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ABSTRACT

ANTITRUST / COMPETITION

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- *Our economy depends upon open markets, open systems, open networks, and full, fair and open competition to promote innovation and benefit consumers.*
- *Competition is a vital component of our modern economy. As we emerge from the economic downturn, we are pleased that U.S. regulators have reaffirmed their commitment to promote competition and revive consumer-oriented antitrust enforcement, especially in regard to monopolistic behavior.*
- *Sound antitrust enforcement is of particular importance to high-tech industries. Characteristics underlying technology markets—complicated patent portfolios, network effects, economies of scale, standardization, and interoperability—make anticompetitive actions difficult to detect, harder to remedy, and more detrimental to innovation and venture capital allocation.*

***Background*:** For over 30 years, CCIA has supported antitrust laws that ensure a level playing field for all participants in computer and communications markets. It is clear that competition policy will play an increasingly larger role in the shape and operation of our industry.

***CCIA's Position*:** CCIA advocates for open markets, open systems, open networks, and full, fair and open competition. Antitrust and competition policy should be designed to advance these goals. Competition and vibrant markets fuel economic growth and reinforce our industry's leadership in innovation and technological development.

Competition Policy and the High-tech Industry: The competitive dynamic is especially important in high-tech industries where rapid innovation is a defining characteristic. Some argue that it is this very trait that obviates the need for antitrust enforcement in the technology industry; however, even a quick examination of this bumper sticker ideology proves this notion wrong. In reality, certain characteristics of computer and communications markets necessitate proactive, targeted competition policy. To a greater extent than most markets, high-tech and internet-centric industries are characterized by a heavy reliance on complicated patent portfolios, network effects, economies of scale, standardization, and interoperability. These inherent features often make anticompetitive actions difficult to detect, harder to remedy, and more detrimental to innovation and venture capital allocation.

Intellectual property rights surrounding hardware and software interfaces are particularly susceptible to anticompetitive practices. Since interoperability is essential to competition in high-technology industries, IP disputes concerning proprietary interfaces merit special consideration. Prohibiting competitors from accessing a *de facto* standard interface specification

can lock users into a particular operating system, software platform, or network software environment. Furthermore, attempts by companies to subvert official standard setting processes to gain and misuse market power are increasingly becoming a problem.

A key event shaping recent jurisprudence and policy was the Federal Trade Commission's (FTC) ruling that computer memory maker Rambus' "patent ambush," in which the company did not disclose relevant patents until after the industry settled on a standard in an effort to gouge higher licensing fees out of its competitors, was anticompetitive and illegal. Regrettably, to the detriment of innovation and the standard setting process, the DC Circuit overturned the FTC decision and the Supreme Court refused to hear the case.

Another crucial area for regulators to pay close attention to is lock-in. As the cloud computing market grows and begins to replace other modes of software and IT service delivery, customers are likely to become incredibly reliant on their cloud provider. As customers become reliant on a certain platform or service, especially if the service is a closed system with proprietary data formats, it becomes difficult for them to switch, especially if data-portability is not supported by their provider. At the very least, clear, upfront disclosure is crucial so customers can make informed decisions when choosing their initial platforms. Also, switching from an open system to closed system once a company attains a critical mass of customers, so-called "installed-base opportunism," should be actively discouraged by regulators as this is clearly a deceptive trade practice that flies in the face of fair and open competition.

Current Status:

In May 2009 soon after taking the helm of the DOJ's Antitrust division, Assistant Attorney General Christine Varney announced that her department would take a harder line against anticompetitive monopolistic conduct than her unprecedentedly lax predecessor. She immediately had her department update its Section 2 report, which signaled that the agency would revert to the prior practice and aggressively pursue conduct that was detrimental to competition and innovation. Furthermore, this announcement placed the DOJ back in line with its sister competition enforcer, the FTC, who had refused to shift its policy direction in the waning years of the prior administration.

Since then there has been a moderate amount of action on the antitrust front. In August 2010 the FTC settled its long running dispute with Intel and agreed to monitor Intel's compliance with a Consent Order aimed at maintaining a competitive market for computer chips. Intel has also paid over $4 billion in settlements and fines over the past few years to come to terms with the cases brought by the European Union, AMD and Nvidia. However, the New York Attorney General's case against the computer chip giant remains ongoing.

Although few cases have been brought by the FTC or the DOJ against high-tech firms, several investigations have come to light, including inquiries into IBM, Apple and Google to name a few. Also, several major mergers have received scrutiny and some parties have even had to make concessions, such as in the case of the Ticketmaster-LiveNation merger. Recently, AT&T announced that it is attempting a mega-merger with one of its major competitors, T-Mobile. Both the DOJ and the FCC will review the merger request, which has generated a public uproar due to its competition distorting effects. AT&T, on the other hand, is arguing that certain efficiencies override the negative effect the merger will have on competition. Given the size of the merger and the value of the mobile telecommunications and broadband market to the public,

the government's handling of the AT&T-T-Mobile merger will be closely scrutinized and much debated.

Given the relative inaction of the last administration's antitrust enforcement, particularly in regards to single-firm conduct, it is natural that the first few years of the Obama administration were largely focused on antitrust investigations, as very few cases were in the queue when the current administration took over. However, how these cases evolve in the next year will shape the legacy of the Obama administration's antitrust enforcers.