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New U.S. Antitrust Chief Signals Tougher Enforcement Stance

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Assistant Attorney General Christine Varney, who was recently confirmed, is sending clear messages that the U.S. Department of Justice Antitrust Division (DOJ) will be departing from Bush Administration policy in some key areas of enforcement policy, a shift that will more closely align the DOJ's policy with that of the Federal Trade Commission (FTC).

The DOJ yesterday¹ announced its withdrawal of the September 2008 *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* Report ("Section 2 Report") on the grounds that it "no longer represents the policy of the Department of Justice with regard to antitrust enforcement under Section 2 of the Sherman Act," at the same time that Ms. Varney was delivering a speech entitled "Vigorous Antitrust Enforcement in this Challenging Era—Remarks as Prepared for the Center for American Progress." Ms. Varney also communicated the new administration's intent to depart from the Bush Administration's non-interventionist policies today in a speech before the U.S. Chamber of Commerce. Ms. Varney rejects the Section 2 Report as raising "many hurdles to Government antitrust enforcement," by (1) being "over skeptical about the ability of antitrust enforcers – as well as antitrust courts – to distinguish between anticompetitive acts and lawful conduct"; (2) placing excessive emphasis on a firm's ability to act efficiently; and (3) understating the "importance of redressing exclusionary and predatory acts that result in harm to competition, distort markets, and

increase barriers to entry." Notably, these concerns were raised by three current FTC Commissioners in September 2008 when the FTC refused to join the DOJ in the issuance of the Section 2 Report. Ms. Varney has also noted other areas in which the DOJ will seek to take an aggressive approach, including: assisting agencies receiving American Recovery and Reinvestment Act funding in detecting and deterring criminal antitrust offenses; exploring in the civil merger and non-merger area vertical theories, particularly those that may impact high-tech and internet based markets; and working within the Obama Administration to address the competition-related issues posed by potential reforms in numerous industries such as banking, healthcare, energy, telecommunications, and transportation.

Although most of Ms. Varney's remarks to date have focused on business practices (rather than specifically discussing merger policy), the unmistakable underlying message is that the Obama Administration will not be lax on antitrust enforcement, even during weak economic times. To the contrary, Ms. Varney indicates that a combination of factors, including inadequate antitrust oversight, contributed to the current economic situation. Ms. Varney's promise to undertake vigorous antitrust enforcement is consistent with the speeches and actions taken by the FTC during the last year, including the FTC's interest in pursuing as a violation of Section 5 of the FTC Act conduct that would not necessarily be viewed as violating traditional antitrust statutes. Companies need to consider this shifting enforcement environment when evaluating the antitrust implications of transactions and business practices.

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¹ This memo was originally issued on May 12, 2009.