

Department of Justice Antitrust Policy Reversal: Varney Formally Withdraws Monopolization Report

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Christine Varney, the new head of the Antitrust Division at the Department of Justice (DOJ), made clear at her confirmation hearing that the Antitrust Division is going to be more aggressive under her leadership, and cited monopolization as an area where she would break with Bush administration policies. True to her word, less than a month after her confirmation, Varney has formally withdrawn the DOJ's report on monopolization.

The Antitrust Division issued the report to analyze enforcement policies under Section 2 of the Sherman Act, which addresses monopolization, in 2008. The report set out guidelines that the Division hoped would articulate "clear standards" so that companies would know when they could expect an enforcement action. In a rare split with the Antitrust Division, three of the four Federal Trade Commission (FTC) Commissioners denounced the guidelines, calling them a "blueprint for radically weakened enforcement" of Section 2. With the formal withdrawal of the report by Varney, the FTC and DOJ are much closer to one another in their approaches to antitrust enforcement. Both are now likely to be substantially more aggressive than was the Bush administration.

What to Expect from the Withdrawal of the Section 2 Report

The Section 2 report counseled great caution in enforcing Section 2 and set out safe harbors for certain conduct. The new policy does away with the safe harbors. It also does away with the "disproportionality test" which barred all enforcement actions unless the anticompetitive harm substantially outweighed any procompetitive benefits. Varney stated that in the previous administration, the excessive concern regarding the risks of over-deterrence had resulted in an overly lenient approach to enforcement, allowing all but the most bold and predatory conduct to go unredressed.

Old Cases Should Guide Courts, Antitrust Practitioners, and Companies

Varney did not articulate a specific test to govern all Section 2 matters, but she did suggest several Section 2 cases that would be the core of her philosophy—*Lorain Journal v. United States*,¹ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,² *United States v. Dentsply International, Inc.*,³ *United*

¹ 342 U.S. 143 (1951).

States v. Microsoft,⁴ and *Conwood Co. v. United States Tobacco Co.*⁵

In all five cases, the plaintiffs successfully showed that the defendants had unlawfully exercised monopoly power to limit the competition that they faced, such as by refusing to deal with customers that also deal with budding competitors, or by denying competitors access to essential inputs.

Other Antitrust Initiatives

In addition to addressing monopolization, Varney discussed the Obama administration's focus on revamping the regulatory framework for a number of important industries, pledging that the Antitrust Division would demonstrate the need for vigorous antitrust enforcement in those areas and that the Antitrust Division would advocate competition-based solutions. She specifically singled out the banking, healthcare, telecommunications, energy, and transportation industries.

Finally, Varney described a new Antitrust Division initiative to work with agencies that are doling out money from the 2009 stimulus package to ensure that the recipients of funds are not engaged in criminal antitrust activity, such as bid rigging.

What Should Companies Be Doing Now?

Varney's arrival at the Antitrust Division marks a major shift in enforcement philosophy. Companies should expect that, under Varney, "the Antitrust Division will be aggressively pursuing cases where monopolists try to use their dominance in the marketplace to stifle competition and harm consumers." A company with large market share needs to reconsider practices that might limit a customer's ability or incentive to purchase from (or sell to) its competitors—and to keep in mind that competitors affected by such practices could find a sympathetic ear in the Antitrust Division.

Although Varney mentioned specific industries that the Antitrust Division is likely to target, there is no reason to expect its efforts to be limited to those highly visible parts of the economy.

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² 472 U.S. 585 (1985). Morgan Lewis Senior Counsel John H. Shenefield wrote the winning brief in this case.

³ 399 F.3d 181 (3d Cir. 2005).

⁴ 253 F.3d 34 (D.C. Cir. 2001) (en banc)

⁵ 290 F.3d 768 (6th Cir. 2002).

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