

**PRESIDENT OBAMA ANNOUNCES NEW ANTITRUST LEADERSHIP**

On March 2, 2009, President Obama named Jon Leibowitz Chairman of the Federal Trade Commission (the “FTC”). Chairman Leibowitz had been serving as a Commissioner of the FTC. The elevation of Chairman Leibowitz did not require confirmation by the Senate and became effective immediately. The President has also nominated Christine Varney to lead the Antitrust Division of the Department of Justice (the “Antitrust Division”) as Assistant Attorney General. Until Ms. Varney is confirmed by the Senate, Deputy Assistant Attorney General Scott D. Hammond will serve as Acting Assistant Attorney General for the Antitrust Division.

Chairman Leibowitz has been involved in antitrust law and policy for many years. From 1989 to 2000, he was Chief Counsel to Senator Herb Kohl, Chairman of the Subcommittee on Antitrust, Competition Policy and Consumer Rights, and from 1997 to 2000 he also served as Chief Counsel to that subcommittee. Following several years as Vice President of Congressional Affairs for the Motion Picture Association of America, he was appointed as an FTC Commissioner in 2004 by President Bush.

Ms. Varney served on the Obama transition team, assisting the President-elect in vetting cabinet appointees. From 1994 to 1997, Ms. Varney served as a Commissioner on the FTC and focused on high-technology and privacy law. Prior to joining the FTC, Ms. Varney was Assistant to the President under Clinton and Secretary to the Cabinet, acting as the main point of contact between Cabinet members and the White House. Ms. Varney also served as general counsel to the Democratic National Committee, chief counsel to the 1992 Clinton/Gore campaign, and general counsel to the 1992 Presidential Inaugural Committee.

Most expect the new antitrust leadership to be considerably more aggressive than that of the prior administration. President Obama has criticized the Bush Administration for being less active than it should have been in its antitrust enforcement and stated that, “[a]s president, I will direct my administration to reinvigorate antitrust enforcement.”<sup>1</sup> The following are some of the areas in which the Obama Administration is likely to expand antitrust enforcement:

Expanded use of Section 5 of the FTC Act. Chairman Leibowitz has advocated the use of the prohibition in Section 5 against “unfair competition” with respect to conduct that might escape the reach of the Sherman Act.<sup>2</sup> In one recent case, Chairman Leibowitz was joined by Commissioners Harbour and Rosch in the application of Section 5 to conduct not found violative of the Sherman Act.<sup>3</sup> The expected appointment of a fifth Commissioner by President Obama likely will add support for this position.

---

<sup>1</sup> Statement of Senator Barack Obama for the American Antitrust Institute, Feb. 20, 2008.

<sup>2</sup> See, e.g., Remarks of Commissioner Leibowitz, *FTC Section 5 Workshop* (Oct. 17, 2008).

<sup>3</sup> Leibowitz was joined by Commissioners Harbour and Rosch in using Section 5 to challenge the “exclusionary” conduct of N-Data during standard-setting activities. *In re Negotiated Data Solutions LLC*, FTC File No. 051-0094 (2008).

Increased scrutiny of vertical mergers. During her tenure as an FTC Commissioner, Ms. Varney supported the Commission's vertical enforcement efforts, noting that vertical mergers can have the effect of raising rivals' costs, foreclosing entry, and facilitating collusion. Ms. Varney can be expected to reassess the Antitrust Division's perceived reluctance to challenge mergers based on vertical foreclosure theories. As Commissioner, she stated that federal antitrust enforcers have the "tools available to ensure that only prudent enforcement actions are taken in this area" and that the agencies "simply cannot abdicate our responsibility to foster competition and protect consumers."<sup>4</sup>

Increased efforts by the FTC to require disgorgement of illicit profits. The FTC recently has been more aggressive in seeking to obtain disgorgement as an antitrust remedy, including in merger cases such as the recent challenge to the consummated acquisition of the drug NeoProfen by Ovation Pharmaceuticals.<sup>5</sup>

More aggressive enforcement against anticompetitive unilateral conduct. The Antitrust Division and Chairman Leibowitz, joined by Commissioners Harbour and Rosch, recently clashed over the extent of unilateral conduct proscribed by Section 2 of the Sherman Act. The Antitrust Division published a report in 2008 (the "2008 DOJ Report") that suggests narrowing the scope of conduct by a single firm that would raise antitrust scrutiny and includes a series of safe-harbor provisions that could be used to protect such conduct.<sup>6</sup>

Three of four FTC Commissioners called the 2008 DOJ Report a "blueprint for radically weakened enforcement of § 2 of the Sherman Act" and stated that the FTC would be ready to "fill any Sherman Act void."<sup>7</sup> Many expect that Chairman Leibowitz and Ms. Varney will seek a broader application of Section 2 than is called for by the 2008 DOJ Report.

Increased scrutiny of patent licensing and settlement practices. With regard to "reverse settlements" in pharmaceutical patent disputes, the agencies may converge in their efforts to limit the ability of patent holders to reach settlements that involve the payment of compensation to an alleged infringer rather than permitting the alleged infringer to enter the market prior to the expiration of the relevant patent(s). One recent proposal before the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights would codify the FTC position on reverse patent settlements.<sup>8</sup>

---

<sup>4</sup> See Christine Varney, *Vertical Merger Enforcement Challenges at the FTC*, Remarks before the PLI 36th Annual Antitrust Institute (July 17, 1995).

<sup>5</sup> *FTC v. Ovation Pharmaceuticals, Inc.*, No. 0:08-cv-06379 (D. Minn. 2008); concurring statement of Commissioner Leibowitz, *In re Ovation Pharmaceuticals*, FTC File No. 081-0156 (2008).

<sup>6</sup> U.S. Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* (Sept. 8, 2008), available at <http://www.usdoj.gov/atr/public/reports/236681.pdf>.

<sup>7</sup> Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice 1 (Sept. 8, 2008), available at <http://www.ftc.gov/os/2008/09/080908section2stmt.pdf>.

<sup>8</sup> S. 369, 111th Cong. (2009).

No significant changes are anticipated in the area of criminal enforcement. The Antitrust Division is expected to continue aggressively pursuing price fixing, market allocation, and other *per se* conduct and to do so in collaboration with other enforcement agencies around the world.

\* \* \* \* \*

For further information regarding this memorandum or on antitrust or competition issues generally, please contact our practitioners in our U.S. or European offices: Bernard A. Nigro, Jr. (202-303-1125, [bnigro@willkie.com](mailto:bnigro@willkie.com)) or Theodore C. Whitehouse (202-303-1118, [twhitehouse@willkie.com](mailto:twhitehouse@willkie.com)) in our Washington, D.C. office, William H. Rooney (212-728-8259, [wrooney@willkie.com](mailto:wrooney@willkie.com)) or David K. Park (212-728-8760, [dpark@willkie.com](mailto:dpark@willkie.com)) in our New York office, and Jacques-Philippe Gunther (33-1-53-43-4538, [jgunther@willkie.com](mailto:jgunther@willkie.com)) or David Tayar (33-1-53-43-4690, [dtayar@willkie.com](mailto:dtayar@willkie.com)) in our Paris office, or the Willkie attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099 and has an office located at 1875 K Street, NW, Washington, D.C., 20006-1238. Our New York telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our Washington, D.C. telephone number is (202) 303-1000 and our facsimile number is (202) 303-2000. Our website is located at [www.willkie.com](http://www.willkie.com).

March 4, 2009

Copyright © 2009 by Willkie Farr & Gallagher LLP.

All Rights Reserved. This memorandum may not be reproduced or disseminated in any form without the express permission of Willkie Farr & Gallagher LLP. This memorandum is provided for news and information purposes only and does not constitute legal advice or an invitation to an attorney-client relationship. While every effort has been made to ensure the accuracy of the information contained herein, Willkie Farr & Gallagher LLP does not guarantee such accuracy and cannot be held liable for any errors in or any reliance upon this information. Under New York's Code of Professional Responsibility, this material may constitute attorney advertising. Prior results do not guarantee a similar outcome.