

**Antitrust in the Obama Administration:
Varney and Leibowitz to Lead Antitrust Enforcement Agencies**

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President Obama has been critical of the previous administration's antitrust enforcement efforts and has made vigorous antitrust enforcement one of his policy priorities. The antitrust team President Obama has selected to lead this effort is now in place. Christine Varney, who served as a Commissioner of the Federal Trade Commission (FTC) during the Clinton administration, will lead the Antitrust Division of the Department of Justice (DOJ). Jonathan Leibowitz will serve as Chairman of the FTC. The Varney Antitrust Division and Leibowitz FTC are expected to spearhead a more aggressive antitrust enforcement effort.

What to Expect from AAG Varney

Companies can expect the Antitrust Division of the DOJ to take a more aggressive stance with regard to (1) mergers in innovation-intensive industries, (2) mergers involving vertical integration, and (3) mergers involving privacy issues. The Antitrust Division is also likely to be more aggressive in challenging vertical restraints and investigating single-firm conduct.

While serving as a Commissioner at the FTC during the Clinton administration, Ms. Varney was a proponent of "innovation market" analysis, which encourages a more aggressive review of mergers in innovation-intensive industries. Innovation market analysis focuses on the effects of mergers, acquisitions, and other activities on competition to develop new products and services via investments in research and development. This history, combined with promises of more aggressive merger enforcement, indicates that companies can expect a Varney-led Antitrust Division to focus increased attention on competitive effects on innovation activity.

During her tenure as a Commissioner, Varney also advocated a more aggressive approach to reviewing vertical mergers. She has expressed concern in the past about the potential of vertical integration to create entry barriers, raise rivals' costs, and facilitate collusion. Companies can expect increased scrutiny over the vertical aspects of mergers reviewed by the Antitrust Division.

AAG Varney is also an advocate of greater enforcement against vertical restraints, including resale price maintenance (RPM) and exclusive dealing. During her tenure as a Commissioner, Varney joined in several resale price maintenance challenges, and she expressed concern at her confirmation hearing about the competitive effects of resale price maintenance agreements. The Antitrust Division in the previous administration favored a more lenient treatment of resale price maintenance agreements, urging the Supreme Court to overturn the *per se* rule against resale price maintenance in *Leegin Creative Products v. PSKS Inc.*

At her confirmation hearing, Ms. Varney also promised to re-evaluate the Antitrust Division's position on single-firm conduct. The "Section 2 Report" published by the Antitrust Division last year has been criticized by several FTC Commissioners, among others, for advocating a limited role for enforcement activities directed toward single-firm conduct. Ms. Varney is expected to bring the Antitrust Division's position on the subject into line with the FTC.

Antitrust Enforcement in Chairman Leibowitz's FTC

Mr. Leibowitz's tenure as FTC Commissioner provides some insight into the issues he is likely to focus on as Chairman. As a Commissioner, Mr. Leibowitz advocated more aggressive antitrust enforcement by the FTC and favored steeper civil penalties and tougher remedies to preserve competition. An example of his aggressive stance on enforcement is his application of the broad language of Section 5 of the FTC Act—which "prohibits unfair or deceptive practices"—in the *N-Data* matter, which involved licensing activities in connection with a standard-setting organization. The Commission agreed that the conduct of N-Data would not violate the Sherman Act. However, a majority of the Commission, including Commissioner Leibowitz, nonetheless concluded that the conduct violated the FTC Act. In subsequent public comments, Chairman Leibowitz advocated an expanded, though still limited, role for application of the FTC Act to prohibit conduct on competition grounds in cases that would not violate established standards for liability under the primary antitrust statute, the Sherman Act.

The FTC's 2009 Annual Report issued by Chairman Leibowitz highlighted the increasing need to protect competition during deteriorating economic conditions. Chairman Leibowitz is, however, wary of introducing "too big to fail" considerations into antitrust analysis of mergers and acquisitions. The FTC will continue to scrutinize the healthcare industry, and can be expected to focus substantial attention on competitive conditions in that industry. Among other things, the Chairman Leibowitz remains firmly committed to the FTC's position that so-called "reverse payment" patent settlements among pharmaceutical companies should be illegal. He has promised to look for opportunities to bring that issue to the Supreme Court and supports legislation to outlaw such settlements. Like AAG Varney, moreover, Commissioner Leibowitz and the FTC are expected to focus increased attention on the competitive impact of mergers, acquisitions, and other conduct on innovation.

Harmonization Between the FTC and DOJ

It is expected that the DOJ and FTC will be more in step with one another in the Obama administration than they were in the Bush administration. The last few years saw the FTC and DOJ butt heads on several important antitrust questions, differing on the antitrust treatment of reverse payment patent settlements, standard-setting activities, and standards governing unilateral conduct. Under AAG Varney's leadership, however, the DOJ's positions are much more likely to be in step with the FTC's. For companies, this unified approach means investigation outcomes will be less dependent on which agency reviews transactions or particular conduct.

In addition to greater U.S. agency collaboration, businesses will see continued cooperation between worldwide antitrust authorities. The DOJ has articulated a willingness to discuss differences and engage with emerging antitrust regimes so that antitrust enforcement is clear and consistent across borders. As the world grows ever smaller, interaction among antitrust enforcement regimes worldwide is ever more important.

What Should Companies Be Doing Now?

In anticipation of increased antitrust scrutiny, companies should consider taking the following action:

- Implement and update antitrust compliance programs. All employees should recognize anticompetitive conduct and be aware of the aggressive scrutiny of the DOJ and FTC.
- Become active in the FTC's and DOJ's discussions of proposed transactions of competitors and suppliers. If a proposed merger can potentially hurt your company, both agencies will likely be receptive to commentary regarding the market effects of the proposed merger.
- Examine pricing, marketing, and distribution policies with a critical view toward vertical restraints. Any bundling arrangement of products or resale price maintenance should be scrutinized as a precautionary measure.

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