Christine Varney's First Speech as Assistant Attorney General: Justice Department Disavows Section 2 Report

2009-05-11

Christine Varney today delivered her first speech as the new Assistant Attorney General in charge of the Department of Justice's Antitrust Division at an event sponsored by the Center for American Progress. The speech, entitled "Vigorous Antitrust Enforcement in this Challenging Era," confirms that the new administration intends to take a sharp turn away from the generally non-interventionist antitrust policy of the Bush administration.[1] Her speech focused most heavily on the Department's approach to enforcing Section 2 of the Sherman Act, which prohibits monopolization or attempts to monopolize.

Withdrawal of Section 2 Report

Most significantly, Varney expressly withdrew the Department's report on *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* (the "Section 2 Report"), which the Department issued in September 2008. The Section 2 Report spelled out the agency's enforcement intentions regarding single-firm conduct and provided significant new policy guidance concerning specific business practices that have been subject to government challenges in the past. (During the Bush administration the Justice Department did not commence a single Section 2 case.) Varney today announced that the Justice Department was withdrawing the Section 2 Report effective immediately and that the Report "no longer represents the policy of the Department of Justice with regard to antitrust enforcement under Section 2 of the Sherman Act. The Report and its conclusions should not be used as guidance by the courts, antitrust practitioners, and the business community." Varney said the Report "raise[d] many hurdles to Government antitrust enforcement," and that there were several related specific problems with the Report's analysis and conclusions:

- The Report was overly skeptical about the "ability of antitrust enforcers—as well as antitrust courts—to distinguish between anticompetitive acts and lawful conduct," and overemphasized "the related concern that the failure to make proper distinctions may lead to 'over-deterrence' with regard to potentially precompetitive conduct."
- The Report placed excessive emphasis on "a dominant firm's ability to act efficiently" and "understate[d] the importance of redressing exclusionary and predatory acts that result in harm to competition, distort markets, and increase barriers to entry."

- In setting forth a general test that conduct should be considered anticompetitive only if anticompetitive harm "substantially outweigh[ed] procompetitive benefits," the Report "reflect[ed] an excessive concern with the risks of over-deterrence and a resulting preference for an overly lenient approach to enforcement."

Notably, Varney's concerns are very similar to those expressed by three FTC Commissioners in a statement rejecting the Report's conclusions in very strongly worded language.

Although Varney said the Department was "not proposing any one specific test to govern all Section 2 matters at this time," she said the Antitrust Division will "go 'back to the basics' and evaluate single-firm conduct against...tried and true standards that set forth clear limitations on how monopoly firms are permitted to behave." She discussed most prominently standards established in three leading Section 2 cases, *Lorain Journal v. United States*,[2] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[3] and *United States v. Microsoft*.[4] Perhaps most significantly, she said that, following the D.C. Circuit's opinion in Microsoft, "we will need to look closely at both the perceived procompetitive and anticompetitive aspects of a dominant firm's conduct, weigh those factors, and determine whether on balance the net effect of this conduct harms competition and consumers." This further confirms that the Justice Department will likely move away from the Bush administration's advocacy of bright-line rules and safe harbors in Section 2 enforcement towards advocating more open-ended analysis of particular conduct in particular circumstances.

Other Notable Points from Varney's Speech

In addition to withdrawing the Section 2 Report, Varney reinforced that the Obama administration intends to pursue a much more aggressive antitrust enforcement agenda than did the Bush administration.

In particular, she suggested that far from viewing current economic conditions as a reason to hold back on antitrust enforcement, the Justice Department believes that they make strong antitrust enforcement especially important. She observed the government made a significant mistake in relaxing antitrust enforcement at the beginning of the Great Depression, and that antitrust regulators should not make the same mistake again. She also cited the current economic difficulties in criticizing the non-interventionist view "that markets 'self-police,' and that enforcement authorities should wait for the markets to 'self-correct,'" and observed that "it is clear to anyone who picks up the newspaper or watches the evening news that the country has been waiting for this 'self-correction,' spurred innovation, and enhanced consumer welfare."

Varney briefly touched on other areas in which the Justice Department will seek to take an aggressive approach.

- **Criminal Enforcement**. Varney praised the Antitrust Division's "unprecedented success in cracking large domestic and international cartels" in recent years, "resulting in increasingly higher criminal fines and longer jail sentences for offenders." She also announced that the Antitrust Division will be working closely with agencies receiving funds under the American Recovery and Reinvestment Act—which may be vulnerable to collusion and other

fraudulent activity—to help detect and deter criminal antitrust offenses, and that if "preventive efforts fail, [the Antitrust Division] will be there to investigate and swiftly prosecute individuals and entities responsible for criminal antitrust violations."

- **Civil Merger and Non-Merger Enforcement**. In the areas of civil merger and non-merger investigations, Varney said the Antitrust Division will be particularly interested in opportunities to "explore vertical theories and other new areas of civil enforcement, such as those arising in high-tech and internet markets." Of particular note, she stressed efforts to "find the right balance to ensure that when intellectual property is at issue, competition is not thwarted through its misuse or illegal extension," reconfirming that the intersection of IP and antitrust is another area in which Obama administration enforcement is likely to diverge sharply from the Bush administration's largely more laissez faire approach.

Implications

Varney's speech is largely consistent with her testimony at her Senate confirmation hearings, where she made clear that businesses can expect more aggressive antitrust enforcement.

But her elaborations on the Report's shortcomings and suggestions about the Antitrust Division's likely approach to Section 2 issues going forward provide some more concrete guidance. The withdrawal of the Report and Varney's comments suggest that the Antitrust Division will likely move much closer to the FTC's enforcement approach, which began to diverge significantly from that of the Antitrust Division during the last years of the Bush administration.

It is worth noting, however, that, the Antitrust Division's views are not binding on the courts, which have taken a relatively restricted view of antitrust enforcement over the last two decades, especially in the Section 2 area. Although the Division's views may influence the courts, the jurisprudence that has developed will likely place limits on the ability of the Division—and the FTC—to pursue an enforcement agenda as aggressive as the agencies' new leadership might like.

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As the Antitrust Division and FTC pursue their antitrust enforcement agendas, WilmerHale is well situated to counsel clients dealing with agency investigations (or seeking to avoid them). Doug Melamed served in the Antitrust Division from October 1996 to January 2001, first as Principal Deputy Assistant Attorney General and then as Acting AAG; during this time, he took a leading role in the prosecution of the Division's action against Microsoft. In addition, Bill Kolasky was a spokesman for the Obama presidential campaign regarding antitrust policy and has litigated many Section 2 cases. Other members of WilmerHale's Antitrust and Competition Practice also have very significant experience handling both agency Section 2 investigations and private Section 2 litigation as well as all other types of government and private antitrust matters.

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[1] The text of her speech can be found here.

[2] 342 U.S. 143 (1951).

[3] 472 U.S. 585 (1985).

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

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