

# *To Day 100 and Beyond: Antitrust Enforcement in the Obama Administration*

By Stacey Anne Mahoney

President Obama has vowed to ramp up federal antitrust enforcement during his administration. Consistent with that promise, within the first two months of his administration, he named the two new heads of his federal antitrust enforcement agencies; in January, he identified Christine Varney as the next Assistant Attorney General (“AAG”) in charge of the Antitrust Division for the United States Department of Justice (“DOJ”), and at the beginning of March, he named Jon Leibowitz as the incoming Chair of the Federal Trade Commission (“FTC”). Not surprisingly given President Obama’s stated agenda, both Varney and Leibowitz have enforcement backgrounds. Their appointments are demonstrative of the importance of antitrust enforcement to the Obama administration. The clear message: expect more enforcement activity from federal antitrust regulators.<sup>1</sup>

## ***Prior to Day 1***

The prioritization of an antitrust enforcement agenda is not a recent or passing fancy to President Obama. Back in September of 2007, while on the campaign trail, then-Senator Obama was one of the only presi-

dential candidates to accept the invitation of the American Antitrust Institute, a Washington, DC, antitrust policy think tank, to provide a public written statement of his position on antitrust. In that submission, Obama wrote:

I will direct my administration to reinvigorate antitrust enforcement. It will step up review of merger activity and take effective action to stop or restructure those mergers that are likely to harm consumer welfare, while quickly clearing those that do not.

My administration will take aggressive action to curb the growth of international cartels, working alone and with other jurisdictions to ensure that firms, wherever located, that collude to harm American consumers are brought to justice.<sup>2</sup>

During his campaign, Obama identified a number of different industries that he felt were in need of antitrust review, including pharmaceuticals,<sup>3</sup> health insurance,<sup>4</sup> media,<sup>5</sup> energy, and collegiate championship

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football.<sup>6</sup> He encouraged the Department of Justice to investigate the antitrust implications of the 2008 DHL/UPS joint venture, as well as the three-party merger in the meatpacking industry, the final portion of which (between JBS S.A. and National Beef Packing Company, LLC) was abandoned by the parties in February of 2009 due to the litigation brought by the Department of Justice in October of 2008 to enjoin the merger.<sup>7</sup> And President Obama justifies his support of network neutrality, in part, on the ground that he believes that net neutrality will “preserve the benefits of open competition on the internet.”<sup>8</sup>

## *President Obama’s Picks*

Christine Varney and Jon Leibowitz, the administration’s two key federal antitrust regulators,<sup>9</sup> are both enforcement oriented. From 1994 to 1997, Varney was a Commissioner at the FTC. While at the FTC, many of her high profile decisions focused on regulation on the internet (although she is also known for her consumer protection vote in the Joe Camel cigarette advertising case). After she left the FTC, Varney began and was the partner-in-charge of the internet law practice group for Hogan & Hartson in DC, which is where she was practicing when she was tapped by President Obama for the AAG position in January of this year. In the White House announcement concerning her appointment, Varney was specifically cited for her novel legal thinking, in particular as applied to technology markets.<sup>10</sup> She was lauded for her application of innovation market theory analysis<sup>11</sup> to transactions in electronic high technology and biotechnology, both areas of particular interest to Varney.<sup>12</sup> The White House announcement also highlighted her expertise with health-care issues, which were a focus of her practice while at Hogan & Hartson. Varney is interested in developing the law regarding vertical restraints; she was an outspoken supporter of prosecuting vertical restraint cases while she was a Commissioner.

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In an interesting speech given to the AAI in June of 2008, Varney may have opened a window into her Section 2 enforcement outlook. Varney stressed that Section 2 enforcement is “hard when you’re the government,” and said that the challenge for the next administration would be to “find the right cases to begin to push back on some of the doctrine that may have gotten too extreme in the last decade.”<sup>13</sup> She also expressed skepticism of the view that government enforcement should be restrained because of a concern that “false positives” might chill innovation. Specifically discussing Section 2 enforcement regarding Google, a competitor of many of her high tech former clients, Varney stated that Google was a company with lawfully-acquired market power that, although it had been a tremendous innovator, warranted close watching in the future.

Varney is committed to increasing cooperation and communication between the U.S. federal antitrust agencies and among international ones as well.<sup>14</sup> There was a rift created between the FTC and the DOJ when, in September of 2008, after having conducted over 150 interviews throughout the course of a year with the goal of issuing a joint DOJ/FTC Section 2 report, the DOJ unilaterally issued its own Section 2 Report.<sup>15</sup> The DOJ Section 2 Report prompted two separate written objections from the then-seated FTC Commissioners. By virtue of her previous tenure as an FTC Commissioner, Varney should be able to dissipate the tension created by the DOJ’s issuance of that Report. She has already indicated that she did not support at least some conclusions in the DOJ Section 2 Report and that she will revisit that Report, in conjunction with DOJ staff and personnel at the FTC.<sup>16</sup>

The standards set forth in the DOJ’s Section 2 Report represent significant enforcement policy changes that, if they were acted upon by Varney’s Antitrust Division, would likely render certain conduct illegal if reviewed by the FTC but legal if reviewed by the DOJ. This is

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clearly not a sustainable federal enforcement policy. Thus, Varney's ability to broker consensus among people with divergent agendas, which was proven by her ability to garner votes from the other Commissioners while at the FTC, will be important if she is to have a successful tenure as AAG.

The shift at the FTC is not going to be as significant as the one at the DOJ. First of all, Jon Leibowitz, the new Chairman, has been a Commissioner at the FTC since 2004.<sup>17</sup> The prior Chairman, William Kovacic, has stepped down as Chair, but will continue as a Commissioner. Potentially more significant from an enforcement perspective than the switching of seats between these two gentlemen is the fact that there is an existing vacant Commissioner seat that can be filled by another Obama appointee.<sup>18</sup> The administration has not yet identified its nominee for that position.

In a number of substantive areas, Chairman Leibowitz and President Obama appear closely aligned. Leibowitz has been a staunch supporter of challenging so-called "pay for delay" agreements between brand-name and generic pharmaceutical manufacturers, a position that is consistent with Obama's repeated statements regarding the need for antitrust regulation in the pharmaceutical sector as one means by which to control spiraling health care costs.<sup>19</sup> Likewise, in June 2007, Leibowitz disagreed with that portion of the FTC's report that no new laws were necessary to ensure the competitiveness of the internet; this statement is parallel to one made by Obama during his campaign that net neutrality must be maintained in order to ensure open competition in that environment.<sup>20</sup> Leibowitz and the President also share an interest in media issues (from 2000 to 2004, Leibowitz was vice president for congressional affairs for the Motion Picture Association of America) and telecommunications issues (from 1997 to 2000, Leibowitz was the Democratic chief counsel and staff director for the U.S. Senate Judiciary Committee's Antitrust subcommittee focusing on competition policy and telecommunications matters). Overall, the ascent of Commissioner Leibowitz to the Chairmanship, particularly in light of the relatively vigorous antitrust enforcement agenda pursued by the FTC during the previous administration, does not

signal the same sea change for FTC enforcement as that which we are likely to see at DOJ.

## *Day 100 and Beyond – What Should We Expect?*

So what will these regulators do first? During her confirmation hearing, Varney expressly supported the bill introduced by Senator Kohl to repeal the freight railroad antitrust exemption. She also indicated that she would work with her staff to determine what the DOJ would do with regard to supporting the bill to repeal the *Leegin* Supreme Court decision providing for rule of reason treatment of resale price maintenance claims. One sector that she identified as a "priority" for the DOJ was agriculture, and, in particular, the dairy industry.<sup>21</sup>

On the FTC side, in December of 2008, the FTC filed a Section 7 case against Ovation Pharmaceuticals alleging that Ovation unlawfully acquired the rights to, and subsequently monopolized, the pharmaceutical treatment for the illness patent ductus arteriosus.<sup>22</sup> In his Concurring Statement in Support of issuing this Complaint, then-Commissioner Leibowitz wrote: "Ensuring that consumers receive the benefits of health care competition will continue to be a priority of this Agency in the next administration."<sup>23</sup> This case is also interesting because it seeks a disgorgement remedy, of which Leibowitz has expressly endorsed more frequent use. In addition, Leibowitz is a proponent of increased usage of § 5 of the FTC Act to challenge conduct that would not otherwise violate Sections 1 or 2 of the Sherman Act, particularly in standard-setting and pharmaceutical environments.<sup>24</sup>

Alternatively, we may glean some perspective on this administration's antitrust perspective by its response to a request made in February by the United States Supreme Court that the Solicitor General's office file an amicus brief in *American Needle v. National Football League*, a case addressing the application of Section 1 to the National Football League.<sup>25</sup>

Criminal cartel enforcement is perhaps the only federal antitrust area in which we will not likely see any significant change. The previous administration was diligent

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in pursuing these claims and President Obama has made a commitment to continue to pursue these cases. There is no reason to believe that Varney will shy away from this enforcement agenda.

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In these tough economic times, more than ever, it is important to remember that clear and consistent antitrust enforcement – protecting competition, and thus consumers, while being conscious of the need for economic stability – is essential to a growing and healthy free market economy.<sup>26</sup>

In other words, buckle your seatbelts, corporate America; it's going to be a bumpy, enforcement-laden ride.



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<sup>1</sup> Attorney General Eric Holder has also confirmed that the Obama administration will pursue antitrust enforcement vigorously. See, e.g., Statement of Attorney Gen'l-designee Eric H. Holder, Jr., Executive Nomination Hearing, U.S. Senate Comm. on the Judiciary (Jan. 15, 2009), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3610&wit\\_id=7566](http://judiciary.senate.gov/hearings/testimony.cfm?id=3610&wit_id=7566).

<sup>2</sup> Statement of Senator Barack Obama for the American Antitrust Inst. (Sept. 2007), available at [http://www.antitrustinstitute.org/archives/files/aa-i-%20Presidential%20campaign%20-%20Obama%209-07\\_092720071759.pdf](http://www.antitrustinstitute.org/archives/files/aa-i-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf) ("AAI Statement").

<sup>3</sup> See *id.* While a Senator, Obama co-sponsored legislation that would prohibit reverse payment settlements between brand-name and generic pharmaceutical manufacturers.

<sup>4</sup> See *id.*

<sup>5</sup> See, e.g., Interview with Senator Barack Obama (*Broadcasting & Cable* interview with John Eggerton, published June 15, 2008).

<sup>6</sup> See, e.g., Interview with Senator Barack Obama (*60 Minutes* interview with Steve Kroft, aired Nov. 16, 2008).

<sup>7</sup> Letter from JBS S.A. to shareholders (Feb. 20, 2009), available at [http://www.mzweb.com.br/jbs/web/Arquivos/JBS\\_FR\\_20090220\\_eng.pdf](http://www.mzweb.com.br/jbs/web/Arquivos/JBS_FR_20090220_eng.pdf).

<sup>8</sup> See Barack Obama, <http://www.barackobama.com/issues/technology>.

<sup>9</sup> Varney's appointment was approved by the Judiciary Committee and sent to the full senate on March 26, 2009.

<sup>10</sup> See Press Release, White House, President Barack Obama Announces Key DOJ Appointees (Jan. 22, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/PresidentBarackObamaAnnouncesKeyDOJAppointees/](http://www.whitehouse.gov/the_press_office/PresidentBarackObamaAnnouncesKeyDOJAppointees/) ("DOJ Appointments Press Release").

<sup>11</sup> Whether innovation markets, as contrasted with product markets, should be the subject of antitrust regulation has been an open question. For a discussion of the appropriateness of regulating innovation markets see J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, Antitrust Regulation Of Innovation Markets, ABA Antitrust Intellectual Property Conference (Feb. 5, 2009), available at <http://www.ftc.gov/speeches/rosch/090205innovationspeech.pdf>.

<sup>12</sup> See DOJ Appointments Press Release, *supra* note 10.

<sup>13</sup> Christine Varney, Speech to American Antitrust Inst. (June 2008), available at <http://www.antitrustinstitute.org/Archives/2008conferenceaudio.ashx> ("Varney Speech").

<sup>14</sup> Testimony of Christine Varney, Assistant Attorney Gen'l for Antitrust Division-designee, Executive Nomination Hearing, U.S. Senate Comm. on the Judiciary (March 10, 2009) ("Varney Confirmation"). President Obama's high international approval ratings should assist Varney in this process, a process that she recognized in her June 2008 AAI speech should be undertaken by this administration. See Varney Speech, *supra* note 13.

<sup>15</sup> U.S. Dep't of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (Sept. 8, 2009), available at <http://www.usdoj.gov/atr/public/reports/236681.pdf>. Obama thought that the DOJ's Section 2 Report was indicative of the fact that the United States needed to establish a more aggressive approach to its antitrust enforcement.

<sup>16</sup> Varney Confirmation, *supra* note 14.

<sup>17</sup> Because he was a Commissioner at the time of being named Chairman of the FTC, Leibowitz did not need to go through the congressional confirmation process.

<sup>18</sup> Of the four present FTC Commissioners, two are Republicans (Kovacic and Thomas Rosch), one is a Democrat (Leibowitz), and one is an Independent (Pamela Jones Harbour). Thus, President Obama will not be constrained by party limits in choosing his next FTC appointee since no choice will exceed the limitation of no more than three Commissioners from one party. And, when Commissioner Harbour's term expires in September this year, President Obama will have another Commissioner position to fill. Both of these two seats could be filled by Democratic Commissioner and still remain in compliance with the FTC Commissioner party limitation rule.

<sup>19</sup> Varney has also indicated that she will work to align the DOJ with the FTC's position on reverse payment arrangements in the pharmaceutical sector. Varney Confirmation, *supra* note 14.

<sup>20</sup> See Jon Leibowitz, Comm'r, Fed. Trade Comm'n, Concurring Statement Regarding the Staff Report: "Broadband Connectivity Competition Policy" (June 27, 2007), available at <http://www.ftc.gov/speeches/leibowitz/V070000statement.pdf>; see also Barack Obama, <http://www.barackobama.com/issues/technology>.

<sup>21</sup> Varney Confirmation, *supra* note 14.

<sup>22</sup> *FTC v. Ovation Pharmaceuticals, Inc.*, Case No. 08-6379 (D. Minn. Dec. 16, 2008).

<sup>23</sup> See Jon Leibowitz, Comm'r, Fed. Trade Comm'n, Concurring Statement, *FTC v. Ovation Pharmaceuticals, Inc.* (Dec. 16, 2008), available at <http://www.ftc.gov/os/caselist/0810156/081216ovationleibowitzstmt.pdf>.

<sup>24</sup> See Jon Leibowitz, Comm'r, Fed. Trade Comm'n, Tales from the Crypt, Remarks at §5 Workshop (Oct. 17, 2008), available at <http://www.ftc.gov/bc/workshops/section5/docs/leibowitz.pdf>.

<sup>25</sup> Varney testified that she would look into the issues associated with the National Football League's situation to determine whether there was an antitrust violation. See Varney Confirmation, *supra* note 14.

<sup>26</sup> See Varney Confirmation, *supra* note 14.