Is Obama the New Trust-Buster?

By John M. Landry
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The U.S. Department of Justice recently launched an antitrust investigation into the recruiting and hiring practices of high-tech firms in Silicon Valley. Although official details of the investigation have yet to be disclosed, the Justice Department is apparently looking into whether firms agreed to refrain from recruiting each other's top talent. If this is accurate, the investigation is another indication of the new administration's stated intention to more aggressively enforce the antitrust laws, particularly against high-tech firms.

According to press reports, the Justice Department issued civil investigative demands (requests for information and documents) last week to at least a dozen companies, including Google, Microsoft, Apple, Yahoo and Intel. Bio-tech firm Genentech is also reportedly targeted. While theoretically, any agreement in restraint of trade by two or more rivals, or potential rivals, can fall within the prohibitions of Section 1 of the Sherman Act, the conduct apparently under scrutiny here — agreements not to solicit employees — is not the first that comes to mind when thinking of antitrust enforcement priorities. It contrasts sharply with the prior administration's focus on classic cartel behavior: agreements among competitors to fix the prices of goods or services sold to consumers above competitive levels. Such enforcement was often international in scope. Antitrust scrutiny of alleged restraints affecting domestic employee recruiting practices arguably goes in quite a different direction.

This is not to say that an agreement among firms to refrain from recruiting each others' top talent does not raise antitrust concerns. The broad goal of antitrust laws is to preserve competition and, thereby, enhance consumer welfare. Price collusion among rivals is considered particularly detrimental, what the U.S. Supreme Court has labeled the "supreme evil of antitrust." Buyers who compete in a buy-side market can fix prices too (below competitive levels) and the Justice Department has in the past brought criminal actions against buyers under the Sherman Act.

Assuming that the high-tech firms now under scrutiny compete as buyers in a market for executives, engineers or other Silicon Valley talent, an agreement not to solicit and hire from one another arguably constitutes a market division agreement. A market division agreement, like price fixing, reduces competition. Here, such an agreement would have the same effect as if the firms agreed to reduce salaries, options and other compensation to uniform levels. A 1948 U.S. Supreme Court decision that deemed illegal an agreement among sugar refiners to restrain price competition in the market for sugar beets, a necessary input, may provide the analogy. Although the employees themselves might disagree, perhaps the Justice Department will argue that there exists a market for top talent in Silicon Valley akin to an input market. It would not be the first time that someone has noted the particular importance of human capital (and the intellectual property it creates) in the high-tech industry. But there may lie the problem for the enforcers. We'll just have to wait and see whether there could actually have been an agreement to divide a "market" for such presumably unique, nonfungible talent.

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Whatever its ultimate merits, the investigation appears to be just one more sign of a new regime of heightened antitrust enforcement. In a well-publicized speech given last month at the Center for American Progress, Christine Varney, now at the helm of the Justice Department's antitrust division, stressed the need for "vigorous antitrust enforcement" as a significant component of the government's responsibility to ensure that markets remain competitive. She even cited "ineffective government regulation, ill-considered deregulatory measures, and inadequate antitrust oversight" as key contributors to the current economic crisis and declared that passive monitoring of market participants was no longer a viable approach.

She stressed that the antitrust division needed to play a vital role in developing sound competition policies and then took the opportunity to formally withdraw the Justice Department's Section 2 report ("Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act," issued in 2008 under the former administration), citing as problematic the excessive hurdles placed on government enforcement of competition-reducing practices by dominant firms.

The new investigation of Silicon Valley's recruiting practices is also consistent with Varney's remarks singling out the high-tech industry: "Increasingly, Americans are relying on high-tech solutions in the home and the workplace and enjoying the fruits of innovation in those markets that have been spurred on by competition between rival firms. We thus plan to devote attention to understanding the unique competition-related issues posed by these markets. In the past, the Antitrust Division was a leader in its enforcement efforts in technology industries, and I believe we will take this mantle again."

Varney directed further attention on Google, publicly stating before her confirmation that its dominance in Internet searching and advertising could raise competition questions.

Indeed, the instant investigation is the third in as many months involving the high-tech industry — and Google in particular. Just last month, the Federal Trade Commission launched an inquiry into whether shared ties between the boards of Google and Apple violated an antitrust prohibition against "interlocking directorates" among rival firms. Google and Apple share two directors and have been increasingly competitive in the cell phone and operating systems markets. Until now, the Clayton Act's prohibition on interlocking directorates has rarely been enforced by government authorities.

In April, the Justice Department began an inquiry into the antitrust implications of Google's $125 million settlement with authors and publishers over its Google Book Search service. The Justice Department is apparently concerned that the settlement would give Google too much control over licenses (in many instances, *exclusive* licenses) to millions of books.

Although all three of these investigations are in the preliminary stages and it is unclear whether any will result in formal government action, what is clear is the new administration's aggressive stance on antitrust enforcement. Companies engaged in business practices with antitrust implications, in Silicon Valley and elsewhere, should tread carefully.

Public antitrust enforcement varies over time and we are apparently now again in a period of change. It is useful to keep in mind that there is little empirical evidence showing that antitrust enforcement actually enhances consumer welfare. It is largely an article of faith. From all indications, the new administration is composed of true believers.

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