NEW ANTITRUST CHIEF withdraws DOJ's SECTION 2 REPORT ON UNILATERAL CONDUCT

The newly appointed head of the Antitrust Division of the Department of Justice (DOJ), Assistant Attorney General Christine A. Varney, gave her first major policy speech yesterday. She explained that enforcement under the prior administration had been "overly lenient." The highlight was Varney's formal withdrawal of a report issued by the Antitrust Division under the prior administration barely eight months ago entitled "Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act" (the Section 2 Report). Taking a major step closer to the enforcement views of the Federal Trade Commission (FTC), which had been sharply critical of the Section 2 Report, Varney's point was simple: "We must change course and take a new tack." She said that the report "raised too many hurdles to government antitrust enforcement," and that "withdrawing the report is a shift in philosophy and the clearest way to let everyone know that the Antitrust Division will be aggressively pursuing cases where monopolists try to use their dominance in the marketplace to stifle competition and harm consumers."1

In addressing the current economic crisis, Varney suggested that the oft-repeated mantra "too big to fail" could be viewed as a failure of antitrust enforcement. She described legislation passed during the Great Depression allowing for price and wage fixing as "ill-advised." Varney said that the lesson is that, even in times of economic distress, the DOJ must work to preserve competitive markets through active antitrust enforcement.

Finally, Varney noted that she will continue to promote vigorous criminal enforcement and will pursue a civil enforcement agenda that includes scrutiny of "vertical issues" and a balanced approach to protection of competition where intellectual property is at issue.

Withdrawal of the Section 2 Report

Section 2 of the Sherman Act applies to anticompetitive conduct by a single firm such as predatory pricing, tying, exclusive dealing, refusals to deal, and bundled or loyalty discounts. The courts, academics, and antitrust practitioners have long debated how Section 2 of the Sherman Act should be applied and have struggled to develop standards to guide Section 2 enforcement. In order to address these issues, the FTC and the DOJ held extensive hearings on the topic. In September 2008, the DOJ released the Section 2 Report, which purported to "synthesize" the views expressed at the hearings and also to "reflect[] the Department's enforcement policy[.]"] In a remarkable demonstration of disharmony with its sister antitrust agency, FTC Commissioners Harbour, Leibowitz,6 and Rosch issued a separate statement in which they characterized the Section 2 Report as "a blueprint for radically weakened enforcement of Section 2 of the Sherman Act."7

Varney cautioned that courts, antitrust practitioners, and the business community should no longer rely upon the report for guidance or view it as reflective of DOJ policy. While lauding the efforts of those participating in the hearings and acknowledging that the report presents a comprehensive evaluation of different enforcement strategies, Varney echoed many of the FTC commissioners' concerns. First, Varney described the report as too skeptical of the ability of government enforcers and the courts to distinguish between anticompetitive and lawful conduct—a concern she did not share.8

Second, Varney said that the Section 2 Report

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1 Christine A. Varney, "Vigorous Antitrust Enforcement in This Challenging Era," at 8 (May 11, 2009).
5 Wilson Sonsini Goodrich & Rosati attorneys Susan Creighton, Renata Hesse, Jonathan Jacobson, and Thomas Krattenmaker each participated in the hearings and contributed analyses.
6 Commissioner Jon Leibowitz was confirmed as the new chairman of the FTC on March 2, 2009.
8 To the same effect, see Jacobson, supra note 7, at 3-4 ("there is simply no reason to believe that false positives are any more prevalent than false negatives").
placed too much emphasis on the concern that antitrust enforcement will lead to the “over-deterrence” of procompetitive conduct, particularly as reflected in the report’s “disproportionality” test. As Varney explained, under this test there is no antitrust liability unless the anticompetitive harm substantially outweighs the procompetitive benefits. Varney contended that protecting plausible efficiencies has led to “overly cautious” and “lenient” enforcement while losing sight of the goal of enforcement: consumer welfare.

Finally, Varney proposed no single test or guiding principle to gauge single-firm conduct. As Varney stated in an official press release and Supreme Court precedent in enforcing the antitrust laws.9 Varney pointed cautious” and “lenient” enforcement while losing sight of the goal of enforcement: consumer welfare.

A newspaper monopolist violated Section 2 by refusing to sell advertisements to businesses advertising on a competing radio station. The Court found that the conduct was aimed at “the complete destruction and elimination” of the competing radio station and was “an attempt to end the invasion by radio of the Lorain newspaper’s monopoly.”10 The Court rejected the newspaper’s proposed bright-line rule that a private business has a “right” to “select its customers and refuse to accept advertisements from whomever it pleases.”11 While recognizing this “general right,” the Court concluded that the right is “qualified,” and is “neither absolute nor exempt from regulation.”12 Similarly in Aspen Skiing, the Court rejected the defendant’s argument that it need not deal with its competitors and concluded, positively citing Lorain Journal, that where the defendant had ceased a profitable prior course of dealing with the plaintiff, the “the jury may well have concluded that [the defendant] elected to forgo [] short-run benefits because it was more interested in reducing competition in the Aspen market over the long-run by harming its smaller competitor.”13 Varney’s citation of these cases suggests that the Antitrust Division’s view of particular cases under her leadership will be guided by a more developed view of the facts, and less reliant on safe harbors and bright-line tests, to determine whether the overall effect of the conduct at issue is to harm the competitive process.14

Notably absent from Varney’s list of cases was the Supreme Court’s relatively recent decision in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, in which the Court described the decision in Aspen Skiing as “at or near the outer boundary of section 2 liability.”15 The omission of Trinko suggests that Varney is not only aiming to change DOJ policy, but is also looking to change the way the courts view Section 2 as well. During the question-and-answer session, Varney said that the DOJ will try to influence the Supreme Court and the lower courts through frequent participation as amici. Varney also suggested during the Q&A that one of the harms of the Section 2 Report is that it has been cited often in briefs by litigants in order to influence judges.

Antitrust in the Current Economic Climate

Varney addressed the role of antitrust in the current economic climate by examining what could be learned about antitrust enforcement during the Great Depression. The Great Depression took place amid relatively lax antitrust enforcement dating back to World War I. Instead of responding to the Great Depression with renewed enforcement, Congress created the National Recovery Administration, which created “codes of fair competition” and allowed industries to act like cartels in setting prices and wages and restricting output. Varney noted that while business had to agree to unionization and collective bargaining to participate in these cartels, consumers were harmed and output was reduced. With the beginning of the Roosevelt administration, the number of cases brought by the DOJ increased threefold and led to renewed vigorous antitrust

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10 342 U.S. 143 (1951).  
12 253 F.3d 34 (D.C. Cir. 2001) (en banc).  
13 Assistant Attorney General Varney’s remarks also refer to United States v. Dentsply International, Inc., 399 F.3d 181 (3d Cir. 2005) (finding unlawful exclusive dealing), and Conwood Co. v. United States Tobacco Co., 290 F.3d 788 (6th Cir. 2002) (finding various unlawful conduct by a moist snuff manufacturer) as instructive Section 2 cases.  
14 342 U.S. at 150.  
15 Id. at 155.  
16 Id.  
17 Id. at 608.  
enforcement as part of the New Deal's economic agenda. This experience teaches, said Varney, that there is no substitute for competitive markets, especially during times of economic distress, when the government's role in ensuring market competitiveness becomes even more crucial. In another jab at the prior administration, Varney concluded that antitrust enforcers "can no longer sit on the sidelines" because markets do not necessarily "self-correct." During the Q&A Varney emphasized that the idea that markets are self-correcting over time went too far.

**Criminal and Civil Enforcement**

Varney also addressed a number of issues related to criminal and civil enforcement:

- The DOJ will explore vertical arrangements where enforcement has "gone cold." Vertical issues arise, for instance, where the merging parties are in different positions in the same supply chain.

- Varney also emphasized that the DOJ will be examining high-tech and Internet-based markets in which "radically new economic models" have developed. Economic analysis will play a significant role in developing policy in these markets.

- Regarding intellectual property, Varney said that the DOJ will find the "right balance" to prevent misuse or illegal extension of intellectual property, suggesting a more enforcement-oriented approach to IP issues.

- Finally, the DOJ's aggressive criminal enforcement program will continue unchanged. Consistent with prior DOJ policy speeches, Varney highlighted the large criminal fines and lengthier jail terms meted out in recent criminal cases brought by the Antitrust Division. The new chief also explained that the Antitrust Division Recovery Initiative was recently launched to assist agencies receiving funds under the American Recovery and Reinvestment Act, aimed at preventing and deterring fraud and criminal violations of the antitrust laws.

**Conclusion**

Assistant Attorney General Varney's renunciation of the Section 2 Report, her endorsement of cases such as *Lorain Journal*, *Aspen Skiing*, and *Microsoft*, and her explicit statement of a much more aggressive enforcement policy all signal that the Department of Justice will be actively looking to bring more cases under Section 2 of the Sherman Act. Clients with market power—which in itself offends no antitrust laws—need to be cognizant that, after eight years of Section 2 quiescence, the DOJ has rejoined the FTC and moved closer to the European Commission in monitoring single-firm conduct. In response to a question regarding the increasing number of complainants going to the European Commission instead of the DOJ, Varney cautioned against such "forum shopping" and said that the DOJ will be closely coordinating with the European Commission and that she did not think complainants would get a better result by going to the European Union. As a result, clients that are concerned about abuses of market power that potentially violate Section 2 may now find a more receptive ear at the Department of Justice.

For more information on the withdrawal of the Section 2 Report or other antitrust matters, please contact Charles E. Biggio, Chris Compton, Susan Creighton, Renata B. Hesse, Jonathan M. Jacobson, Chul Pak, Scott A. Sher, Franklin Rubenstein, or any other member of Wilson Sonsini Goodrich & Rosati's antitrust practice.