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## Legal Updates & News

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#### **New Directions in Antitrust Enforcement: Obama Appoints Christine Varney to Head DOJ Antitrust Division**

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During the presidential campaign, now-President Obama vowed to “reinvigorate antitrust enforcement.”<sup>[1]</sup> He sharply criticized the Bush administration as having the “weakest record of antitrust enforcement of any administration in the last half century.”<sup>[2]</sup> In particular, Obama faulted the Bush administration’s record in merger challenges. He has cited statistics showing that between 2001 and 2006, the antitrust agencies challenged mergers at less than half the rate of challenges during the prior four years under the Clinton administration.<sup>[3]</sup> Obama thus promised to “step up review of merger activity and take effective action to stop or restructure those mergers that are likely to harm consumer welfare.”<sup>[4]</sup> Moreover, Obama criticized the Bush Department of Justice (DOJ) for not bringing a single monopolization case in seven years.<sup>[5]</sup>

Last Thursday, President Obama took the first step in fulfilling his vow; he appointed a Clinton-administration antitrust veteran, Christine Varney, to head the DOJ Antitrust Division. From 1994 to 1997, Ms. Varney served as a Commissioner at the Federal Trade Commission (FTC). If her record as an enforcer is any indication, Ms. Varney, if confirmed by the Senate, will likely bring change in both merger and non-merger antitrust enforcement. Specifically, companies may expect the DOJ to take a more aggressive stance in (1) mergers in innovation-focused industries, (2) mergers involving vertical integration, and (3) mergers involving privacy issues. In addition, the DOJ may take a harder look at non-merger cases involving vertical restraints.

#### **Merger Enforcement**

##### ***Mergers in Innovative Industries***

Ms. Varney’s appointment may mean closer scrutiny of mergers in high-tech and other innovation-focused industries. Specifically, her appointment may signal a resurgence of a doctrine developed in the Clinton administration but largely abandoned during the Bush administration – innovation market analysis.

During her tenure at the FTC, Ms. Varney was on the leading edge of the development of this type of merger analysis. In 1995, the FTC and the DOJ issued guidelines that formally recognized the concept of innovation markets – markets consisting of the research and development directed toward particular goods or services.<sup>[6]</sup> The agencies thereby defined a means to evaluate the competitive effects of merging competing research and development efforts, even if the product of the research and development may be years off. The idea is that preserving competing research and development efforts can spur innovation. Prior merger enforcement focused only on existing products or products that were likely to enter the market in a short time frame.

Ms. Varney defended this new development as necessary for the antitrust agencies to “understand all of the dimensions of competition among firms” and to thereby protect innovation, which is vital to “advancing consumer welfare.”<sup>[7]</sup> She also joined in several decisions applying innovation market analysis to require that merging parties make divestitures to protect innovation. In 1994, for instance, the Commission used innovation market analysis in reviewing the acquisition of American Cyanamid by American Home Products, which were two of three companies conducting research to

develop a rotavirus vaccine. The Commission required the parties to license Cyanamid's rotavirus vaccine research to ensure that the merger did not reduce innovation.<sup>[8]</sup> Similarly, Ms. Varney joined the majority in using innovation market analysis to impose compulsory licensing in *Ciba-Geigy/Sandoz*.<sup>[9]</sup> The majority brushed aside objections that the licensing scheme was based on the much-maligned "essential facilities" doctrine and would put the Commission in the role of price regulator.<sup>[10]</sup>

Should Ms. Varney be confirmed to head the DOJ, innovation market analysis may well be used more often. Parties seeking mergers in high-tech and other innovation-focused industries should be prepared to address the implications of this analysis in matters before the DOJ.

### **Vertical Mergers**

Mergers in high-tech industries may also face closer scrutiny if they involve vertical integration. An increasingly aggressive focus on vertical merger issues marked Clinton administration antitrust enforcement, but the Bush administration soon broke with that trend.<sup>[11]</sup>

Ms. Varney's appointment may signal a return to a more aggressive stance on vertical mergers. While at the FTC, Ms. Varney repeatedly defended the Commission's vertical merger enforcement efforts, emphasizing that vertical mergers may create entry barriers, raise rivals' costs, and facilitate collusion.<sup>[12]</sup> Although she recognized that there is "a great deal of theoretical controversy about the effects of vertical mergers," Ms. Varney argued that antitrust enforcers have "the tools" to separate those vertical mergers that are likely to cause anticompetitive effects from those that are not.<sup>[13]</sup>

Ms. Varney's commitment to vertical merger enforcement was manifest in her decisions involving high-tech industry transactions. For example, in the Silicon Graphics case, Ms. Varney joined a 3-2 Commission decision that relied on a vertical foreclosure theory to impose conditions on a vertical integration.<sup>[14]</sup> The majority was concerned that the merger would raise barriers to entry in the entertainment graphics workstation and software markets. It therefore required the merging parties to maintain an open architecture and publish their applications programming interfaces. Similarly, in Cadence Design Systems, Ms. Varney joined the majority in applying vertical merger theory to an acquisition in the market for software for the design of integrated circuits.<sup>[15]</sup> The majority found that Cadence's acquisition of the only firm that developed the most advanced version of a particular software tool to be used with Cadence's dominant layout software could raise entry barriers. The Commission therefore required Cadence to allow other tool developers continued access to interface protocols for its layout software. Ms. Varney also joined the majority in the Commission's challenge to Time Warner's acquisition of Turner and TCI, which highlighted vertical merger analysis.<sup>[16]</sup>

The American Bar Association has urged the incoming administration to provide greater guidance regarding vertical merger analysis.<sup>[17]</sup> Under Ms. Varney's leadership, the DOJ may be happy to do so.

### **Mergers Involving Privacy Issues**

Ms. Varney's expertise in privacy and Internet issues may also mean that the DOJ will consider privacy concerns in future mergers. In reviewing the recent *Google/DoubleClick* merger, the FTC struggled with integrating privacy issues in merger analysis. Two Commissioners thought that privacy concerns should have played a part in the analysis of that merger, but the majority believed that privacy concerns remain a consumer protection, not an antitrust, issue.<sup>[18]</sup> Given her background, Ms. Varney will be well attuned to the debated over the role that privacy issues should play in merger analysis.

### **Non-merger Enforcement**

#### **Vertical Restraints**

Bush-administration antitrust enforcers also broke with their predecessors when it came to challenging vertical restraints. The Clinton-administration brought a number of actions challenging such restraints, while challenges to such restraints have been few and far between in the last eight years. Ms. Varney may change that.

During her tenure at the FTC, Ms. Varney pushed enforcement against vertical restraints. In a speech before the ABA in early 1995, Ms. Varney explained her thoughts on resale price maintenance ("RPM") cases: "[O]ur enforcement agenda today is that resale price maintenance agreements are unlawful *per se* and the Commission will enforce the law in this area."<sup>[19]</sup> This was

a clear change from Reagan-administration antitrust enforcement, which did not bring a single pure vertical restraint challenge.

True to her word, Ms. Varney joined in several important RPM challenges, including cases that expanded the scope of the *per se* rule in RPM cases. In a case against American Cyanamid, Ms. Varney joined the majority in inferring the existence of a *per se* illegal RPM agreement despite the fact that the defendants had never announced resale prices nor sought a commitment from distributors to sell at or above a certain price level.<sup>[20]</sup> In a case against Reebok, Ms. Varney joined the Commission in condemning an RPM policy, enjoining Reebok from using “structured terminations” to effect RPM even though such terminations “falls into the ‘gray’ area of RPM jurisprudence.”<sup>[21]</sup> Ms. Varney also joined in a number of other cases challenging vertical price fixing agreements.<sup>[22]</sup>

The Bush administration, however, did not bring a single challenge to against an RPM policy. Instead, the Bush administration urged the Supreme Court to overturn the *per se* rule against RPM, which it did in *Leegin Creative Products v. PSKS, Inc.*<sup>[23]</sup>

Since that time, there has been much speculation regarding when, under a rule of reason analysis, RPM is unlawful. Given her prior positions in this area, Ms. Varney’s Antitrust Division may be the one to lead the charge in testing the boundaries set in *Leegin* by bringing challenges to vertical price restraints.

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## Footnotes

[1] Statement of Senator Barack Obama for the American Antitrust Institute, *available at* [http://www.antitrustinstitute.org/archives/files/aai- Presidential campaign - Obama 9-07-092720071759.pdf](http://www.antitrustinstitute.org/archives/files/aai-Presidential%20campaign-Obama%209-07-092720071759.pdf).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] U.S. Dep’t of Justice & Fed. Trade Comm’n, *Antitrust Guidelines for the Licensing of Intellectual Property* (1995).

[7] Christine Varney, *Innovation Markets in Merger Review Analysis*, 9 *Antitrust* 16, 16 (1995).

[8] *Am. Home Products*, 59 *Fed. Reg.* 60,807 (Nov. 25, 1994).

[9] Separate Statement of Chairman Robert Pitofsky, and Commissioners Janet D. Steiger, Roscoe B. Starek, III, and Christine Varney in *Ciba-Geigy, Ltd.*, C-3725, *available at* <http://www.ftc.gov/os/1997/04/others.htm>.

[10] *Id.*

[11] See, e.g., Deborah A. Garza, *A Comparative Analysis of the Clinton Antitrust Program and Suggestion Of Changes To Come*, 15 *Antitrust* 64, 67 (2001)

[12] See Christine Varney, *Vertical Merger Enforcement Challenges at the FTC*, Remarks before the PLI 36th Annual Antitrust Institute, July 17, 1995 (“*Vertical Merger Enforcement*”), *available at*

<http://www.ftc.gov/speeches/varney/vara.shtm>; see also Christine Varney, *The Dangers of Health Industry Consolidation and Corporatization and the Effect on Quality, Cost and Access*, Remarks before the Citizens Fund Conference, May 10, 1995, *available at*

<http://www.ftc.gov/speeches/varney/citi.shtm> (“I am concerned about the overall competitive impact of vertical integration by drug companies into the pharmacy benefits management market.”);

Christine Varney, *Efficiency Justifications in Hospital Mergers and Vertical Integration Concerns*, Remarks before the Health Care Antitrust Forum, May 2, 1995, *available at*

<http://www.ftc.gov/speeches/varney/varht.shtm>.

[13] See *Vertical Merger Enforcement*, *supra* note 12.

[14] See Press Release, Fed. Trade Comm’n, *FTC Settlement Would Preserve Competition on Price and Innovation for Entertainment Graphics Software and Hardware* (June 9, 1995), *available at* <http://www.ftc.gov/opa/1995/06/sqi.shtm>.

[15] See Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A. Varney in the Matter of Cadence Design Systems, Inc./Cooper & Chyan Technology, Inc., File No. 971-0033, *available at* <http://www.ftc.gov/os/1997/05/state01.htm>.

[16] See Separate Statement of Chairman Pitofsky and Commissioners Steiger and Varney, In the Matter of Time Warner Inc., File No. 961-0004, *available at* <http://www.ftc.gov/os/1996/09/twother.htm>.

[17] See American Bar Association Section of Antitrust Law, 2008 Transition Report, Recommendation 41.

[18] See Dissenting Statement of Pamela Jones Harbour, In the Matter of Google/DoubleClick, File No. 071-0170, *available at* <http://www.ftc.gov/os/caselist/0710170/071220harbour.pdf>; Concurring

Statement of Commissioner Jon Leibowitz, In the Matter of Google/DoubleClick, File No. 071-0170.

[19] Christine Varney, *Vertical Restraints Enforcement at the FTC*, Remarks before the ALI-ABA Eleventh Annual Advanced Course on “Product Distribution and Marketing,” January 16, 1996 (“*Vertical Restraints*”), available at <http://www.ftc.gov/speeches/varney/varnmg.shtm>.

[20] *American Cynamid Company*, 123 F.T.C. 1257 (1997)

[21] *Vertical Restraints*, *supra* note 19.

[22] See, e.g., In the Matter of New Balance Athletic Shoe, Inc., Dkt. No. C-3683, available at <http://www.ftc.gov/os/1996/09/c3683.do.htm>.

[23] 127 S. Ct. 2705 (2007).