

Meet the New US Antitrust Leadership

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The two US antitrust agencies, the Antitrust Division of the US Department of Justice and the Federal Trade Commission (FTC), now have in place most of their new senior leaders following the inauguration of President Obama. Below is some brief information on these new leaders.

Antitrust Division

The Antitrust Division is headed by **Assistant Attorney General Christine Varney**. From 1994 to 1997, Varney served as a Commissioner at the FTC, where she focused in particular on a wide variety of technology-related issues including innovation markets, vertical theory, and privacy issues in the information age. Before becoming an FTC Commissioner, Varney was Secretary to the Cabinet in the Clinton Administration. Since she left the FTC, she has been a partner at Hogan & Hartson in Washington working on antitrust, consumer protection and privacy issues.

The Antitrust Division has four deputy assistant attorneys general, each with a specific portfolio. One of those positions, the Deputy Assistant Attorney General for Criminal Enforcement, has for more than a decade been held by a career Antitrust Division attorney. The current criminal deputy is **Scott Hammond**. Mr. Hammond joined the Division in 1988 and became deputy assistant attorney general in 2005. He also served as the Director of Criminal Enforcement, Senior Counsel for Criminal Enforcement to the Assistant Attorney General, and a trial attorney in one of the Division's litigation sections.

Molly S. Boast has been appointed Deputy Assistant Attorney General for Civil Matters. From July 1999 to June 2001, Ms. Boast was Senior Deputy Director and then Director of the FTC's Bureau of Competition. During that time, she had management responsibility for merger and civil nonmerger Commission litigation and investigations. Since 2001, she has been a partner at the New York office Debevoise & Plimpton LLP where she has led the antitrust practice group. From 1987 to 1999, she worked at the New York law firm of LeBoeuf, Lamb, Greene & MacRae where she was head of the litigation department and a member of the firms' Steering Committee.

William Cavanaugh Jr. has also been appointed Deputy Assistant Attorney General for Civil Matters.

Since 1985, Mr. Cavanaugh has been with the New York law firm of Patterson, Belknap Webb & Tyler LLP where he has served as the firm's Co-Chair, Chair of the Litigation Department and a Litigation Partner. He is a Fellow of the American College of Trial Lawyers.

Carl Shapiro has been appointed Deputy Assistant Attorney General for Economic Analysis. Dr. Shapiro is taking a leave of absence from the University of California at Berkeley, where he is Transamerica Professor of Business Strategy in the Haas School of Business and Professor of Economics. He has been at the Haas School of Business since 1990. Dr. Shapiro was previously the Antitrust Division's Economics Deputy from August 1995 to June 1996, where he provided economic analysis on a variety of antitrust cases, including Microsoft, NASDAQ, and several mergers. He previously taught at the Woodrow Wilson School and the Department of Economics at Princeton University for 10 years.

Philip J. Weiser has been appointed Deputy Assistant Attorney General for International, Policy and Appellate Matters. Mr. Weiser, who is not expected to arrive at the Department until July, is currently a Professor and Associate Dean for Research at the University of Colorado, where he has taught since January 1999, in the School of Law and in the Interdisciplinary Telecommunications Program. From September 1996 to August 1998, he was a Senior Counsel to Joel Klein, Assistant Attorney General of the Department's Antitrust Division, where he advised Klein on antitrust policy in the telecommunications industry and participated in civil investigations.

Gene Kimmelman has been appointed Chief Counsel for Competition Policy and Intergovernmental Relations. Mr. Kimmelman was most recently Vice President for Federal and International Affairs at Consumers Union (CU). From 1993 to 1995, Kimmelman served as Chief Counsel and Staff Director for the Antitrust Subcommittee of the U.S. Senate Judiciary Committee. From 1984 to 1993, he was Legislative Director for the Consumer Federation of America (CFA) where he directed their legislative and regulatory programs. In 1981, he began his career as a staff attorney for Public Citizen's Congress Watch.

Federal Trade Commission

Jon Leibowitz has been designated to serve as the new Chairman of the FTC. Commissioner Leibowitz was previously sworn in as a Commissioner in September 3, 2004. Before joining the FTC, he had extensive experience in Congress where he was the Democratic chief counsel and staff director for the U.S. Senate Antitrust Subcommittee from 1997 to 2000, chief counsel and staff director for the Senate Subcommittee on Terrorism and Technology from 1995 to 1996 and the Senate Subcommittee on Juvenile Justice from 1991 to 1994. In addition, he served as chief counsel to Senator Herb Kohl from 1989 to 2000 and worked for Senator Paul Simon from 1986 to 1987. Immediately before joining the FTC, he served as vice president for congressional affairs for the Motion Picture Association of America.

Richard A. Feinstein, who was appointed Director of the Bureau of Competition, is rejoining the agency from Boies, Schiller & Flexner LLP, where he focused on antitrust litigation and counseling.

He was formerly an Assistant Director in the Bureau of Competition's Health Care Services and Products Division, focusing on antitrust enforcement, including anticompetitive practices and mergers involving health care providers and payers, and anticompetitive conduct in the pharmaceutical industry. Mr. Feinstein worked previously at McKenna & Cuneo, LLP and as a trial attorney and supervisor in the Antitrust Division of the U.S. Department of Justice.

David C. Vladeck, who will serve as Director of the Bureau of Consumer Protection, has been a Professor of Law at Georgetown University Law Center, teaching federal courts, government processes, civil procedure, and First Amendment litigation. He co-directed the Center's Institute for Public Representation, a clinical law program for civil rights, civil liberties, First Amendment, open government, and regulatory litigation. Mr. Vladeck previously spent almost 30 years with Public Citizen Litigation Group, including 10 years as Director. He has argued a number of First Amendment and civil rights cases before the U.S. Supreme Court, and more than 60 cases before the federal courts of appeal and state courts of last resort.

Joseph Farrell, who was named Director of the Bureau of Economics, has been a Professor of Economics at the University of California, Berkeley, where he has been Chair of the Competition Policy Center and an Affiliated Professor in the Haas School of Business. He also has served as Deputy Assistant Attorney General and Chief Economist for the Antitrust Division of the U.S. Department of Justice, and as Chief Economist for the Federal Communications Commission. His research has centered on competition policy, compatibility standards, and innovation. Dr. Farrell is a Fellow of the Econometric Society.

Susan S. DeSanti, who will be Director of Policy Planning, joins the Commission from Sonnenschein Nath & Rosenthal, where her practice has focused on antitrust counseling and litigation in a variety of industries. She previously spent 15 years at the Commission. During that time, she served in a variety of positions, including Director of Policy Planning, Deputy General Counsel for Policy Studies, senior attorney advisor to Chairman Robert Pitofsky, and attorney advisor to Commissioner Dennis Yao. In addition to several years in private practice before she joined the Commission, DeSanti recently served as Senior Counsel to the Antitrust Modernization Commission.

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It is not possible, based solely on their collective backgrounds, to predict accurately how these leadership teams will address particular cases or even particular issues of policy or theory. A few observations seem warranted, however. First, Christine Varney and Jon Leibowitz have both spoken of their mutual close friendship, and Drs. Shapiro and Farrell have worked together on research and co-authored papers on antitrust and other issues. Further, both Richard Feinstein and Molly Boast are veterans of both agencies. These relationships and experience suggest the agencies may be able to reduce the tension between them, which has become significant in the last few years. Ms. Varney has indicated in her testimony and in other comments that she expects the Department of Justice to be closer to the FTC on some key policy differences that have divided the agencies,

particularly on the standards for and scope of enforcement under Section 2 of the Sherman Act and on the standards for evaluating so-called reverse payment settlements entered into by pharmaceutical manufacturers. These relationships may also enable the agencies to undertake and complete joint projects. These might include, for example, revising the Section 2 report issued that the Department of Justice last fall that the Federal Trade Commission refused to join and three Commissioners strongly rebuked, and re-visiting of the 1992 Horizontal Merger Guidelines.

Second, the appointments at the Department of Justice reflect a strong emphasis on litigation experience. Both Mr. Cavanaugh and Ms. Boast have extensive antitrust litigation experience. Although both agencies have had trial lawyers in senior positions at various times, these appointments are notable, particularly since both agencies have suffered highly public losses at trial earlier in the decade. The FTC addressed this issue last year with the appointment of J. Robert Robertson, formerly of Kirkland & Ellis, as Chief Trial Counsel in the Bureau of Competition; in addition, Commissioner Thomas Rosch is a well-recognized career antitrust litigator.

Third, several of these appointees have a background in consumer protection and consumer litigation. It is reasonable to expect that, accordingly, consumer-focused industries such as health care and retailing may get increased attention. How else these individuals will impact policy remains to be seen and is worth watching closely.

Of course, it will be the statements of the agencies and, more importantly, their enforcement activity and records that will ultimately delineate the future path of government antitrust enforcement. These appointees have broad and deep experience, and their experience and policy preferences will undoubtedly influence their decisionmaking. Although we do not foresee radical changes in antitrust enforcement, it is reasonable to expect that in particular matters these decisionmakers may come to different conclusions than their predecessors would have.

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WilmerHale's antitrust and competition law team is very familiar with antitrust agencies in the United States as well as in other jurisdictions. Our lawyers appear regularly before the Antitrust Division, the FTC, the European Commission, the German Federal Cartel Office and the United Kingdom's Office of Fair Trading. Our Beijing office is well acquainted with the Ministry of Commerce officials charged with enforcement of China's new anti-monopoly law. In the United States, Doug Melamed served as Principal Deputy Assistant Attorney General and then Acting Assistant Attorney General in the Antitrust Division from 1996 to 2000 and Bill Kolasky served as Deputy Assistant Attorney General from 2001 to 2002. In addition, Becky Burr served as an Attorney Advisor to Christine Varney when she was an FTC Commissioner, and David Medine served as Associate Director of the Credit Practices Division at the FTC. Two other partners, Jim Lowe and Jim Burling, have served as staff lawyers at the Department of Justice and FTC respectively, and one of our associates, Avery Gardiner, served as Counsel to Assistant Attorney General Tom Barnett. In Europe, Claus-Dieter Ehlermann served as Director General of both the Competition Directorate and the Legal Service, and Jacques Bourgeois served as principal legal advisor of the Commission, advising on

competition matters among other things. In London, counsels Karman Gordon and Christopher Hutton both worked for the Office of Fair Trading before joining the firm. In addition, more than twenty former WilmerHale lawyers have gone on to career positions at the Antitrust Division, FTC, European Commission, German Federal Cartel Office or OECD.

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