

Four More Years: What Obama's Reelection Means for United States Antitrust Policies

The reelection of President Obama means four more years of his antitrust policies. Competition Policy International asked competition experts what effect this will have – or will not have – on U.S. competition policy.

During the 2008 presidential campaign, Barack Obama pledged to “reinvigorate antitrust enforcement” and “step-up review of merger activity.” In response, the Antitrust Division of the Department of Justice and the Federal Trade Commission stepped-up activity quite significantly. The Antitrust Division “took the gloves off” and stepped back into court by trying its first merger case in about 10 years, suing to block AT&T/T-Mobile, trying several cartel cases to guilty verdicts resulting in record fines and extended prison sentences, and litigating cases like e-books. Similarly, the FTC successfully challenged several high-profile mergers, particularly in the health care area. The FTC also continued its efforts to prevent so-called “pay-for-delay” or “reverse payment” settlements between branded and generic pharmaceutical companies, although so far without much success. Both agencies have devoted substantial resources to international cooperation through bilateral relationships and through multi-lateral organizations such as the ICN and OECD.

Bill Baer, who is highly regarded within the antitrust bar, has been nominated to head the Antitrust Division, and we all hope that Congress will quickly confirm him now that Joe Wayland has announced that he is leaving on November 16. Jonathan Leibowitz has announced plans to leave the FTC, which will create a Democratic vacancy. One of the two other Democratic Commissioners, Edith Ramirez or Julie Brill, who have demonstrated that they are aggressive but sensible enforcers, could be named Chairman upon his departure, or the new Commissioner could be designated as Chairman. I expect that

new leadership at both agencies will continue all of these trends.

- Janet L. McDavid (Hogan Lovells)

I think that the open question for the Federal Trade Commission is how aggressively they want to explore the boundaries of Section 5. Would the FTC prefer to settle cases and impose long-term regulatory regimes—something they have done for Google, Facebook and MySpace—or do they want to take a real run at defining Section 5’s limits?

- Randal C. Picker (University of Chicago Law School)

Healthcare, healthcare... PPACA (“Obamacare”), contrary to the statements of many of its critics, is extremely market driven, depending on robust competition among health care providers and their various tools and medications to control costs. This is going to show up heavily in: challenges to mergers in the health care industry, including hospital mergers such as the one on the Supreme Court’s docket (FTC v. Phoebe-Putney); close scrutiny of exclusionary practices including things like MFNs in that industry; the migration of pharmaceuticals from branded to generic versions and the role of Hatch-Waxman and reverse payment settlements in achieving or frustrating that migration; aggressive use of antitrust to combat overly protective state boards and other organizations in the health care industry. I predict that all of these will receive closer scrutiny by both agencies.

- Herbert Hovenkamp (University of Iowa, College of Law)