

# LEGAL DEVELOPMENTS

May 14, 2009

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## Head of the DOJ's Antitrust Division Outlines the Agencies' Plans to Reinvigorate Antitrust Enforcement

On May 11, 2009, Assistant Attorney General Christine Varney, who is the head of the Department of Justice's Antitrust Division, confirmed what many have predicted – antitrust enforcement in an Obama administration will be significantly more robust than was antitrust enforcement over the past eight years. In particular, the DOJ will: (i) reinvigorate antitrust enforcement against exclusionary or predatory conduct by single firms; (ii) dedicate resources to assist public agencies receiving federal stimulus funds to detect and deter collusive or fraudulent activity by firms seeking to receive such funds; and (iii) explore new vertical antitrust theories, particularly in high-tech and Internet based markets.

In a speech before the Center for American Progress, Assistant Attorney General Varney observed that one of the important lessons from the Great Depression is that, while vigorous antitrust enforcement is always important, it is particularly important during times of economic distress. She went on to assert that inadequate antitrust enforcement, and a misguided belief that markets can self-police, contributed to the current economic conditions facing the country. Ms. Varney, therefore, intends to make vigorous antitrust enforcement an important component of the government's multi-faceted response to the economic crisis.

### Section 2 Enforcement

An important role for the DOJ in the government's response to current market conditions, according to Ms. Varney, will be renewed enforcement of Section 2 of the Sherman Act. Section 2 polices single-firm conduct, such as exclusionary and predatory practices.

In September 2008, the DOJ issued a Section 2 Report that established significant hurdles to the governments' enforcement of Section 2 claims. The Report was criticized by many, including the Federal Trade Commission, as placing too great an emphasis on not chilling aggressive competition and too little emphasis on protecting consumers.

Ms. Varney not only expressed her disagreement with the Report, but officially withdrew the Report, making clear that it "no longer represents the policy of the Department of Justice with regard to antitrust enforcement under Section 2 . . . and its conclusions should not be used as guidance by courts, antitrust practitioners, and the business community." In particular, Ms. Varney was critical of the Report's endorsement of a "disproportionality test," pursuant to which conduct would only be considered anticompetitive if the harm to

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competition was disproportionate to the benefits to consumers and to the defendants.

Ms. Varney's withdrawal of the DOJ's Section 2 Report brings the current DOJ enforcement policy more in line with that of the FTC, which was more aggressive than DOJ during the past administration and which formally repudiated the Section 2 Report at the time it was issued.

Rather than issue a new report, Ms. Varney explained that antitrust analysis of Section 2 claims should proceed according to the balanced approach set forth in earlier case law. Earlier case law analyzing Section 2, however, is far from clear, which is why DOJ undertook to draft the Section 2 Report in the first place.

Broadly speaking, the earlier case law approach and the current position of DOJ is that there are real limits on the rights of firms with market power to refuse to deal with other parties if that refusal harms competition. In particular, the DOJ will closely scrutinize a dominant firm's conduct to assess whether the procompetitive benefits outweigh the competitive harms. In light of the DOJ's renewed focus on Section 2 enforcement, firms with high market shares should take care when engaging in conduct that will hurt their rivals, particularly if that conduct does not serve other legitimate business goals.

### **Section 1 Enforcement**

Section 1 of the Sherman Act prohibits contracts, combinations and conspiracies that restrain trade. Ms. Varney praised the DOJ's unprecedented success over the past few years in obtaining billions of dollars in criminal fines, in addition to significant jail terms for cartel members who violated Section 1.

She went on to observe that higher levels of concentration, along with the current economic instability, makes the market increasingly vulnerable to unlawful collusion or fraud.

Moreover, the vast amounts of federal stimulus funds being made available to government agencies create a tempting target that could lead to collusive or fraudulent activity. To address this concern, the DOJ is dedicating resources to help the public entities receiving federal stimulus money to identify and deter criminal antitrust activity, such as collusion.

### **Civil Enforcement**

Exploring vertical antitrust theories and focusing on new areas of antitrust enforcement will be another important priority for the DOJ. In particular, high-tech markets that benefit consumers will be of interest. Although Ms. Varney did not go into detail as to what DOJ's plans are with regard to enforcement in these areas, her speech does highlight high-tech and Internet based markets as ones that will be scrutinized more closely.

### **Likely Impact of DOJ's New Policies**

Assistant Attorney General Varney's speech is a warning to businesses that the laissez-faire approach to antitrust enforcement that prevailed for the past eight years is over. In addition to renewed enforcement of single-firm conduct and closer scrutiny of vertical agreements and high-tech markets, businesses should expect the DOJ to take a harder look at mergers and acquisitions, particularly in light of Ms. Varney's assertion that the current economic crisis was caused, in part, by the underenforcement of antitrust laws.

In the current economic climate, there may be a tendency by firms to act aggressively so as to increase market share and defeat their rivals. Given the DOJ's stated policy of increased antitrust enforcement, firms should take care that their conduct falls on the side of aggressive competition, not exclusionary conduct.

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