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Administration Plans to Strengthen Antitrust Rules

By [STEPHEN LABATON](#)

WASHINGTON — [President Obama](#)'s top antitrust official this week plans to restore an aggressive enforcement policy against corporations that use their market dominance to elbow out competitors or to keep them from gaining market share.

The new enforcement policy would reverse the Bush administration's approach, which strongly favored defendants against antitrust claims. It would restore a policy that led to the landmark antitrust lawsuits against [Microsoft](#) and [Intel](#) in the 1990s.

The head of the Justice Department's antitrust division, Christine A. Varney, is to announce the policy reversal in a speech she will give on Monday before the Center for American Progress, a liberal policy research organization. She will deliver the same speech on Tuesday to the United States Chamber of Commerce.

The speeches were described by people who have consulted with her about the policy shift. The administration is hoping to encourage smaller companies in an array of industries to bring their complaints to the Justice Department about potentially improper business practices by their larger rivals. Some of the biggest antitrust cases were initiated by complaints taken to the Justice Department.

Ms. Varney is expected to say that the administration rejects the impulse to go easy on antitrust enforcement during weak economic times.

She will assert instead that severe recessions can provide dangerous incentives for large and dominating companies to engage in predatory behavior that harms consumers and weakens competition. The announcement is aimed at making sure that no court or party to a lawsuit can cite the Bush administration policy as the government's official view in any pending cases.

In the speeches, Ms. Varney is expected to explicitly warn judges and litigants in antitrust lawsuits not involving the government to ignore the Bush administration's policies, which were formally outlined in a report by the Justice Department last year. The report applied legal standards that made it difficult to bring new cases involving monopoly and predatory practices.

As a result of the Bush administration's interpretation of antitrust laws, the enforcement pipeline for major monopoly cases — which can take years for prosecutors to develop — is thin. During the Bush administration, the Justice Department did not file a single case against a dominant firm for violating the antimonopoly law.

Many smaller companies complaining of abusive practices by their larger rivals were so frustrated by the Bush administration's antitrust policy that they went to the [European Commission](#) and to Asian authorities.

Ms. Varney's new policy more closely aligns American antitrust policy on monopolies and predatory practices with the views of antitrust regulators at the European Commission.

Herbert Hovenkamp, a leading antitrust scholar regarded as a centrist between those seeking more aggressive enforcement and those who generally argue for restraint, said the guidelines by the Bush administration were "a brief for defendants."

He said that the repudiation of those guidelines by the Obama administration "will almost certainly have a greater impact than the guidelines themselves had."

"This will be bad news for heavyweights in the tech industries — companies like [Google](#) and Microsoft," said Professor Hovenkamp, who teaches at the [University of Iowa](#) College of Law.

"People aligned with plaintiffs will rejoice. Those aligned with defendants will wring their hands. A lot of law firms will be indifferent because they take money from both sides."

Ms. Varney is expected to say that the Obama administration will be guided by the view that it was a major mistake during the outset of [the Great Depression](#) to relax antitrust enforcement, only to try to catch up and become more vigorous later. She will say the mistake enabled many large companies to engage in pricing, wage and collusive practices that harmed consumers and took years to reverse.

While Ms. Varney is not expected to mention any specific companies or industries vulnerable under the new policy, those who have talked to her about the speech say she is aiming at agriculture, energy, health care, technology and telecommunications companies. She may also be reviewing the conduct of some in the financial services industry, which is now undergoing a wave of consolidation as a result of the financial crisis.

Ms. Varney, who headed the Internet practice group of the Washington-based Hogan & Hartson law firm, served as a commissioner at the Federal Trade Commission in the 1990s after working in the White House during the early years of the Clinton administration.

Signaling her intent to revive a moribund antitrust program, she has recruited a collection of senior aides, many of whom are seasoned antitrust litigators or worked in the Clinton administration and the Federal Trade Commission and were involved in many prominent cases, including the one against Microsoft. They include Molly S. Bost, William Cavanaugh, Gene Kimmelman, Carl Shapiro and Philip J. Weiser.

Antitrust policy is set by Washington in two ways: by the interpretation of laws announced by the Justice Department and the Federal Trade Commission through guidelines for the courts and private litigants, and by the enforcement cases that those agencies decide to bring. The government's guidelines are often cited by lawyers and given considerable weight by judges in antitrust cases, including those lawsuits that the government does not participate in.

It is not unlawful for a company to gain control of a market. It becomes unlawful if the company engages in

conduct to exclude or harm competitors with no business justification.

Conservative antitrust experts, some judges and defendants in such cases have said that the line is too difficult to draw and that it is better to let rivalries play out in the marketplace than in the courts.

After more than a year of hearings and studies, the Justice Department in 2008 published a 215-page report analyzing Section 2 of the Sherman Antitrust Act, explaining the government's approach to the monopolistic and predatory practices of companies.

Reflecting deep skepticism of the role of government in the marketplace, the 2008 report made formal a set of policies that had largely been followed by the Justice Department, but not by the Federal Trade Commission, during the Bush administration.

When the report was issued, Thomas Barnett, then the head of the antitrust division and the architect of the guidelines, said that they were meant to articulate "clear standards" for determining whether certain types of conduct by large companies would harm competition.

In a rare split with the Justice Department, three of the four commissioners at the Federal Trade Commission denounced the guidelines, calling them "a blueprint for radically weakened enforcement" against anticompetitive practices.

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