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Obama Administration Signals More Aggressive Antitrust Enforcement: Banking, Health Care, Energy, Telecommunications & Transportation Will Receive Special Scrutiny

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Candidate Barack Obama promised he would increase antitrust enforcement if elected. In speeches delivered on May 11th and 12th, President Obama's recently confirmed Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, Christine Varney, announced that the Obama administration would indeed reinvigorate enforcement of federal antitrust laws. "It is time for the Antitrust Division to step forward again," Ms. Varney stated, as she announced the "recalibration" of antitrust enforcement. The two speeches, one delivered at the Center for American Progress and the other at the United States Chamber of Commerce, were nearly identical. But the speech given to the Chamber included a section on cooperation with other antitrust enforcement agencies.

Ms. Varney condemned the "passive" antitrust enforcement policy of the past eight years of the Bush administration and expressly rejected the economic theory of the Chicago School, which promotes limited regulation of markets and relies more heavily on self-policing and self-correction by market players. Ms. Varney stated, "We cannot sit on the sidelines any longer - both in terms of enforcing the antitrust laws and contributing to sound competition policy as part of our nation's economic strategy." Ms. Varney identified five particular industries in which the Obama administration would focus renewed antitrust enforcement: banking, health care, energy, telecommunications, and transportation. She also emphasized that vigorous enforcement of the antitrust laws is important in times of economic distress in order to protect consumer welfare.

Perhaps the most striking indication of the Obama administration's new stance on antitrust policy was Ms. Varney's repudiation of a 2008 Antitrust Division policy paper on Section 2 of the Sherman Act and dominant firms. Generally speaking, a firm violates Section 2 when it unlawfully acquires or maintains a monopoly. The 2008 policy paper tried to define exactly what constitutes unlawful acquisition or maintenance of a monopoly, and announced a definition that, if it were adopted by the courts, would greatly increase the burden on those seeking to prosecute or recover damages from an allegedly illegal monopoly. Ms. Varney formally withdrew the Section 2 Report, rejecting it as "an overly lenient approach to enforcement." The focus of an inquiry under Section 2 ought to be, she argued, whether the consumers are harmed by higher prices, reduced product variety and slower innovation, and not whether the alleged monopolist achieved efficiencies. Ms. Varney said: "Reinvigorated Section 2 enforcement will thus require the Division to go 'back to the basics' and evaluate single-firm conduct against these tried and true standards that set forth clear limitations on how monopoly firms are permitted to behave. There can be no better charter for our return to fundamental principles of antitrust enforcement."

This new anti-monopoly policy is a sharp departure from the Section 2 policy of the Bush administration. Ms. Varney made clear the intentions of the Obama Justice Department's Antitrust Division: "Going forward, the Department is committed to aggressively pursuing enforcement of Section 2 of The Sherman Act. . . ." She said that there would be no "free pass" for dominant firms who engage in illegal monopoly behavior. Firms with large market shares or particularly popular products should therefore review marketing practices, especially proposed changes in business conduct, that are intended to exclude, or are likely to have the effect of

excluding, competing firms from the relevant market, or that might otherwise limit consumer choice or increase prices.

Ms. Varney promised to continue the previous administration's vigorous prosecution of criminal violations of Section 1 of the Sherman Act, which prohibits, among other things, cartels and conspiracies to fix prices, rig bids or allocate markets. Ms. Varney made clear that the aggressive prosecution of such criminal cartels will continue. Ms. Varney suggested that the agency might open up additional fronts in criminal prosecution. She noted that federal, state and local agencies that receive appropriations designed to stimulate the economy under the American Recovery and Reinvestment Act may be vulnerable to collusion and other fraudulent activity. To address this substantial risk, Ms. Varney announced the launch of the Antitrust Division Recovery Initiative. Under this program, Division attorneys will provide training to "over 8,000 agents, auditors, grant recipients, and other procurement professionals . . . to make a significant impact on the overall prevention of fraud, waste, and abuse relating to the use of ARRA funds."

Without explicitly criticizing the former administration's enforcement policies and priorities in civil merger and non-merger antitrust enforcement, Ms. Varney signaled that these areas would also see an increase in antitrust enforcement. In recent years, the enforcement policy of the administration and decisions of the courts have led to more lenient treatment of vertical arrangements -- such as agreements between a manufacturer and its retailer or a franchisor and a franchisee. Ms. Varney suggested that her leadership team would explore new theories to analyze such arrangements. Ms. Varney also mentioned her continuing interest in antitrust enforcement in high-tech and internet-based markets. She hoped that the Antitrust Division will once again assume the mantle of leadership of enforcement efforts in these areas. She also said that the Division will seek what she called the "right balance" to ensure that the misuse or illegal extension of intellectual property rights does not thwart competition.

In the speech to the Chamber of Commerce, Ms. Varney devoted several paragraphs to discussing the administration's plans for cooperation with other antitrust agencies. Ms. Varney, a former commissioner of the Federal Trade Commission, said that she intended to find common ground between the FTC and the Antitrust Division especially in the analysis of vertical arrangements, Section 2 enforcement, and the review of mergers and acquisitions. Ms. Varney promised to continue the previous administration's collaboration with antitrust enforcement authorities outside the United States with respect to investigation and prosecution of international cartels, convergence in substantive laws, cooperation with international organizations such as the International Competition Network and the OECD, and support for emerging antitrust regimes around the world.

Although merger enforcement was not a focus of Ms. Varney's speeches, it is likely we will see increased scrutiny of proposed mergers, including an increased likelihood of suits to enjoin pending deals, and quite possibly scrutiny of deals already consummated that the prior administration allowed to proceed without objection.

All companies, but especially those engaged in the banking, health care, energy, telecommunications or transportation industries, need to prepare themselves for the new aggressive posture adopted by federal antitrust officials. Investigations by the Department of Justice's Antitrust Division, as well as by the Federal Trade Commission, are likely to increase significantly. This may be a good time to review existing antitrust compliance programs and practices. Some practices that have been less risky for the last few years may once again become the focus of antitrust enforcement. Good antitrust compliance programs are essential to preparing for this new day in antitrust enforcement. Companies should consider presentations to management and sales force employees that address this newly stated policy on the enforcement of federal antitrust laws.