KIRKLAND ALERT
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Department of Justice Announces That Antitrust Division Will Begin More Aggressive Antitrust Enforcement Campaign

On May 12, 2009, the newly confirmed Assistant Attorney General for Antitrust, Christine Varney, discussed Department antitrust enforcement plans during a speech to the U.S. Chamber of Commerce in Washington, D.C. In the speech, Ms. Varney repeatedly promised that the Department of Justice (also "DOJ") would be increasing its antitrust enforcement efforts, in both the civil and criminal arenas. Explaining that antitrust enforcement is particularly important "in a distressed economy," and harkening back to DOJ antitrust efforts during the Roosevelt Administration, Ms. Varney stated that "[i]t is time for the Antitrust Division to step forward again."

Ms. Varney explained that increased antitrust enforcement will focus, in part, on additional scrutiny of companies under Section 2 of the Sherman Act, which governs the legality of single-firm conduct asserted to be anti-competitive. In that vein, Ms. Varney explained that the DOJ was revoking prior guidance (the Department of Justice's 2008 215-page report, "Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act" ("the Report")). In the Report, which issued after two years of public hearings and review, the Department of Justice stated that it can be exceedingly difficult to distinguish hard-nosed competition from unlawful exclusionary conduct, and explained that this problem has, at times, led to legal condemnation of behavior that actually benefits consumers. The Report advocated the continuing development of clear conduct-specific tests and safe harbors directed to the type of market practice at issue. In addition, the Report advocated use of a "disproportionality test." Under the disproportionality test, conduct would be unlawful under Section 2 of the Sherman Act only if the anticompetitive effects are substantially disproportionate compared to procompetitive effects.

In her May 12, 2009 speech, Assistant Attorney General Varney disagreed with the view that it can be difficult to distinguish healthy competition from unlawful exclusionary practices. She further explained that the Antitrust Division was withdrawing the Report, as "it raised many hurdles to Government antitrust enforcement." Ms. Varney promised increased scrutiny of the actions of companies with market power under Section 2, stating that "[v]igorous antitrust enforcement action under Section 2 of the Sherman Act will be part of the [Antitrust] Division's critical response." In the speech, Ms. Varney proposed no specific substitute tests or guidance at this time, and explained that the Department will instead look to the analysis in two Supreme Court cases (one of which the Court has recently characterized as "at or near the outer boundary of Section 2 liability") and the *Microsoft* case. For example, in one of the Supreme Court cases, *Aspen*, the Court upheld Section 2 liability of a dominant firm for refusing to deal with its rival. The Court set forth a general test—whether conduct "tends to impair the opportunity of rivals . . . [in a way that] either does not further competition on the merits or does so in an unnecessarily restrictive way," that commentators have noted gives limited guidance to marketplace participants. In this regard, the Court distinguished such "exclusionary" practices from ones supported by "valid business reasons." In *Microsoft*, the Court of Appeals for the District of Columbia Circuit stated that where conduct has both procompetitive effects and anticompetitive effects,

Section 2 claims would be resolved by weighing the one against the other. These cases employed or suggested malleable or vague tests, which will engender uncertainty for businesses with market power.

Ms. Varney also stated that the Department was devoting substantial new resources to criminal antitrust enforcement, particularly as it might relate to industries or companies that received funds under the American Recovery and Reinvestment Act (ARRA), which provided substantial appropriations to stimulate economic activity in America. Through increased enforcement scrutiny, Ms. Varney explained that the Antitrust Division of DOJ "hopes to make a significant impact on the overall prevention of fraud, waste, and abuse relating to the use of ARRA funds." This effort supplements the Division's already well-advanced initiatives regarding global cartels.

Finally, Ms. Varney stated that DOJ's increased expenditure of resources for criminal antitrust enforcement, and "the withdrawal of the Section 2 Report, does not mean that" the Department of Justice is abandoning "efforts to work with . . . international colleagues." She stated that, "[t]o the contrary, I believe that as targets of antitrust enforcement have expanded their operations worldwide, there is a greater need for U.S. authorities to reach out to other antitrust agencies" overseas. These international enforcement efforts most notably include, for example, the European Commission's recent $1.45 billion fine of Intel for alleged anticompetitive behavior in its pricing of computer chips.

The May 12, 2009 statements of the Department of Justice promise increased antitrust scrutiny of market actors through both civil and criminal law. This increased scrutiny not only will come of potential multi-firm conduct, but perhaps even more importantly, will almost certainly come of single-firm conduct under Section 2 of the Sherman Act. As a result, companies and firms, particularly those that can be asserted to have market power, can expect a heightened potential for antitrust regulators to question corporate conduct, whether through investigative demands or judicial enforcement actions, civil and criminal.

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