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President Obama Announces Key Antitrust Nomination: What to Expect From the FTC and DOJ in the New Administration

Today President Barack Obama announced his nomination of Christine A. Varney to serve as assistant attorney general in charge of the Antitrust Division of the Department of Justice. Ms. Varney's appointment is subject to Senate confirmation.

Christine A. Varney is a partner at Hogan & Hartson in Washington, DC, where she heads the firm's Internet practice group. Until recently, she served as personnel counsel to President Obama's transition team.

Ms. Varney has significant experience in dealing with technology and privacy issues, as well as antitrust law, in both the private and the public sector. From 1994 to 1997, Ms. Varney served as a commissioner at the Federal Trade Commission, where she led the agency's consumer privacy and Internet policy initiatives. Prior to joining the FTC, Ms. Varney served as assistant to the President and secretary to the Cabinet under President Clinton. In private practice, Ms. Varney has represented high-profile technology and media clients, including eBay, AOL, Fox Interactive Media/MySpace, and DoubleClick. Her publications include numerous articles on Internet privacy, data security, and online advertising.

What Changes Will the New Administration Bring to Antitrust Enforcement?

On the campaign trail, President Obama promised that his administration will "reinvigorate antitrust enforcement."¹ What this means as a practical matter, for businesses, financial institutions, and dealmakers, remains to be seen. But at least a few broad changes in antitrust enforcement policy can be anticipated under the new administration.

As a candidate, President Obama criticized the FTC and DOJ under President Bush for what he characterized as a weak record of antitrust enforcement. He promised that

¹ Statement of Senator Barack Obama for the American Antitrust Institute (September 27, 2007), available at http://www.antitrustinstitute.org/archives/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.

under his administration, the agencies would redouble their enforcement efforts on several fronts.² In particular, the new President has suggested that his administration's antitrust regime will ramp up enforcement efforts in two key areas: merger review and civil nonmerger enforcement.

Merger Review

In a statement to the American Antitrust Institute ("AAI"), as well as in stump speeches and interviews, President Obama emphasized that he intends to "step up merger review activity" at both the FTC and the DOJ. According to the AAI statement, between 2001 and 2006, the FTC and DOJ together challenged, on average, roughly half the number of mergers per year that the agencies challenged during 1996-2000. President Obama suggested he would seek to reverse this trend by directing his administration "to stop or restructure those mergers that are likely to harm consumer welfare." At the same time, the President committed to "quickly clearing those [mergers] that do not" adversely impact consumers.

It is therefore reasonable to expect that the new administration, while by no means opposed to dealmaking, will increase merger enforcement activity to at least some degree as compared to its predecessor.

Certain industries, moreover, may find potential deals receiving particular scrutiny from the DOJ and FTC. These include:

- Healthcare: The Obama administration has promised to make healthcare reform a priority, and that includes more vigorous antitrust enforcement in the healthcare industry. First, the President has stated that health insurance premiums "have skyrocketed" since 2000, at least in part due to significant consolidation among health insurers.³ It is therefore reasonable to anticipate that future healthcare mergers will receive increased scrutiny. Second, with respect to the pharmaceutical industry, the President has committed his administration to promoting competition between generic and brand-name drugs and curbing "anticompetitive agreements that artificially retard the entry of generic" drugs. In this regard, so-called "reverse settlements," involving payments by branded drug manufacturers to generic manufacturers to settle potential patent claims, may become a more direct enforcement target for both the FTC and DOJ. Finally, President Obama has said that he intends to sign legislation that would repeal the antitrust exemption for medical malpractice insurance, though only "for the most egregious cases of price fixing, bid rigging, and market allocation."

² See AAI Statement, *supra*; Jeff Mason, "Obama eyes media with promise of antitrust push," Reuters UK (May 18, 2008), available at <http://uk.reuters.com/article/oilRpt/idUKN1849107920080518>.

³ See AAI Statement, *supra*.

- Media: Another priority for the antitrust agencies under the new administration will likely be media consolidation. Without singling out for criticism any particular mergers approved under his predecessor, President Obama has said that he “feel[s] that media consolidation during the Bush administration has had the effect of eliminating a lot of the diversity of information sources.”⁴ The new President has signaled that he “strongly favor[s] diversity of ownership of [media] outlets,” and that he believes the FTC and DOJ “should closely scrutinize all mergers for their implications for competition and consumer choice.” In addition, President Obama has suggested that the Federal Communications Commission “should more seriously evaluate the impact of proposed mergers on the ability of divergent communities to participate in the national media environment.”
- Energy: While less specific than his comments regarding the healthcare and media industries, remarks by President Obama and his advisers during the campaign suggest that preserving competition in the energy sector will be another priority for the new administration. The President has expressed some skepticism regarding the consolidation among energy companies that occurred during the Bush administration.⁵

Civil Nonmerger Enforcement

In addition to increased merger enforcement activity, the new administration is widely expected to step up enforcement in the civil nonmerger area. Unilateral conduct, especially monopolization, will almost certainly become a higher enforcement priority for the Antitrust Division under President Obama than it was under President Bush: in his AAI statement, the President observed that during the Bush administration, the DOJ “ha[d] not brought a single monopolization case.”

In this regard, the Obama administration’s civil nonmerger enforcement policies will likely hew more closely to the views recently expressed by FTC Commissioners Leibowitz, Harbour, and Rosch, than to the Justice Department’s 2008 Report on Single-Firm Conduct – which the Commissioners criticized as “a blueprint for radically weakened enforcement of Section 2 of the Sherman Act.”⁶ The FTC, moreover, will likely augment its consumer protection activities, as compared to the past several years.

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⁴ John Eggerton, “Barack Obama’s Media Agenda: An Exclusive Interview,” *Broadcasting & Cable* (June 15, 2008), available at <http://www.broadcastingcable.com/article/CA6570325.html>.

⁵ See Mason, *supra*.

⁶ See Statement by Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice (Sept. 8, 2008), available at <http://www.ftc.gov/os/2008/09/080908section2stmt.pdf>.

While the new administration may bring about some significant changes in the enforcement priorities of the FTC and DOJ along the lines discussed above, continuity can be expected in other aspects of the agencies' agendas. Investigation and prosecution of international cartels seems likely to remain a focus for the Antitrust Division under President Obama, though criminal enforcement efforts may receive somewhat less emphasis than in the prior administration. Likewise, President Obama has expressed support for competition advocacy and cooperation with foreign governments' antitrust regimes – both of which served as priorities for the antitrust agencies under President Bush.

Finally, it is unclear what effect the current crisis in the world's financial markets will have on the Obama administration's antitrust enforcement agenda. For both political and economic reasons, the financial crisis may put pressure on the agencies to approve deals that might otherwise receive greater scrutiny – at least in the near term.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum may be addressed to any of the following:

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