

ANTITRUST ALERT

VARNEY CONFIRMED AS DOJ ANTITRUST HEAD; OBAMA PICKS SIGNAL SHIFT TO MORE AGGRESSIVE ENFORCEMENT

On April 20, 2009, the United States Senate confirmed Christine Varney as assistant attorney general for the Antitrust Division of the Department of Justice (DOJ). A former commissioner on the Federal Trade Commission appointed by President Clinton, Ms. Varney has been a vocal proponent of more aggressive antitrust enforcement. Ms. Varney joins Jon Leibowitz, who was previously named chairman of the Federal Trade Commission (FTC) by President Obama, as the country's top antitrust enforcement officials. With Ms. Varney's confirmation, the senior leadership at both federal antitrust enforcement agencies is now in place, setting the stage for President Obama's promised shift towards more activist antitrust enforcement.

SENIOR ANTITRUST STAFF NOW IN PLACE

At DOJ, Ms. Varney is assembling a team heavy with veterans of the more enforcement-minded Clinton antitrust era, including Carl Shapiro, who will serve as the Antitrust Division's chief economist. Mr. Shapiro has been a vocal critic of the prior administration's merger enforcement record, particularly its decision not to challenge the Whirlpool-Maytag merger. Ms. Varney will also reportedly bring to the Division William Cavanaugh Jr., an experienced antitrust litigator who will enhance the DOJ's ability to win merger cases, as well as Molly Boast, former director of the FTC Bureau of Competition in the Clinton administration, and Phillip Weiser, a former Supreme Court clerk and senior counsel to the assistant attorney general for Antitrust during the Clinton administration.

Ms. Varney's team also reflects her experience and interest in high-tech industries. Mr. Shapiro has written extensively on anticompetitive abuses of intellectual property, Mr. Cavanaugh has litigated a number of antitrust and patent matters arising out of the pharmaceutical industry, and Mr. Weiser is a recognized expert in the telecommunications and technology industries.

At the FTC, Chairman Jon Leibowitz has likewise brought on board an antitrust enforcement team with roots in the Clinton administration, one that will advance the FTC's heavy emphasis on enforcement in the pharmaceutical sector. Richard Feinstein, tapped to be director of the Bureau of Competition, previously served as head of the FTC's health care shop and worked on some of its highest-profile pharmaceutical enforcement matters. Joseph Farrell, who will serve as the FTC's chief economist, was previously chief economist at the DOJ Antitrust Division during the Clinton administration. Susan DeSanti will take over as head of the office of policy planning, the same position she held during the Clinton administration.

MORE AGGRESSIVE ENFORCEMENT

Under Ms. Varney's and Mr. Leibowitz's leadership, the federal antitrust enforcement agencies are expected to be more active than in the prior administration, both with respect to conduct matters and merger enforcement. For example, Ms. Varney's confirmation may mean a retreat from the DOJ's prior "hands-off" approach to Section 2 of the Sherman Act, which deals with monopolization and single-firm conduct. Towards the end of the Bush administration, the DOJ published a report on Section 2 that put forth a view of the law in this area that many commentators criticized as advocating an inappropriately laissez-faire philosophy. Indeed, in a striking public display of discord, three of the four sitting FTC commissioners—including now-Chairman Leibowitz—issued a scathing critique of the DOJ's report. Ms. Varney has stated her disagreement with the conclusions of the DOJ report, characterizing them as "not appropriate," and has pledged that "one of the first things" she will do as head of the Antitrust Division is consult with the FTC and her colleagues at DOJ to discuss the report's conclusions. Many observers expect the DOJ to amend or withdraw the report.

On the merger front, it is widely believed that both agencies will be aggressive enforcers of Section 7 of the Clayton Act, which prohibits mergers that may substantially lessen competition. Ms. Varney and her senior appointees (including Carl Shapiro, as discussed above), have been critical of the previous administration's perceived lax merger enforcement, suggesting that the days of a merger like Whirlpool-Maytag getting a pass are over.

Both agencies also have signaled increased attention to resale price maintenance agreements, which are agreements between manufacturers and their distributors fixing resale prices to downstream customers. Although the United States Supreme Court held 5-4 in a 2007 case that the practice of resale price maintenance was not per se illegal (a decision Ms. Varney stated she was "quite surprised" by), the Court left open the possibility that such arrangements could be challenged under the antitrust "rule of reason." During her confirmation hearings, Ms. Varney noted the Court's decision left DOJ "a lot of room to continue to prosecute retail price maintenance where it results in anti-competitive consequence and I intend to continue that prosecution." The FTC has announced a series of public hearings on resale price maintenance, and commissioners have expressed their skepticism that the practice can ever be beneficial to consumers. The net result of FTC and DOJ actions could well be restoration of resale price maintenance to the status of conduct too risky for any well-counseled business to engage in.

The bottom line is that we are entering a new antitrust era. President Obama's new antitrust enforcement team is highly intelligent and highly skilled, but also very aggressive and enforcement-minded. "Old" assumptions in the business community about what is lawful or unlawful, and what the FTC and DOJ are likely to do when reviewing mergers or other conduct, may need to be re-examined. In the coming period it will be fascinating to see the antitrust enforcement decisions made by the new administration, but equally interesting to see how those enforcement decisions fare in the courts.

CONTACT INFORMATION

If you have questions regarding this alert, please contact—

Mark J. Botti	mbotti@akingump.com	202.887.4202	Washington, D.C.
Paul B. Hewitt	phewitt@akingump.com	202.887.4120	Washington, D.C.
J. Brady Dugan	bdugan@akingump.com	202.887.4152	Washington, D.C.
Anthony W. Swisher	aswisher@akingump.com	202.887.4263	Washington, D.C.