

The Obama Administration: Will “Change” Include a Change in Antitrust Enforcement?

by James M. Burns



During his campaign, Sen. Barack Obama repeatedly proclaimed that, with his election, “change” would be coming to Washington, D.C. Now that Sen. Obama has become President-Elect Obama, will his recipe for change extend to the antitrust laws? Will the incoming Obama administration change the way federal regulators view the antitrust laws? Will it increase the number of antitrust enforcement actions brought by the Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC)? Well, if candidate Obama’s statements along the campaign trail are an accurate indicator of his future intentions, all signs clearly point towards a significant increase in antitrust enforcement at the federal level over the next four years.

Numerous signs that the incoming Obama administration will take a different, more activist, approach towards antitrust enforcement can be found from along his campaign trail. For example, candidate Obama’s views on the current level of antitrust enforcement were expressed in a speech last May, when he declared, “We’re going to have an antitrust division in the Justice Department that actually believes in antitrust law. We haven’t had that for the last seven, eight years.” However, candidate Obama’s views on the antitrust laws and his intentions regarding how to modify antitrust enforcement if elected were by no means limited to general pronouncements of this nature. Owing perhaps to his former role as a law school professor, during his campaign candidate Obama provided an unusually detailed amount of specificity concerning the “change” he believes is required to make federal antitrust enforcement more effective.

Changes in antitrust policy

Back in 2007, when still a bit of a long-shot candidate, Senator Obama provided a detailed response to an American Antitrust Institute request for his views on antitrust enforcement policy (notably, he was reportedly the only candidate, from either party, to respond to their request at the time.) In his statement, Obama was critical of the Bush administration’s merger enforcement and pledged more vigorous enforcement, asserting that “between 1996 and 2000, the FTC and DOJ together challenged on average more than 70 mergers per year,” but that “from 2001 to 2006, the FTC and DOJ on average only challenged 33.” As the campaign progressed, Obama also expressed concern about consolidation in the media industry, including the XM/Sirius merger, which he said might “give the new firm excessive market power or unduly limit the choices consumers have for satellite-radio content.” In July, candidate Obama also called for a close examination of the proposed DHL/UPS joint venture, stating, “At the very least, the DOJ should examine whether having two competitors in a fairly concentrated market act as partners would have anticompetitive effects.” Given all of these pronouncements, it seems quite clear that an Obama administration is likely to live up to candidate Obama’s pledge to “step up review of merger activity and take

effective action to stop or restructure those mergers that are likely to harm consumer welfare, while quickly clearing those that do not.”

While on the campaign trail, candidate Obama also frequently pledged to bring more antitrust enforcement cases, stating, “I will assure that we have an Antitrust Division that is serious about pursuing cases.” In addition, Obama specifically decried the Bush administration’s “failure” to bring any monopolization cases over the last seven years, and told the American Antitrust Institute, “My administration will ensure that insurance and drug companies are not abusing their monopoly power through unjustified price increases —whether on premiums for the insured or on malpractice insurance rates for physicians.” Reaffirming his view that monopoly enforcement has been insufficient over the last eight years, Obama recently voiced his strong disapproval of a September 2008 DOJ Antitrust Division report that sought to explain and justify the Division’s cautious approach to bringing monopolization actions. Thus, it appears quite likely that the policies set forth in that report will be short-lived and that, before too long, an Obama administration will bring at least one monopolization case, possibly in the health care area.

A focus on a few particular industries

Candidate Obama also took direct aim at several particular market sectors in his response to the American Antitrust Institute. In addition to media mergers, Obama also expressed the view that antitrust enforcement in the healthcare, energy, and pharmaceutical sectors needed to be enhanced. Specifically, in the media area, on the campaign trail candidate Obama expressed his “strong support” for the principle of network neutrality, and said that letting internet providers charge fees that give some websites or applications priority over others “would threaten innovation, the open tradition and architecture of the internet, and competition.” In the areas of healthcare and pharmaceuticals, Obama claimed that “lax enforcement of healthcare mergers” has caused harm to consumers, and stated that he would also take steps to ensure that branded pharmaceutical companies could not block generic drugs from the marketplace.

Legislative initiatives involving the antitrust laws

President-elect Obama’s plans for antitrust “change” are also likely to extend to legislative proposals. For example, in his response to the American Antitrust Institute, candidate Obama also noted that, while in the Senate, he introduced legislation to repeal the McCarran-Ferguson Act for medical malpractice insurance, and confidently proclaimed, “As president, I will sign this bill into law.” Accordingly, legislation seeking to repeal the insurance industry’s McCarran-Ferguson Act exemption — which has been introduced many times over the last 20 years but never enacted — is likely to be an early agenda item for the Obama administration. Another initiative likely to gain traction in an Obama administration is legislation that would overturn the Supreme Court’s 2007 decision in *Leegin*, reinstating the pre-*Leegin* law that made retail price maintenance a per se antitrust violation.

Patent law antitrust issues

Candidate Obama also took aim at settlements in patent infringement actions involving generic drugs. In his policy statement to the American Antitrust Institute, he expressed a desire to “ensure that the law effectively prevents anticompetitive agreements that artificially retard the entry of generic pharmaceuticals onto the market, while preserving the incentives to innovate that drive firms to invent life-saving medications.” The specific concern in this area of the law is that so-called “reverse payment” settlements to resolve patent infringement actions may in reality be intended more as a means of delaying the entry of generic drugs into the market — an anticompetitive result. Within the last few years the U.S. Supreme Court has twice denied petitions for certiorari to hear such matters, and bills to address reverse payment settlements have been introduced, but stalled, in Congress. An Obama administration may put White House muscle behind such legislation and/or petition the Supreme Court to finally grant certiorari and hear and resolve this important issue.

International cooperation

Finally, candidate Obama also pledged to strengthen competition advocacy in the international community. He has stated that he will “work with foreign governments to change unsound competition laws and to avoid needless duplication and conflict in multinational enforcement of those laws.” Accordingly, this is likely to be another focus of the new Obama administration.

Conclusion

In short, given the frequency and detailed nature of candidate Obama’s campaign trail pronouncements about the need for “antitrust change,” it is very likely that we will see a considerable increase in the level of antitrust enforcement in the new Obama administration. There will be numerous developments in the world of antitrust enforcement over the next four years.

About the Author

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