

March 9, 2009

Leibowitz Named FTC Chairman

Last week President Barack Obama appointed Jon Leibowitz to serve as Chairman of the Federal Trade Commission. Mr. Leibowitz's appointment fills the second of the nation's top two antitrust enforcement posts, following the President's nomination on January 22, 2009 of Christine Varney to serve as Assistant Attorney General for Antitrust at the Department of Justice. Because Mr. Leibowitz was already a Commissioner of the FTC, his elevation to Chairman did not require Senate confirmation.

Mr. Leibowitz has been a Commissioner of the FTC since 2004. He previously served as Chief Counsel and Staff Director for the U.S. Senate Antitrust Subcommittee, and occupied various other Senate roles from 1986 to 2000. From 2000 to 2004, Mr. Leibowitz worked as Vice President for Congressional Affairs for the Motion Picture Association of America.

Last year, Mr. Leibowitz joined his fellow Commissioners Pamela Jones Harbour and J. Thomas Rosch in publicly criticizing the DOJ's Report on Single-Firm Conduct under Section Two of the Sherman Act.¹ The Commissioners argued that the DOJ's Report downplayed the risks of under-enforcement of Section Two and adopted legal standards "that would make it nearly impossible to prosecute a case" for monopolization or other single-firm conduct under the antitrust laws. With respect to specific practices, including predatory pricing, loyalty discounts, bundled discounts, tying, and refusals to deal, the Commissioners maintained that the DOJ's Report set standards for antitrust plaintiffs that were uniformly more stringent than those imposed by the courts.

During his tenure at the FTC, Mr. Leibowitz has advocated for aggressive government action to promote competition between generic and brand-name pharmaceutical manufacturers. He has been an especially outspoken critic of federal court decisions upholding settlements that involve payments by the holders of branded drug patents to potential generic competitors – so-called "reverse settlements" – and has called for legislation to ban such agreements.² As a candidate, President Obama pledged to focus antitrust enforcement efforts on promoting competition between the makers of branded and generic drugs, promising that his administration would "ensure that the law effectively prevents anticompetitive agreements that artificially retard the

¹ 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>.

² See Jon Leibowitz, "The Pill Not To Be Taken With Competition: How Collusion Is Keeping Generic Drugs Off the Shelves," The Washington Post (Feb. 28, 2008), available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/24/AR2008022401669.html>.

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entry of generic pharmaceuticals onto the market, while preserving the incentives to innovate that drive firms to invent life-saving medications.”³

Given the emphasis that both the President and Mr. Leibowitz have placed on these issues in the past, it is reasonable to anticipate that actions aimed at preserving competition in the pharmaceutical industry – along with increased consumer protection efforts and greater scrutiny for mergers in a variety of industries – will serve as a priority for the FTC under Chairman Leibowitz’s direction.

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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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³ Statement of Senator Barack Obama for the American Antitrust Institute (Sept. 27, 2007), available at http://www.antitrustinstitute.org/archives/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.