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New Head of the Antitrust Division Sets the Tone: 'It is Time for the Antitrust Division to Step Forward Again.'

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Summary

Christine Varney, the new Assistant Attorney General for Antitrust, declared today that antitrust enforcers "cannot sit on the sidelines any longer," and pledged to pursue a policy of "more vigorous antitrust enforcement in this challenging era."[1] The key takeaways for business are that under Varney's leadership there will be:

- Greater scrutiny of conduct by companies with market-leading positions, particularly conduct designed to harm competitors.
- Greater scrutiny of IP licensing, distribution and other conduct involving upstream and downstream business partners.
- A willingness to consider new theories of anticompetitive effects, and to become an advocate for stronger antitrust enforcement in the courts, agencies and Congress.

Analysis

Varney's speech– as well as her choice of venue, the Center for American Progress, which bills itself as dedicated to building "upon progressive ideals put forth by such leaders as Teddy Roosevelt" – was plainly intended to mark a bold turn toward more interventionist enforcement policy in several key areas of antitrust: single-firm conduct, mergers and vertical practices, concerted action, and competition advocacy. Harkening back to the era of Thurman Arnold, when the number of cases brought by the Antitrust Division increased three-fold between 1937 and 1939, Ms. Varney announced that the "Obama Administration will do likewise."

Two themes animated her remarks.

First, vigorous antitrust enforcement is all the more vital during times of economic distress. Varney thus put to rest speculation that the current economic conditions might offer some respite from aggressive DOJ antitrust enforcement. Indeed, she opined that "inadequate antitrust enforcement"

appears to have contributed to the current economic conditions, and underscored that antitrust enforcement needs to be on the "front line of the government's response" to the Nation's economic problems.

Second, there has in the past been too much reliance in antitrust on the "idea that markets 'self-police,' and that enforcement authorities should wait for the markets to 'self-correct.'" In her view, it is now clear that, while the "country has been waiting for this 'self-correction,' spurred innovation, and enhanced consumer welfare . . . these developments have not occurred." Her conclusion from this is that antitrust enforcers need to step up their activity, and not "sit on the sidelines any longer." "Passive monitoring of market participants is not an option," Varney said.

Varney outlined some of the implications of her views for specific aspects of the Division's enforcement agenda:

- **Varney Plans More Aggressive Monopolization Enforcement**

Varney intends to "change course and take a new tack" against potential abuses by monopoly firms.

A centerpiece of Varney's remarks was her announcement that, effective immediately, the Division has withdrawn the "Section 2 Report" issued last fall.[2] She wanted it to be clear to all concerned that the report no longer reflects Division policy, and indeed was objectionable because it raised "many hurdles to Government antitrust enforcement."

More fundamentally, Varney reiterated that she ***does not*** share the concerns most often articulated as support for caution in the area of Section 2 enforcement: the difficulties enforcers and courts have in distinguishing between anticompetitive acts and lawful conduct, and the concomitant risk that over-enforcement may chill potentially pro-competitive conduct. She believes enforcers "are able to separate the wheat from the chaff."

In place of the analysis set forth in the Section 2 report, Varney explained that the Division would "go back to basics" and rely on the "tried and true standards" articulated in three previous decisions – *Lorain Journal,*[3] *Aspen Skiing*,[4] and *Microsoft* [5] – each of which was decided in favor of the plaintiff. Given that the Supreme Court has described *Aspen Skiing* as "at or near the outer boundary of §2 liability," Varney's citation to this trilogy suggests that she may be inclined to entertain quite expansive theories of Section 2 liability.

Varney's remarks will surely encourage firms that believe they have been stifled by the predatory or exclusionary tactics of dominant rivals to bring their complaints to the Division. When asked about the practice of some complainants of seeking a more favorable audience from European antitrust enforcers, Varney replied that she did not see any reason to expect a better result from those enforcers than from the Division.

- **Varney Will Focus Greater Attention on IP Licensing and Other Vertical Practices**

Varney outlined a civil enforcement program that would likely give significant attention to vertical theories in assessing mergers and other practices, an area that she suggested had "gone cold" in recent years. She opined that there has in the past been too myopic a focus on efficiencies, which has lost sight of the ultimate goal of protecting consumers. In particular, she intends to take a lead enforcement role in high-tech markets and strike a balance that ensures that competition is not thwarted through the misuse or illegal extension of intellectual property.

In addition, she envisions investigating what she described as radically new economic models of competition brought about by the Internet revolution, including reassessing how concentration should be measured in this context.

- **Expect Plaintiff-Side Competition Advocacy**

Varney indicated that competition advocacy would be a central part of the Division's work, with the Division having a seat at the table when regulatory and legislative policy is being crafted. In addition, Varney expects the Division to be very active in filing briefs in pending antitrust cases in which it is not a party, and she forecasts a different tone for that participation than in previous years.

- **Steady as She Goes in Criminal Enforcement**

Although her speech paid homage to Thurman Arnold's path-breaking anti-cartel criminal prosecutions, there was little news about the Division's criminal enforcement program. So, expect no big changes. Varney did announce, however, a program to focus enforcement attention on potential collusion or other fraud in connection with American Recovery and Reinvestment Act programs.

In her first public statements as AAG, Christine Varney's bold vision of aggressive enforcement has not hewed to Teddy Roosevelt's advice to "speak softly." Whether the Division will follow through with a "big stick" remains to be seen, but it will face obstacles – not the least being the constraints of modern case law – in fulfilling Varney's vision.

Footnotes

[1] Quotations herein are from Ms. Varney's oral remarks as well as the written version of her speech, entitled "Vigorous Antitrust Enforcement in this Challenging Era," available from the Department of Justice Office of Public Affairs or via this link: http://graphics8.nytimes.com/images/2009/05/12/business/VarneySpeech.pdf.

[2] *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, United States Department of Justice (2008).

[3] *Lorain Journal Co. v. United States*,342 U.S. 143 (1951).

[4] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

[5] *United States v. Microsoft*,253 F. 3d 34 (D.C. Cir. 2001).