

The conventional wisdom may not apply; a more nuanced **approach to antitrust** can be expected.

Conventional wisdom says that a new Democratic administration in the White House is likely to bring about a shift from several years of light antitrust activity to a much more proactive approach. And as a presidential candidate, Barack Obama made it clear that antitrust enforcement would pick up under his administration.

“We’re going to have an antitrust division in the Justice Department that actually believes in antitrust law,” Obama said during the primaries. “We haven’t had that for the last seven, eight years.” Elsewhere, his campaign noted Obama’s intention to “reinvigorate antitrust enforcement, which is how we ensure that capitalism works for consumers.”

But that’s not all Obama or his aides said. The topic of antitrust—which is not usually fodder for campaign speeches—actually came up fairly often in the 2008 race. And Obama’s comments suggest that the conventional wisdom may not apply and that a more nuanced approach can be expected in the years ahead.

“Yes, there is going to be a general philosophy of more vigorous enforcement, but in several ways, President Obama appears to take a centrist view of antitrust,” says [John Gibson](#), a partner at Winston & Strawn. “He has said that he will take steps to ensure that antitrust law is not used as a tool to interfere with robust competition.”

“Reinvigorated” activity

Gibson says that this centrist approach may show up in the definition of what is and what isn’t a monopoly. “President Obama made the statement that we live in a different world, where sometimes American businesses have to be enlarged to compete effectively in an international market, for example. So, I think we’ll see a very studied approach that says, ‘Let’s look at which companies are really

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Overlaps: A Changing World

As the Obama administration tackles its agenda, questions about monopolies are likely to come up in a number of areas and take antitrust oversight into complicated territory.

For example, there is a great deal of interest in health care reform in Washington, and many observers see expanded cooperation across providers as a way to increase efficiency and quality. “The health care industry already feels like the guidelines for how they can collaborate with each other to improve quality and clinical integration aren’t too clear, and they have been pushing for clarification,” says [Michael Sibarium](#), a partner at Winston & Strawn. “Now, if health care reform calling for greater cooperation comes along, what impact, if any, will that have on antitrust?”

Similar issues may arise with the \$700 billion-plus financial services industry bailout. “To the extent that the federal government takes equity stakes in banks, what does that mean for antitrust as a practical matter?” asks Sibarium. “How is enforcement going to work with a company in which the government owns a 20 percent stake? There are some significant potential question marks out there.”

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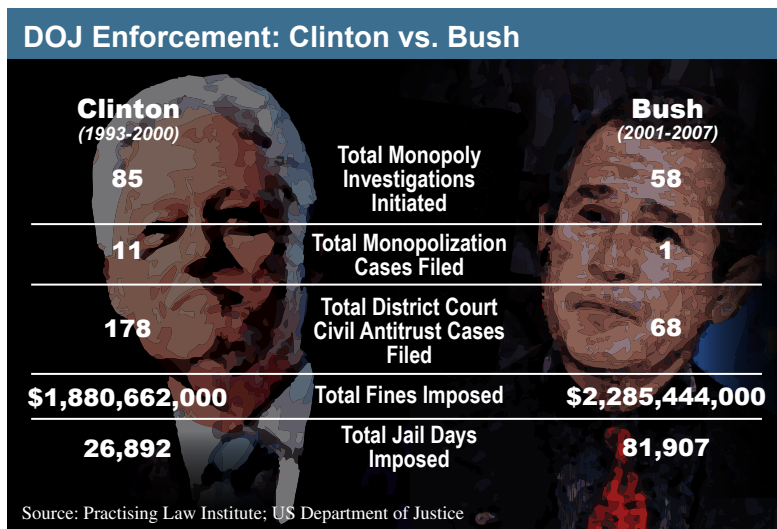
impacting competition unfairly, not just at who is big and successful.’ This is not an administration that is going to declare total war on the Fortune 500.” With a troubled economy, the new administration may also find that political realities trump ideology, and be more open to large mergers if they seem likely to preserve industries and jobs.

That said, increased antitrust activity is, in time, almost inevitable, and there are a number of issues that are likely to see “reinvigorated” activity under the new administration. In his Senate confirmation hearings, U.S. Attorney General Eric Holder said that antitrust is “a critical part of what the Justice Department does.... And so, antitrust enforcement will be something that we will devote a lot of attention to. We’ll get an assistant attorney general who understands the mission of that division, the historic mission of that division, and I expect it will be more active.”

“The choices for President Obama’s antitrust team certainly suggest more aggressive action,” says [Michael Sibarium](#), a partner at Winston & Strawn. For example, he says, Jon Leibowitz, the new chairman of the Federal Trade Commission, has been a member of the commission for several years, and has tended to favor strong enforcement. And for assistant attorney general for the antitrust division of the Department of Justice—the position Holder mentioned—the president picked Christine Varney. As an FTC commissioner during the Clinton administration, she worked to expand merger analyses to include companies’ research into future products, not just existing or about-to-be-released products. Later, as a private lawyer for Netscape, she encouraged the Justice Department to pursue its antitrust case against Microsoft.

“In the area of consumer protection, for example, I think you’ll see investigations by the FTC ratchet up significantly,” says [Mark McCareins](#), a Winston partner. In addition, he notes that President Obama has expressed interest in scrutinizing media industry mergers to ensure a diverse range of viewpoints and the use of regulation to ensure open Internet access.

There is also likely to be action in the area of unilateral conduct, in which individual, dominant companies take certain actions that might limit competition in their industries. One such issue involves minimum resale price maintenance agreements—those in which manufacturers require retailers to sell their products at a certain price. For almost a century, such agreements were automatically considered an antitrust violation. But in 2007, the U.S. Supreme Court ruled that they are not always illegal, and instead have to be considered on a case-by-case basis.



U.S. Department of Justice enforcement activity is expected to increase under the Obama administration, following a relative lull during the Bush years. It is worth noting that fines and imprisonments did not decline under Bush, and are not likely to do so under the new president, underscoring the importance of effective compliance programs.

Opponents say that this change will drive up prices for consumers, and a number of businesses are also displeased, says Sibarium. “Companies have had to navigate through this and figure out how to respond to the change in the law, while dealing with a variety of state laws that still consider these agreements to be per se illegal,” he says. In 2007, then-Senator Joe Biden co-sponsored the Discount Pricing Consumer Protection Act, which was designed to restore the previous treatment of such agreements. It did not make it to the Senate floor, but in early January 2009, the bill was reintroduced—clearly indicating that the issue is still in play.

Beyond such specific issues, more fundamental changes are likely to increase enforcement activity in the long run. For example, in recent years, the FTC has been more aggressive and the Justice Department less aggressive in enforcement, but with new Obama appointees, the agencies are likely to operate with more of a shared perspective. In addition, President Obama has the opportunity to name a number of judges early in his term, thanks in part to several Bush court appointments that were delayed by Congress. Says Gibson: “Over the next couple of years, these things are likely to have a meaningful effect on the antitrust environment.”

The coming years are also likely to see increased coordination between federal and state antitrust authorities, which had declined over the last eight years, says Sibarium. He adds that greater cooperation between antitrust authorities in the United States and other countries is also likely. “There has been a trend toward greater coordination internationally on antitrust, and that trend will probably continue, with coordination on a range of enforcement

actions, such as mergers and criminal cartel work,” he says.

The motivation for this cooperation is, in large part, a growing interest in antitrust globally, with more and more countries adopting laws to help ensure competition. China, for example, put an “antimonopoly law” in place last year, Sibarium says. “Where the United States historically took a lot of the lead in pursuing antitrust, you may see more big cases coming out of places like Asia,” he says. “The growth of antitrust around the world will continue to be a significant story.”

Vigilance: An Ounce of Prevention

The vast majority of business activity does not involve antitrust issues, but companies still need to be vigilant—especially with a new administration that promises greater enforcement. “The penalties for antitrust violations, both in terms of fines and jail time, can be severe, so it’s very important to maintain a strong internal antitrust compliance program,” says Winston partner [Mark McCareins](#).

Companies need to follow several rules of thumb for an effective program. For example, such efforts need to be ongoing. “It’s not simply a matter of taking the vaccine once and then being fine,” McCareins says. “It takes continuing commitment, both to update people and to make sure new employees are on board.” In addition, he says, such programs need to extend beyond U.S. borders, because antitrust is now a global issue, with increasing action by governments around the world and the increasing flow of executives and business across borders. And they need to be driven from the top down: “Senior management backing the program is essential,” he says. “Otherwise, it is going to be hard to get the rest of the organization to buy in.”

Compliance programs are key to staying out of trouble, but they can also be important when problems do arise. For example, says McCareins, “under the Federal Sentencing Guidelines, companies that have active compliance programs are in a sense given ‘credit’ for those programs.” In addition, the Department of Justice has a program that grants amnesty to companies that voluntarily report internal illegal antitrust activities that they discover. “An ongoing compliance program can be an excellent vehicle for detecting problematic conduct in its infancy, making it possible for a company to avail itself of the amnesty program,” he says.