Center for American Progress

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Introduction and summary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Create a progressive Antitrust Enforcement Program tailored to the economic downturn

Renewed attention to antitrust enforcement should focus on several key areas in order to encourage speedy economic recovery. First, policing cartels will be even more important as the economic downturn drives some companies to seek the easy life by arranging treaties with their rivals. Second, businesses may attempt to use the difficult economic times as a justification to consolidate with competitors in ways that would not have been imaginable or acceptable 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 that path as a shortcut to preserving shareholders' profit expectations in tough times.

Some may suggest that antitrust enforcement should be minimized 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. As market opportunities diminish, some companies may attempt to collude or coordinate to keep profits at traditional levels and dampen the impact of the economic downturn. Other dominant firms may find it even more tempting to engage in exclusionary conduct—behavior that stifles opportunities for rival companies. Still others may try to use the economic downturn to propose mergers or acquisitions to obtain market power.

Competition does play an important role in supporting the economic recovery. Yet all of the actions described above—cartels, price fixing, exclusionary conduct by dominant firms, and mergers securing market power—dampen rather than strengthen economic growth. Not surprisingly, one of the strongest periods of economic growth—during the Clinton administration—was accompanied by a balanced but comprehensive period of antitrust enforcement.

Those who may suggest reduced antitrust enforcement would be advised to remember an important lesson of economic history. That story begins in the 1930s, when the government dampened antitrust enforcement and encouraged the formation of government-sponsored cartels. In the aftermath of the Depression, the Temporary National Economic Committee, or TNEC, which operated from 1938 to 1941, found that the lack of antitrust enforcement in the 1930s harmed the economic recovery. The reasons: Business concentration and monopoly behavior constricted production and pegged prices too high. This resulted in diminished investment, production, employment, and income that prolonged the Depression and triggered the temporary recession of 1937-1938. Christina Romer, the current chair of President Obama's Council of Economic Advisors, concluded that such government-sponsored cartels obstructed the economy's price-adjusting mechanism. Furthermore, some economists estimated cartelization to have further reduced gross national product by 27 percent and prolonged the Great Depression by seven years.[4]

One key to reversing the current economic downturn is increased competition. As the TNEC report found, antitrust enforcement can play a vital role in removing market barriers and permitting new firms to enter markets, thereby increasing job opportunities and leading to economic growth. Much of the post-Depression antitrust enforcement revitalized economic growth in key manufacturing industries.

Additionally, where the government provides the foundation for many industries through direct economic support, and the antitrust enforcers must make sure those initiatives are free from anticompetitive or fraudulent conduct. In fact, this oversight has already begun. On April 13, 2009, the Justice Department's Antitrust Division began an Economic Recovery Initiative that targets potential fraud and collusion related to any stimulus spending. As the division observed, "The American Recovery and Reinvestment Act of 2009 will provide over $500 billion of funding for programs to jumpstart the U.S. economy, save and create jobs, and invest in the country's future. The potential risk of collusion and fraud increases dramatically when large blocks of funds, such as those associated with the Recovery Act, are quickly disbursed."[5] The initiative aims to train grant officers and federal agencies in how to identify fraud. Although it is too early to tell how effective this program will be, it is a step in the right direction and good example of antitrust enforcement adjusting itself to our new economic situation.

Reverse the constriction of the antitrust laws

The previous administration's 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. The Bush administration always argued on behalf of defendants, with one exception, in its amicus program, and it aggressively attacked the role of private antitrust enforcement. Moreover, it declined to support before the Supreme Court 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 anticompetitive conduct.

The Antitrust Division should work actively to reverse the past constriction of the law, and it can use three tools to remedy this problem.

First, the Antitrust Division can begin to reverse this constricted review of the law through its own enforcement actions. One way it can do that is to re-establish the Division's Civil Task Force. Early in the past administration, the Republican leadership eliminated this task force, which had been established during the Clinton administration and had produced a record of litigation admired throughout the Justice Department.[6] 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. Bringing back the Civil Task Force will help the division make civil enforcement a major priority.

Second, the division should actively seek opportunities, through its amicus program, to clarify the law in a fashion that expands the ability of private parties to augment public enforcement and protect competition through antitrust litigation. The government has limited enforcement resources, and private antitrust litigation brought on behalf of consumers is important to identify and attack anticompetitive conduct. The division should actively participate as an amicus in cases in the lower courts, providing guidance on issues in which the courts are inconsistent or the law is unclear. Examples include issues such as antitrust injury, the standards for motions to dismiss under proof of conspiracy, structuring the rule of reason analysis, market definition, class certification, and demonstrating a violation with proof of actual anticompetitive effects.[7] In those cases in which the division does support defendants, it should do so in a way that articulates a balanced statement of what the law should be, keeping open the potential for developing the law to promote competition.

Assisting the courts in articulating a sensible standard under the Supreme Court's *Twombly* decision is particularly important.[8] The 2007 decision in *Bell Atlantic vs. Twombly et al* significantly raised the burden for plaintiffs to plead facts in a complaint to avoid a motion to dismiss. In a practical sense the decision makes it increasingly difficult for plaintiffs to bring suits challenging collusion or price fixing. Price fixing is a chronic problem as demonstrated by the increasing number of substantial criminal cases prosecuted by the division, which have seen several penalties exceeding $100 million. The courts should strengthen—not weaken—the tools to prosecute cartels. Private litigation can be an important route to identify illegal collusion, but if the burden on pleading facts is set too high then these efforts to challenge cartels will be stillborn. The division should advocate for a standard for motions to dismiss that enables these cases to go forward.

Finally, where the courts have gone too far in narrowing the antitrust law, the division should work with Congress to reverse that trend. There is no better example of a decision that went too far than the Supreme Court's decision two years ago in *Leegin Creative Leather Products v. PSKS*,[9] which abandoned the rule that resale price maintenance—the practice of a manufacturer dictating resale prices to its distributors—was per se illegal. The results have been increased obstacles for discounters—especially Internet-based discounters—to aggressively compete and significantly higher prices for consumers. Fortunately, Senator Herb Kohl (D-WI) has introduced legislation to reverse *Leegin*, and the new administration should actively support that legislation.[10]

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. The effort to address the concerns of dominant firm conduct began promisingly with the FTC and DOJ agreeing to a series of joint hearings. But rather than arriving at a consensus with its sister agency, the DOJ chose to go it alone and issue its own report at the close of the administration.

The report articulates alleged rules that would basically permit exclusionary conduct by monopolists unless the smaller firm can demonstrate that the anticompetitive effects are "disproportionately" greater than the pro-competitive potential of the exclusionary conduct. [11] The report conveys an extremely narrow view of the law, one in which dominant firm cases would be brought rarely if ever and would almost never succeed. As Jon Jacobson, a former commissioner of the Antitrust Modernization Commission, observed:

> *Monopoly power can cause great harm to the national economy through higher prices, lower output, reduced choice, and stunted innovation. The premise underlying the disproportionality test is that monopoly is not really harmful. That premise is unsupported and, in any event, contrary to the fundamental purposes underlying Section 2.*

Fortunately, three FTC commissioners, including one Republican and current chairman Jon Leibowitz, issued a detailed statement resoundingly rejecting the report.[12] The commissioners identified two "overarching concerns" with the report. First:

> *"The U.S. Supreme Court has declared that the welfare of consumers is the primary goal of the antitrust laws. However, the department's 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. At almost every turn, the department would place a thumb on the scales in favor of firms with monopoly or near-monopoly power and against other equally significant stakeholders."*

Second, the commissioners observe that the report "seriously overstates the level of legal, economic, and academic consensus regarding Section 2." In addition, the commissioners noted that they were "concerned that voices representing the interests of consumers were not adequately heard," and that the report relied too heavily on economic theory in the consideration of applying antitrust law.[13] Thus, the commissioners caution that the DOJ's approach if "adopted by the courts, would be a blueprint for radically weakened enforcement of Section 2 of the Sherman Act."

Certainly there are areas of antitrust enforcement that need reform, and markets that are not behaving entirely competitively. But the area of dominant firm conduct is not one of them. There is barely any evidence that uncertainty in antitrust law has dampened the ability of dominant firms to compete aggressively. Not only are the standards inconsistent with the law and sound antitrust and economic policy, these rules would also give monopolists free reign to crush new or existing rivals.

The Obama Antitrust Division should signal a new direction in protecting consumers and abandon the Bush administration's dominant firm report.

Restore the ability to litigate mergers

During the past administration, the division—and its partner, the FTC—litigated far fewer mergers cases than the typical three or four per year. It won only once, and failed to ascend the courthouse steps for more than five years. The lack of merger litigation was truly remarkable, especially because this litigation is critical for consumers. As just one example, if the Clinton administration had failed to block the Staples/Office Depot merger, millions of consumers would have paid higher prices for office supplies for the past 12 years.

The problem with a lack of litigation is that it weakens the division's skills and ability to litigate effectively and secure meaningful relief in merger enforcement matters. What's more, failing to litigate makes each potential case seem ever more daunting. (At the close of the Bush administration the division did go to court in two merger cases.)

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.

There are certain areas where litigation may be warranted. As presidential candidate Obama observed, enforcement in health insurance was particularly lax, permitting almost all markets to become highly concentrated and leading to higher prices. In telecom, the division permitted massive consolidation as the Baby Bells have devoured almost all of their siblings. The division under the Bush administration never challenged a merger based on the loss of potential competition. Similarly, the division failed to challenge any vertical merger—a merger between two companies that produce different goods or services for one specific product. Vertical arrangements such as those raised in the Ticketmaster-Live Nation merger should receive considerable attention from the division.[14]

Besides litigation, the division, along with the FTC, needs to both ramp up enforcement and provide guidance in areas left underenforced in the prior administration. Although the agencies conducted hearings on horizontal mergers, they overlooked many areas of merger enforcement including potential competition, vertical mergers, and mergers raising buyer power concerns. The guidelines addressing potential competition and vertical mergers were last revised in 1984 and are clearly out of date. These guidelines need to be revised to recognize the potential anticompetitive concerns in all three of these areas.

Industries that need special attention: health care, agriculture, and telecom

The consequences of underenforcement and unenforcement in antitrust can be seen clearly in three sectors: health care, agriculture, and telecommunications. This section will detail what has happened in each of these industries, and what the Obama administration can do to reverse the damage.

Restore the balance in health care antitrust enforcement

Health care is a priority for the government enforcement agencies. In fact, it accounts for a greater portion of enforcement resources than any other industry. Health care antitrust enforcement can play an important role in the efforts to control health care costs and enhance innovation in these markets. Central to sound health care antitrust enforcement is establishing a balance among these important principles:

- Enforcement should focus on the sectors of the health care system with the greatest impact on consumers.
- Both monopoly and monopsony power can harm consumers.
- Enforcement must be balanced with clear guidelines and advice to permit procompetitive conduct.

Moreover, because the government has limited resources for antitrust enforcement, its efforts should also focus in those areas with the greatest potential benefit for consumers. Currently there are serious concerns about how the agencies' health care enforcement resources are utilized. In assessing the federal health care antitrust enforcement program, the American Antitrust Institute observed the following in its transition team report:

> *"[T]he priorities of the health care enforcement agenda need to be realigned to areas with the greatest impact on consumers. Unlike in prior administrations, there is a significant imbalance in enforcement priorities between anticompetitive activity by health insurance companies and health care providers. In the seven years of the Bush administration, all nonmerger enforcement actions have involved health care providers, with no enforcement involving health insurers."*[15]

Enforcement in the past administration focused almost entirely on doctors and ignored the problems posed by health care intermediaries, such as health insurers, Group Purchasing Organizations, or GPOs, and Pharmacy Benefit Managers, or PBMs. All of the 33 Bush administration enforcement actions against anticompetitive conduct were brought against physicians. There is little evidence that these actions produced significant competitive benefits. Almost 40 percent of these cases were brought in rural markets, exacerbating the existing challenge of retaining and attracting qualified professionals to those underserved areas.[16] Even the Antitrust Section of the American Bar Association has counseled that enforcement against physicians "is a controversial and relatively murky area."

Some suggest that the significant number of enforcement actions might be evidence of a significant competitive problem. Relying on the number of enforcement actions would be very misleading. Only one of the 33 cases against physicians was litigated. Provider groups rarely have the resources to battle with the government agencies and may choose to settle the investigation by signing a consent agreement that does not admit to liability, but simply agrees to abandon some practices. Signing a consent decree is not proof of economic harm since for the provider groups this is less costly than trying to seek vindication, even if they have not violated the law. And in none of the 33 cases have insurance companies sued for treble damages, suggesting that the insurance companies did not believe they were injured by providers' alleged anticompetitive behavior or that the injury was not substantial enough to seek damages. In only a handful of cases did the agencies even allege that the alleged anticompetitive conduct led to higher prices. Perhaps most importantly for consumers, there is no evidence that the actions enabled health insurers to secure lower rates from providers, or if these lower rates resulted in lower premiums for consumers.

At the same time the Antitrust Division brought no meaningful enforcement actions against anticompetitive or fraudulent conduct by intermediaries, including insurers, GPOs, and PBMs. State enforcement officials compensated for much of this lack of enforcement by bringing several cases that secured significant penalties. To give just one example, in the past five years a coalition of over 30 state attorneys generals have brought five cases against the major PBMs, securing over $370 million in penalties. Similarly, New York brought a case against United Healthcare's subsidiary Ingenix, for manipulating the usual and customary rate—the charge for out-of-network health care services that is consistent with average rate for identical or similar services in a certain area—and secured more than $350 million in penalties. New York found that United used Ingenix's data to "dramatically under-reimburse" their members for out-of-network medical expenses. By distorting the "reasonable and customary" rates, which are paid for out-of-network expenses, United kept the reimbursements artificially low, forcing patients to bear a higher share of the cost than they should have.

Enforcement actions like these on the state level should be more common at the federal level as well, because insurance and PBM markets are a fertile environment for anticompetitive and fraudulent conduct. For markets to work effectively two factors are essential: transparency and choice, both of which are lacking in these markets. Insurance company practices are opaque, complex, and confusing. Moreover, insurance companies and even the plan sponsor—such as an employer—may not have a clear obligation to the consumer, creating a tremendous opportunity for opportunistic conduct by PBMs and insurance companies.

Similarly, almost all health insurance and PBM markets are highly concentrated. The structural problems this creates, including higher prices for consumers and higher costs for the health care system, became even more severe due to a lack of merger enforcement over the past eight years.[17] As a candidate, President Obama singled out health insurance mergers as a major culprit in undercutting efforts to address increasing health care costs. He specifically criticized the Justice Department for taking a lax attitude toward health insurance mergers:

> *The consequences of lax [antitrust] enforcement for consumers are clear. Take health care, for example. There have been over 400 health care mergers in the last 10 years. The American Medical Association reports that 95 percent of insurance markets in the United States are now highly concentrated and the number of insurers has fallen by just under 20 percent since 2000. These changes were supposed to make the industry more efficient, but instead premiums have skyrocketed, increasing over 87 percent over the past six years.*[18]

In CAP's "Competitive Health Care: A Public Plan that Delivers Market Discipline", Karen Davenport and Peter Harbarge note that "today's health insurance industry oligopoly is profoundly costly and inefficient for individuals, families, employers, employees, physicians, hospitals, and other health care providers. As the number of competitors shrinks in the marketplace, choice becomes limited, prices rise, and innovation is stifled, to the detriment of customers and vendors."[19] In fact, a 2007 survey conducted by the American Medical Association found that in more than 95 percent of insurance markets, one commercial carrier controlled at least 30 percent of the market.[20]

This merger wave hurt small businesses, consumers, and health care providers. Practically every metropolitan health insurance market is now highly concentrated. A similar trend occurred for PBMs—three of these companies now dominate the market. The result? Near record profits for health insurers and PBMs. As health insurers have used their market clout to reduce reimbursement for health care providers and increase their own profits, providers have increasingly been forced into offering assembly-line health care.

Insurance market concentration has led to higher prices, more anti-consumer insurance provisions, greater payment delays, less coverage, and poorer service. Increasingly, consumers have appropriately rebelled at the actions of insurers that restrict coverage, manipulate claims processing systems, and find other ways of either refusing to pay or delaying payments. Efforts to regulate health insurers are left to the states, as there is no federal approach to assuring both choice and transparency in these markets.

It's time for this to change, and for federal enforcement to challenge these poorly functioning markets and anticompetitive conduct. We do not know the reasons for the imbalance in enforcement priorities in recent years. One reason may be an assumption that the interests of health insurers are coincident with those of consumers. Such a view would be misguided, especially when dealing with for-profit insurers that are responsible to their shareholders. Insurers may simply pocket as higher profits the savings they reap from paying providers lower rates, especially where those insurers have market power.

Moreover, health insurers are not true fiduciaries for insurance subscribers. Plan sponsors may have a limited concern focusing on the cost of the insurance, and not the quality of care. This means that health insurers can and do increase profits by reducing the level of service and denying medical procedures that physicians would normally perform based on professional judgment. Providers are critical as advocates for the patient, and play a central role in advocating for patient care, but often insurers overrule their judgment or prevent them from fully informing patients. Health insurers also prohibit providers from advising patients about medically necessary procedures that may be covered under other plans through physician "gag" clauses.[21] For this reason, countless consumer protection actions have been taken against health insurers. If competition among insurers diminishes, which it already has, patients are more likely to pay for these procedures out-of-pocket or forego them entirely—consequences that are already being seen today. Ultimately, the creation of monopsony power from the hundreds of health insurance mergers adversely impacts both the quantity and quality of health care.

In addition to choice and transparency, collaboration among providers is also vital to the functioning of health care markets. The key guidance in this area is joint FTC-DOJ Statements of Antitrust Enforcement Policy in Health Care, which were issued in 1996. The guidelines are clearly out of date. When the 1996 Guidelines were issued, then-FTC Commissioner Varney wrote, "[t]he health care marketplace is undergoing rapid change, and it is primarily through an open dialogue with all involved in the health care industry that the Agencies can continue to provide appropriate and relevant antitrust guidance."[22] Yet that dialogue and the willingness to respond to a rapidly changing marketplace was lost in the past administration, which seemed to believe the best investment of the taxpayers' enforcement resources was in pursuing a single minded prosecution of health care providers. Moreover, the guidelines, which have not been revised for 13 years, are clearly out of date.

The lack of balanced guidance may pose obstacles to the new administration's health care reform efforts. It is clear that provider collaboration will play a vital role in most reform efforts, including a more comprehensive approach to improving health care results and controlling costs. Yet the standards applied by the antitrust enforcers have been increasingly narrow. While the Clinton administration antitrust enforcers approved almost over 25 physician collaboration ventures, the Bush administration approved only three. In order to meet the agencies' standards for sufficient integration, groups often have to form increasingly large entities of several hundred physicians. That narrow approach dampens pro-competitive collaboration and innovation. And the cost of securing these approval letters has grown—it now exceeds $100,000, clearly out of reach for all but very large physician groups.

This problem was highlighted in a recent CAP program on the vital role of health care providers in health care reform: "Can Health Reform Deliver for Providers?" Dr. Nancy Nielsen, the president of the AMA, observed how the agencies' narrow standards inhibited collaboration by physicians: "There is a very high burden imposed by the DOJ that really makes it very difficult for physicians, not integrated in a practice, to come together and share information and to collaborate to achieve financial rewards." The current approach of the antitrust enforcers limits the ability of all health care providers to provide the full range of collaboration that will become increasingly essential to achieve the goals of health care reform.

How can the imbalance in health care enforcement be corrected?

First, the DOJ with the FTC should revise the 1996 Guidelines after a meaningful dialogue with health care providers. There is significant room to provide more opportunities for health care providers to collaborate, and the guidelines need revision in order to facilitate greater forms of collaboration. A good place to start would be to allow efforts to collaborate to improve health information technology.

Second, there should be a renewed attention to potentially anticompetitive actions by insurers and other intermediaries such as PBMs. Insurers use various practices, such as most favored nation provisions, all products clauses, and silent networks (networks that enroll providers without their permission), that deter competition, leading to higher prices for consumers. Similarly, PBMs have been engaging in various activities such as exclusivity provisions that have led to higher drug prices.[23] Enforcement should focus on the types of conduct that, if challenged, can have the most significant effect on improving competition.

Third, enforcement against health care providers should focus on those instances of clearly egregious conduct with a significant impact on consumers. Case selection should be based on evidence of an adverse effect on competition and consumers. That is not to suggest that illegal activity should be given a free pass; instead, there should be a focus on those matters with a clear and substantial impact on competition and demonstrable harm to consumers.

Finally, the lack of health insurance merger enforcement must be reversed. At the beginning of the Bush administration, antitrust enforcers faced a similar situation with a failure to successfully challenge hospital mergers. In response, the FTC conducted a retrospective study of several consummated hospital mergers to both identify mergers that had led to anticompetitive effects and "to update [the FTC's] prior assumptions about the consequences of particular transactions and the nature of competitive forces in health care."[24,25] Based on the retrospective, the FTC successfully challenged one consummated merger and more importantly revised and strengthened the approach to litigating these cases. The DOJ should follow the FTC's example and conduct a thorough study of consummated health insurance mergers.

Strengthening enforcement in agriculture markets

Perhaps in no other market has the lack of enforcement affected producers as severely as in agriculture markets. Increasingly, the lack of merger enforcement means that farmers and other agricultural producers pay more for inputs—such as grain, feed, and fertilizer—and receive less when they sell their goods to processors. Food prices may be increasing for consumers, but economic evidence suggests that today's farmers are not benefiting from those higher prices.

Moreover, agricultural processing markets are a fertile territory for deceptive and exclusionary practices. Often agricultural processors are vertically integrated, and their ability to control supply permits them to manipulate the price for food products. In addition, the conduct in processing markets is opaque, providing the opportunity for processors to engage in deceptive or unfair practices.

Not surprisingly, Congress held more hearings on competition in agriculture in the past 12 years than on competition in any other market. There is a significant disconnect between the expectations of Congress, farmers, and enforcement. As Professor Peter Carstensen noted in testimony on the JBS-National merger that attempted to combined two of the country's largest beef processors: "There are serious problems of market failure in agriculture directly related to the high and increasing levels of concentration in the industries buying from and supplying farmers and ranchers."[26]

The lack of merger enforcement is critical. With the exception of last year's JBS-National merger, the DOJ has not challenged any agricultural processing mergers in 10 years. In the past 12 years, there has been no enforcement against anticompetitive practices and no criminal enforcement actions in the agricultural industry. Moreover, in a recent dairy merger, the division did not require a consent decree—where the parties would agree publicly to cease activities the government alleged to be illegal—but rather allowed the parties to create a private agreement. There is evidence today that those parties have violated this agreement, which could have serious implications for small dairy producers in the future.

How can the lack of enforcement be reversed?

First, the DOJ should convene a task force on competition issues that includes representatives of the Department of Agriculture and the FTC to provide a broad assessment of competitive problems in agriculture markets. This task force should take evidence and hold hearings on the current state of competition in agriculture markets. A key priority of the task force should be to determine whether the agencies have the statutory powers under the antitrust laws, the Agricultural Marketing Agreement Act—the source of USDA's milk market regulatory authority—and the Packers and Stockyards Act to challenge effectively the full range of competitively harmful practices. These practices include price manipulation in commodity markets that affects transaction prices (for instance, the price of the very small quantity of cheese sold on the Chicago Mercantile Exchange directly controls the price of all milk purchases in the United States), refusals to deal on equal terms with all willing sellers, use of exclusive buying arrangements to foreclose market access, and tacit—or perhaps even express—collusion to allocate markets among buyers.

Second, the DOJ should conduct a retrospective study of consummated agricultural mergers. In particular, the DOJ should monitor recent mergers approved in the past administration—including Monsanto-Delta Pine and JBS-Smithfield—to determine if the mergers resulted in higher prices or other anticompetitive effects.

Third, the DOJ should take a stricter approach to mergers in agricultural input markets, such as seeds or fertilizer, and mergers that may lead to the exercise of buyer power in processing markets. This includes developing and using market definitions appropriate to buyer-side market analysis.

Fourth, the DOJ should take a much more proactive, investigative role in examining the exclusionary and exploitive conduct of the major buyers of agricultural commodities, especially in dairy, livestock, and poultry. In doing so, it should take account of the fact that buyer power exists at lower market shares and in geographically more circumscribed markets. Hence, buyer power in agriculture may present more pervasive risks of anticompetitive conduct.

Returning enforcement to telecom markets

In the telecommunications sector, consumers and competing companies have fallen into a black hole between antitrust and regulation. On the one hand, antitrust authorities allowed a long series of mergers that have resulted in the effective resurrection of the Ma Bell monopoly on a regional basis. At the same time, the FCC's implementation of the Telecommunications Act of 1996 has failed to open the local market to effective competition. The courts have also said that the existence of regulation precludes claims of anticompetitive conduct. While the DOJ cannot address the failure of regulation to prevent exclusionary conduct by the dominant telecommunications companies, it can address the anticompetitive results of the past eight years.

The DOJ has relied on theories of intermodal competition to allow incumbent local exchange carriers to acquire contiguous dominant local carriers as well as large, head-to-head competitors. The DOJ also created a theory of a "dynamic duopoly" that suggests that two competitors are sufficient for competition in any telecom market. Unfortunately, intermodal competition has proven to be far less effective than head-to-head competition in disciplining market power. The DOJ has also failed to recognize the potential harmful effects of vertical market power in an industry with strong complementarities in product markets.

The economic theory that allowed these mergers to occur must be abandoned to avoid further harm in this and other sectors. Recognizing the failure of this lax merger policy and admitting the dramatic increase in market power that has resulted from these mergers will enable the antitrust authorities to begin to take action against anticompetitive and anti-consumer practices under different sections of the antitrust laws. Thus, a return to traditional values and models in the merger space is a key pillar on which broader reform and reinvigoration of antitrust enforcement should be based.

At the same time, the Supreme Court has weakened the potential for antitrust enforcement through decisions such as *Verizon v. Trinko* that eliminate antitrust litigation as a solution because of the existence of a regulatory structure.[27] Unfortunately, these decisions fail to take into account how lax regulation has become. The DOJ should work with Congress to overturn those decisions.

Mergers have led to excessive concentration and antitrust exemptions afforded to the telecommunications industry, which was formerly regulated. This problem is not limited to the communications sector and should be addressed in other sectors as well. One particularly egregious example is in the rail sector, where blatantly anticompetitive conditions called paper barriers have been imposed on short lines—independent rail companies that operate over short distances—when they were spun off from major national railroads.

Indeed, the railroad industry is one of the most extreme examples of the creation of market power through mergers without any protection for consumers. There are only two dominant railroads in the east and two in the west; all impose "non-compete" clauses on short lines created by spin-offs and refuse to compete on price, yet they are exempt from the antitrust laws. The Senate Judiciary Committee recently came out in support of eliminating the antitrust exemption in the railroad industry with the approval of S. 146, the Railroad Antitrust Enforcement Act, and that statutory change deserves careful evaluation by Congress.

Legislative reform to strengthen antitrust enforcement

The antitrust laws have stood the test of time as general statutes to protect competition. Yet at times it becomes necessary to reform the law, so that it can better fulfill the congressional intent to protect competition. Recent Supreme Court decisions, which have narrowed the law in 15 consecutive decisions in favor of defendants, are ample cause for concern over the future of antitrust enforcement. As the American Antitrust Institute, the leading advocacy group for antitrust enforcement, noted after last month's *Pacific Bell Telephone Co. v. linkLine* decision, in which the court ruled, again, in favor of defendant Pacific Bell Telephone Co.:

> *"…this decision highlights the need for Congress to resuscitate the antitrust laws, which have been left for dead in the Supreme Court. Otherwise, the new Administration's plans to reinvigorate antitrust enforcement may well be stymied by a hostile Supreme Court."*[28]

An evaluation of the impact of these recent decisions on the antitrust laws is necessary. It is worth recalling the guidance[29] of the late Justice Thurgood Marshall:

> *"…The antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster."*

It is difficult to reconcile these recent decisions of the Court with Justice Marshall's vision. The division should consider the impact of the recent Supreme Court decisions on the future for antitrust enforcement, competition, and consumers. As discussed earlier, this evaluation should begin by considering the need for legislation to reverse the Court's decision in *Leegin* Creative Leather Products.

The division should also work with Congress to consider two more basic reforms that will strengthen antitrust enforcement. First, Congress should strengthen the Tunney Act, which first passed in 1974 and is designed to subject Justice Department decisions on mergers and acquisitions to court review before they become final. In 2004, Congress reformed the act's procedures with the hope and expectation that those reforms would give courts greater ability to evaluate whether a proposed final judgment on a merger is in the public interest.[30] As the statute provided, "[I]t would misconstrue the meaning and congressional intent in enacting the Tunney Act to limit the discretion of district courts to review antitrust consent judgments solely to determining whether entry of those consent judgments would make a 'mockery of the judicial function.'"[31] Yet in several subsequent Tunney Act proceedings, the Antitrust Division argued that the courts' review was limited to whether the proposed remedy fulfilled the competitive issues raised in the complaint. The division's position was that courts cannot go beyond the scope of the complaint, and the courts have adopted the restricted view that their review is limited to the "mockery of the judicial function" standard. Congress should amend the Tunney Act to clearly provide for a court to have the complete power to review whether a proposed decree is in the public interest.

Second, Congress needs to extend a provision reducing treble damage liability for those firms participating in the division's immunity program. The division's immunity program is the most effective tool in its criminal enforcement program. It provides immunity from criminal liability– amnesty for the first firm to disclose illegal activity to the division. In 2004, Congress created an additional incentive for firms to disclose illegal price fixing and participate in the division's Corporate Leniency Policy by limiting any civil damages recovery from a corporate amnesty applicant to "actual damages sustained. . . attributable to the commerce done by the applicant in the goods or services affected by the violation."[32] This provision increases the incentives of firms to disclose illegal conduct. Unfortunately, this provision will sunset on June 23, 2009, five years after its passage, unless Congress renews it. See id. § 211(a). Congress should renew the damage provision for those firms that participate in the immunity program.

Conclusion

A successful antitrust enforcement policy is essential to put America back on the path toward long-term economic growth. Weak enforcement leads to cartels, price fixing, exclusionary conduct by dominant firms, and mergers securing market power, all of which limit economic growth. Looking forward, the Obama administration should work to ensure that antitrust enforcement is given the priority it needs.

Endnotes

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