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## Aggressive Antitrust Enforcement: What Should Businesses Expect from the Obama Administration's Recent Policy Announcements?

The Obama Administration has announced its initial roadmap for more aggressive antitrust enforcement. In a speech delivered yesterday, Christine A. Varney, the Assistant Attorney General for Antitrust, announced policy initiatives that were consistent with promises made during her confirmation hearings to promote civil antitrust enforcement and "rebalance legal and economic theories in antitrust analysis and enforcement." What does this mean for corporate antitrust compliance under the Obama administration? Varney's speech identified several areas in which businesses can expect increased scrutiny:

### Vigorous Enforcement of Single-Firm Conduct Under Section 2.

Under the Bush Administration, the Justice Department did not file a single case against a dominant firm alleging violations of Section 2 of the Sherman Act. Varney announced that the Antitrust Division will "change course and take a new tack" with respect to Section 2 enforcement. Varney withdrew a controversial report on Section 2 issued by the Bush Administration in September 2008, stating concerns that the report "loses sight of an ultimate goal of antitrust laws—the protection of consumer welfare" and "advocates extreme hesitancy in the face of potential abuses by monopoly firms." Varney expressly rejected the Report's conclusion that conduct is likely only considered anticompetitive when it satisfies the so-called "disproportionality test," and results in harm to competition that substantially outweighs the procompetitive benefits. Varney criticized this approach, stating that it "effectively straightjackets antitrust enforcers and courts from redressing monopolistic abuses, thereby allowing all but the most bold and predatory conduct to go unpunished and undeterred." Varney advocated a "return to fundamental principles of antitrust enforcement" when it comes to evaluating single-firm conduct. Varney did not propose the use of any one specific test to evaluate Section 2 matters, but cited several cases—including the Supreme Court's decisions in *Lorain Journal v. United States*, 342 U.S. 143 (1951) and *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), as well as recent appellate decisions in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc); *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002), and *United States v. Denstply International, Inc.*, 399 F.3d 181 (3rd Cir. 2005)—as strong examples of successful challenges to exclusionary conduct that the Antitrust Division will look to when determining whether a dominant firm's conduct on balance harms competition and consumers.

### Continued Emphasis on Criminal Enforcement with a Focus on Cartel Activities and Procurement Fraud.

Varney praised the Antitrust Division's unprecedented success in domestic and international cartel enforcement in recent years, and indicated that the Antitrust Division will continue its aggressive efforts to detect and prosecute cartel activity. She indicated that, in addition to its traditional cartel enforcement activities, the Antitrust Division is targeting potential anticompetitive conduct relating to the public procurement process—"We are especially concerned that the recent infusion of vast amounts of federal funding to distressed industries and stimulus money to federal, state, and local governments may lead to increased collusion and fraudulent activity." To combat this risk, Varney announced that the Antitrust Division Recovery Initiative program has been launched to assist agencies handling federal economic recovery funds with preventing and detecting fraud and abuse in the public procurement process.

**Expanded Civil Merger and Non-Merger Enforcement and a Recalibration of the Division's Economic Analysis.**

In addition to increased Section 2 scrutiny, Varney announced that the Antitrust Division will push forward with other types of merger and non-merger investigations, with a particular emphasis on (1) exploring vertical theories of harm and (2) evaluating the competition-related issues involved in high-tech and Internet-based markets. Varney also indicated that, although rigorous economic analysis will keep its place at the foundation of the Division's antitrust policy, she sees a need to re-focus the Division's economic analysis on the core principle that competition in the marketplace is the best way to ensure that consumers have access to the best products at the lowest prices.

Underpinning each of these specific policy initiatives is the Obama Administration's pledge that vigorous antitrust enforcement will play a significant role in the Government's response to the current economic crisis. Varney cited "inadequate antitrust enforcement" as one of the factors that contributed to nation's current economic conditions and expressly rejected the notion that antitrust enforcers should let the markets "self-police" and "self-correct." Therefore, while it remains to be seen how the proposed enforcement initiatives will play out in particular cases and in the courts, businesses should prepare themselves for increased scrutiny by antitrust enforcers under the Obama administration.

If you have any questions regarding the foregoing, please feel free to contact one of the attorneys listed below:

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