

Antitrust and Unfair Competition Alert

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Top U.S. Antitrust Enforcer Announces More Aggressive Anti-Monopoly Enforcement

President Obama's top antitrust official recently took her first significant step toward restoring an aggressive enforcement policy against corporations that use their market dominance to elbow out competitors or to keep them from gaining market share.

Christine A. Varney, Assistant Attorney General for the Antitrust Division of the Department of Justice, withdrew a 2008 Bush administration report relating to monopolization offenses, moving her Department closer to the position of the Federal Trade Commission and the European Commission.

“Withdrawing the Section 2 report is a shift in philosophy and the clearest way to let everyone know that the Antitrust Division will be aggressively pursuing cases where monopolists try to use their dominance in the marketplace to stifle competition and harm consumers,” said Varney. “The Division will return to tried and true case law and Supreme Court precedent in enforcing the antitrust laws.”

The now withdrawn 215-page report, which analyzed Section 2 of the Sherman Antitrust Act, was published by the Justice Department in 2008 after more than a year of hearings and studies and sought to explain the government's approach to the monopolistic and predatory practices of companies. It supported the view that lines are difficult to draw and business rivalries are better left to the marketplace.

During the Bush administration, the Justice Department did not file a single case against a dominant firm for violating the antimonopoly law.

The report “no longer represents the policy of the Department of Justice with regard to antitrust enforcement under Section 2 of the Sherman Act,” the Department announced in a statement. Varney seeks instead to return to the policy that led to the landmark antitrust lawsuits against Microsoft and Intel in the 1990s. She said the 2008 report advocated hesitancy in the face of potential abuses by monopoly firms. She said that implicit in this overly cautious approach is the notion that most unilateral conduct is driven by efficiency and that monopoly markets are generally self-correcting.

A major antitrust policy shift under the Obama Administration is not unexpected, given that during the campaign, President Obama criticized the Bush administration for having “what may be the weakest record of antitrust enforcement of any administration in the last half century” and promised that if he were elected, he would make reinvigorating antitrust enforcement a priority.

In a speech announcing the withdrawal of the report, Varney explained that she had studied antitrust enforcers' response to the Great Depression and concluded that antitrust enforcement must not be lax even during troubled economic times.

“It appears that a combination of factors, including ineffective government regulation, ill-considered deregulatory measures, and inadequate antitrust oversight contributed to the current conditions,” she stated. “I believe these extreme conditions require a recalibration of economic and legal analysis and theories, and a clearer plan for action. As antitrust enforcers, we cannot sit on the sidelines any longer – both in terms of enforcing the antitrust laws and contributing to sound competition policy as part of our nation’s economic strategy.”

In light of these developments, now is the time to ensure your company has taken the necessary steps to minimize the risk of an antitrust violation. We recommend your company implement an antitrust compliance policy and a contemporary document management policy or, if you already have such policies in place, consider updating them.

If you have any questions or require assistance in auditing your current policies or developing new ones, please contact Neil C. Schur at (215) 751-1944 or ncsc@stevenslee.com, Joe Wolfson at (610) 205-6019 or jwo@stevenslee.com, or your Stevens & Lee lawyer.

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