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Fresh

Personal Care

Supplements

Management

Ingredients

Regulatory

Organic

Blogs

Events

Newsletter

HOME » BREAKING NEWS » BREAKING NEWS ARTILCE

## What will a new FTC mean for Whole Foods?

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BY: CARA HOPKINS

President Obama will likely identify his picks to lead the U.S. Federal Trade Commission and the Department of Justice's Antitrust Division in the coming weeks, posing the question: What will come of the investigation into the Whole Foods/Wild Oats merger?

The merger was announced in February 2007. In June of that year, the FTC asked a federal court to temporarily block the acquisition, claiming that it would substantially lessen competition or tend to create a monopoly in the relevant product market defined as "premium, natural and organic supermarkets" in 18 cities where Whole Foods and Wild Oats were the only stores that fit the PNOS definition. Whole Foods argued that its competition is not the narrow PNOS market, but rather all supermarkets—including conventional mass market grocers. It is little question that the outcome of the Whole Foods litigation largely hinges on this market definition issue.

The FTC successfully blocked a merger using the submarket argument in 1997 when Staples Inc. attempted to merge with Office Depot Inc. In this case, Los Angeles-based antitrust lawyer Heather Cooper of Sheppard, Mullin, Richter & Hampton LLC, pointed out, FTC presented evidence that "in areas where Staples was the only office superstore, it was able to set prices significantly higher than in areas where it competed with other office superstores." Such evidence has not been presented in the Whole Foods/Wild Oats case.

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According to Cooper, new antitrust leadership under President Obama is likely to continue to pursue its opposition in the Whole Foods case. An administrative hearing on the merits of the merger will be heard in February and will address the market definition issue and the issue of what weight to attribute to "core" versus marginal consumers. The FTC, Cooper said, looks like it is entrenched in its position and Whole Foods has been aggressively defending the merger every step of the way. "Although the FTC may put the matter on hold temporarily, I would be surprised if the FTC abandoned its challenge," she said. "I expect the litigation to continue."

More generally, Cooper said, "Many in the antitrust bar expect to see more vigilant enforcement of the antitrust laws in the Obama administration." In particular, the agencies may well turn up the heat on its review of mergers among competitors.

No matter who takes the helm of the FTC and DOJ antitrust divisions, Cooper predicts the administration will have to balance oversight with consideration for tough economic times. "I think they will take a prudent approach," Cooper said. "They're going to look more closely at deals, but there's going to have to be a balance. In these economic conditions, some companies will have to consolidate with others to survive. The agencies will have to balance this with their desire to block mergers they believe are likely to harm consumers by, for example, leading to higher prices."

[U.S. senators criticize FTC's new rules in Whole Foods case](#)

[FTC asks judge to halt Whole Foods integration, potentially rebrand former Wild Oats stores](#)

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