

ANTITRUST & TRADE PRACTICES

Alert

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Department of Justice Sends Clear Message: Heightened Antitrust Enforcement Is Here

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Key Points

- Department of Justice vows to increase scrutiny of exclusionary practices by dominant firms and to continue vigorous enforcement against hardcore antitrust violations.
- Because difficult economic conditions and heightened government enforcement can lead to increased antitrust risk, an effective antitrust compliance program is a necessity.

Early Signs of Heightened Enforcement Confirmed

President Obama's campaign promise to "reinvigorate antitrust enforcement" has taken a number of significant steps toward becoming a reality. President Obama's selections of Christine Varney to head the Department of Justice's (DOJ) Antitrust Division and Jon Leibowitz, to head the FTC, indicated that his campaign pledge was a promise he intended to keep, as both were viewed as aggressive antitrust enforcers (as we reported in our March 24, 2009 Alert, "Antitrust in the Obama Administration: Are You Prepared for Heightened Enforcement?").

On May 11 and 12, 2009, Ms. Varney provided prepared remarks to the Center for American Progress and the United States Chamber of Commerce, respectively, titled "Vigorous Antitrust Enforcement in this Challenging Era." The prepared remarks confirm that the DOJ Antitrust Division is committed to increasing its antitrust enforcement efforts, stating: "there is no adequate substitute for a competitive market, particularly during times of economic distress" and "vigorous antitrust enforcement must play a significant role in the Government's response to economic crisis to ensure that markets remain competitive."

Ms. Varney also announced the withdrawal of the DOJ's 215-page report, titled "Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act" (the "Section 2 Report"). Section 2 pertains to monopolies and attempted monopolization. The Section 2 Report was issued in late 2008 during the waning months of the Bush presidency and set forth the DOJ's antitrust policies regarding dominant firms. Ms. Varney stated that "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." She also stated that "while preserving the right of firms with market power to continue to compete, we cannot allow them a free pass to undertake predatory or unjustified exclusionary conduct." Ms. Varney's message that the DOJ will carefully review the actions of dominant firms represents a dramatic change in course – during the eight years of the Bush Administration, the DOJ did not file a single Section 2 case against a dominant firm for engaging in anticompetitive exclusionary conduct.

Ms. Varney also asserted that "with higher levels of concentration and economic instability, markets are increasingly vulnerable to collusion and other fraudulent activity." Accordingly, criminal and civil enforcement will continue to be an important part of the DOJ's response to the distressed economy. She cited with approval the fact that in the first six months of the current fiscal year, the DOJ had already secured almost \$1 billion in criminal fines and the longest jail sentence to date for a single offense under the federal antitrust laws. In addition, the DOJ has launched an initiative to assist public agencies receiving stimulus funds under the American Recovery and Reinvestment Act to detect antitrust violations committed by private contractors, such as bid rigging.

Finally, Ms. Varney's comments touched on the role that antitrust enforcement will play in the Obama Administration's plans to reform the federal government's regulation of and relationship with a number of key industries. She believes that the DOJ will play a key role in providing analysis and advice on the competition-related issues posed by initiatives to reform the healthcare, banking, energy, telecommunications, and transportation industries.

What's Next

Heightened antitrust enforcement, coupled with the potential for severe criminal sanctions and civil liability, makes it imperative that companies have an effective antitrust compliance program in place. An effective antitrust compliance program involves much more than a paragraph in a company's code of conduct. Rather, it must include written policies tailored to the company's unique risk profile, an emphasis on compliance from top management, and appropriate training and communication on the company's antitrust policies. Reviewing your antitrust compliance program and assessing its effectiveness should be a top priority.

Bass, Berry & Sims Antitrust & Trade Practices Group

Ross Booher
(615) 742-7764
rbooher@bassberry.com

David R. Esquivel
(615) 742-6285
desquivel@bassberry.com

Wendee M. Hilderbrand
(615) 742-7252
whilderbrand@bassberry.com

Lucas Ross Smith
(615) 742-6526
lsmith@bassberry.com

E. Steele Clayton, IV, Assistant Chair
(615) 742-6205
sclayton@bassberry.com

Erin M. Everitt
(615) 742-7997
eeveritt@bassberry.com

Taylor J. Phillips
(615) 742-7802
tphillips@bassberry.com

John-David H. Thomas
(615) 742-7998
jdthomas@bassberry.com

Joshua R. Denton
(615) 742-7761
jdenton@bassberry.com

R. Dale Grimes, Chair
(615) 742-6244
dgrimes@bassberry.com

Matthew J. Sinback
(615) 742-7910
msinback@bassberry.com

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315 Deaderick Street • Suite 2700 • Nashville, TN 37238-3001 • (615) 742-6200
The Tower at Peabody Place • 100 Peabody Place, Suite 900 • Memphis, TN 38103-3672 • (901) 543-5900
1700 Riverview Tower • 900 S. Gay Street • Knoxville, TN 37902 • (865) 521-6200