounters, to aggressively compete. Fortunately Sen. Herb Kohl (D-Wis.) has introduced legislation to reverse *Leegin*, and the new administration should actively support it.

Abandon the Justice Department's dominant firm report.

The culmination of the Bush administration's antitrust nonenforcement was the issuance of a report on dominant firm conduct last year, which attempted to provide de facto rules of per se legality for dominant firms. These alleged rules would basically permit exclusionary conduct by monopolists unless the small firm can demonstrate that the anti-competitive effects are "disproportionately" greater than the pro-competitive potential of the exclusionary conduct.

The report articulates an extremely narrow view of the law, one in which dominant firm cases would be brought rarely if ever and would almost never succeed. Three FTC commissioners, including a Republican, resoundingly rejected the report. Not only are the standards inconsistent with the law and sound antitrust and economic policy, but these rules would give monopolists free rein to crush new or existing rivals. The Obama Antitrust Division should abandon this report.

Restore the ability to litigate mergers.

During the past administration, the division went to court in far fewer mergers cases, it won only once, and it failed to ascend the courthouse steps for more than five years. Since the division and the FTC typically would bring three or four merger cases a year, the lack of merger litigation was truly remarkable.

The problem with a lack of litigation, of course, is that it weakens the ability of the agency to litigate and secure meaningful relief in merger enforcement matters. Moreover, failing to litigate makes each potential case seem ever more daunting. (Fortunately at the close of the Bush administration, the division brought two merger cases, currently in litigation.)

This timidity in merger litigation must be reversed. The division, like every other part of the Justice Department, prides itself as being the best litigators in Washington, but without the experience, it is difficult to effectively litigate.

And there are certainly areas where litigation may be warranted. As candidate Obama observed, enforcement in health insurance was particularly lax, permitting almost all markets to become highly concentrated, leading to higher prices. In telecom, the division permitted massive consolidation. The division never challenged a merger based on the loss of potential competition. Similarly, the division failed to challenge any vertical merger. Vertical arrangements such

as those raised in the Ticketmaster-Live Nation merger, announced on Feb. 10, should receive considerable attention from the division's litigators.

Finally, the division should review consummated mergers to determine if competition and consumers have been harmed. If there is evidence of harm, the division should go to court to unwind the mergers. Health insurance mergers would be a good place to start.

Remember other enforcers are colleagues and not enemies.

Perhaps one of the most unsettling aspects of the past administration was its willingness to openly criticize other antitrust enforcers and suggest that the only view of antitrust enforcement that could be correct was its view.

Probably no better example of this is when the division criticized with lightning speed enforcement actions against Microsoft in other countries. These efforts to poke foreign antitrust enforcers in the eyes did not benefit the future of collaborative international antitrust enforcement.

As Varney has remarked, America stands to lose its influence over the direction of international antitrust enforcement if it leaves the work of enforcing antitrust laws to foreign jurisdictions. The likely new assistant attorney general should recognize that listening and engaging in dialogue are a far more effective means of establishing collaborative relationships with foreign enforcers.

And, overall, let's stress the importance of antitrust law. The Clinton administration embraced the vital role of antitrust enforcement as an element of the overall economic policy. Under the Obama administration, let's bring it back as part of the tools to establish a sound economy.

David Balto is the former policy director of the Federal Trade Commission and a senior fellow at the Center for American Progress.