

May 11, 2009

Authored by Bobbee J. Musgrave

## U.S. DEPARTMENT OF JUSTICE ANNOUNCES MAJOR CHANGES TO ANTITRUST ENFORCEMENT

On May 11, 2009, Christine A. Varney, Assistant Attorney General for Antitrust at the U.S. Department of Justice (DOJ) announced major changes to DOJ's Antitrust enforcement strategy. A full copy of Ms. Varney's remarks are available at [http://www.hro.com/files/file/documents/Alert\\_Antitrust\\_Varney.pdf](http://www.hro.com/files/file/documents/Alert_Antitrust_Varney.pdf).

In a speech delivered at the Center for American Progress, Ms. Varney issued a strong warning:

As antitrust enforcers, we cannot sit on the sidelines any longer – both in terms of enforcing the antitrust laws and contributing to sound competition policy as part of our nation's economic strategy.

Ms. Varney identified several changes that will drive DOJ antitrust enforcement policy and that we expect will result in significantly increased enforcement activity.

- She explicitly repudiated the 2008 Sherman Act Section 2 Report prepared during the previous administration which she characterized as "raising many hurdles to Government antitrust enforcement." Ms. Varney concluded that the right of dominant firms to continue to compete must be preserved, but the DOJ "cannot allow them a free pass to undertake predatory or unjustified exclusionary acts." Accordingly, effective immediately, "the Section 2 Report no longer represents the policy of the Department of Justice with regard to antitrust enforcement under Section 2 of the Sherman Act. The Report and its conclusions should not be used as guidance by courts, antitrust practitioners, and the business community."
- Ms. Varney indicated that DOJ will be pursuing a substantially more aggressive approach to single firm conduct, specifically referencing the U.S. Supreme Court's decisions in *Lorain Journal v. United States* and *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* as examples of "balanced analyses" of antitrust jurisprudence under Section 2 of the Sherman Act. In recent years those two cases were considered to be outliers and their holdings were generally understood to be confined to a very narrow range of conduct. Ms. Varney's characterization of them as "balanced" raises red flags that many types of conduct by dominant firms which were considered acceptable will now, at minimum, risk drawing DOJ's scrutiny.
- On the issue of enforcement of the anti-conspiracy provisions of Section 1 of the Sherman Act, Ms. Varney explained that the DOJ will be placing considerable resources into assisting public agencies receiving federal stimulus funds in identifying anticompetitive conduct by contractors and other parties seeking access to those funds. Ms. Varney also remarked that DOJ will be more closely examining online businesses to determine whether new modes of enforcement may be necessary.

### HRO Comments

Ms. Varney's statements today are consistent with what attorneys of HRO's Antitrust and Competition Practice Group have been predicting since the election of President Obama last November: DOJ will be returning to center stage in antitrust enforcement and will be guided by an interpretation of the antitrust laws that is more aggressive than has been seen in the past 30 years. Assuming DOJ follows through on those statements (and the repudiation of the 2008 report on Sherman Act enforcement is a strong indication that it will do so), this will have major implications for businesses of all sizes and in all sectors of the economy.

### HRO CONTACTS Antitrust and Competition

Bobbee J. Musgrave  
Partner  
bobbee.musgrave@hro.com  
303-866-0386

Gino A. Maurelli  
Partner  
gino.maurelli@hro.com  
303-866-0649

Lawrence Theis  
Partner  
larry.theis@hro.com  
303-866-0449

Tracy L. Ashmore  
Partner  
tracy.ashmore@hro.com  
303-866-0304

Michael J. Hofmann  
Partner  
michael.hofmann@hro.com  
303-866-0257

Steven J. Perfrement  
Partner  
steven.perfrement@hro.com  
303-866-0370

Meryl L. Macklin  
Partner  
meryl.macklin@hro.com  
415-268-1981

Robert L. Stolebarger  
Partner  
robert.stolebarger@hro.com  
415-268-1954

Jesse W. Markham, Jr.  
Of Counsel  
jesse.markham@hro.com  
415-268-1958

Robert F. Starzel  
Of Counsel  
bob.starzel@hro.com  
415-268-1912

Stephen D. Rynerson  
Associate  
stephen.rynerson@hro.com  
303-866-0376



Holme Roberts & Owen LLP  
Attorneys at Law

Most immediately, businesses that have been relying on antitrust opinions that were issued under DOJ's 2008 report should consider obtaining updated advice from competent antitrust counsel. In the longer term, businesses, especially those which are dependent on business models developed in the past ten years, should consider seeking a broad antitrust review of how compatible those models might be with the DOJ's new enforcement approach. The explicit mention of the Supreme Court's decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, which found a dominant market player liable for a Sherman Act Section 2 violation for failing to cooperate with a competitor, is particularly significant.

If you are affected by any of the issues raised in Ms. Varney's speech or are interested in learning more about how the DOJ's new enforcement strategy may impact your business, please contact any of the attorneys listed on the right side of page one and we will be glad to offer guidance in navigating these changes.

*This article is a periodic publication of Holme Roberts & Owen LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances, nor is it intended to address specific disclosure or compliance issues that may arise in particular circumstances or provide an exhaustive discussion of the topics discussed herein. The contents are intended for general informational and educational purposes only, and you are urged to consult counsel concerning your particular situation and any specific legal questions you may have. For further information regarding the topics described herein, please contact any of the attorneys listed.*