

## Varney's Report Card As DOJ Antitrust Chief: Incomplete

By **Jacqueline Bell**

Law360, New York (July 7, 2011) -- As Christine Varney prepares to leave the top post at the U.S. Department of Justice's Antitrust Division for a job at mergers and acquisition heavyweight Cravath Swaine & Moore LLP, antitrust experts say she'll leave behind a complex and controversial legacy.

Varney was appointed by President Barack Obama in early 2009, tasked with giving shape to the president's tough-minded campaign promises to revitalize U.S. antitrust enforcement and to propel antitrust regulators in a different direction from the previous administration, which Obama criticized for being too lax.

One of Varney's first steps as antitrust chief was to withdraw a report related to monopolization offenses issued only a few months earlier under the Bush administration, saying the report raised too many hurdles to government antitrust enforcement, and sparking expectations for a spike in antitrust regulatory actions.

Yet under Varney's watch, the Antitrust Division ramped up its rhetoric but took few dramatic departures from the previous administration's strategies, analysts say.

"Christine Varney began the process of turning around a tanker ship that was stalled and going down," said Albert Foer, president of the American Antitrust Institute. "She pointed it in a better direction but with judicial winds blowing against her, her captaincy failed to accomplish all we had hoped for it."

Antitrust practitioners say Varney seems to have walked a middle road — working to protect consumers while avoiding charges of being anti-business.

"She's been balanced. I'm sure that most people have particular positions they might disagree with. But overall I would say she's been more aggressive than the Bush administration but not in any radical way," said James Wilson, an antitrust partner at Vorys Sater Seymour & Pease LLP.

The agency's reviews of high profile mergers under Varney's watch are likely to be a key factor in future evaluations of her legacy, experts say, particularly the agency's clearance — with conditions — of

controversial tie-ups between Ticketmaster Entertainment Inc. and Live Nation Inc., Comcast Corp. and NBC Universal Media LLC, and Google Inc. and ITA Software Inc.

Richard Brosnick, shareholder at Butzel Long, said the agency has been much more willing to go beyond the typical divestiture or licensing remedies and to impose fixes that controlled a merged company's conduct even after a transaction closed.

"She seemed to be much more open to that," Brosnick said.

In the Comcast-NBC deal, for example, the consent decree was designed to keep the merged company from trying to shut out online and on-demand video distributors by barring it from using restrictive licensing practices and forcing it to give up its voting rights in Hulu LLC. In the Google-ITA deal, the DOJ required Google to continue to fund flight search software research and establish internal firewall procedures, among other remedies.

"I think she showed that you can be pragmatic without being a pushover," said Richard M. Steuer, antitrust partner at Mayer Brown LLP. "The division under her leadership wasn't afraid to say no when it believed the answer was no, but it was also prepared to engage in some granular discussions of new behavioral remedies."

But critics of conduct fixes say they can be complex and difficult for regulators to administer and have mixed results. A final evaluation on Varney's tenure will have to wait until it can be determined what effect those remedies actually have, said Robert Lande, an antitrust law professor at the University of Baltimore School of Law.

"This professor would grade her 'Incomplete.' Her most important cases resulted in conduct-oriented consent orders. Only time will tell whether the consent orders were tough enough to have done any good," Lande said.

Darren Bush, antitrust law professor at the University of Houston Law Center, took a dim view of the effectiveness of those remedies, arguing that more should have been done to curb competition concerns.

"All the big merger cases blasted through," Bush said. "We've got some serious problems with antitrust enforcement."

Over the past two years, the Antitrust Division has also brought several large cases challenging company conduct, including hitting the credit card industry over its merchant discount fee rules and taking action against Blue Cross Blue Shield Michigan over terms in the insurer's contracts with hospitals.

Those suits do have the potential to be groundbreaking cases but it's impossible to tell at this stage how they will do in court, Foer said, making the impact of the actions difficult to evaluate.

In a statement released Wednesday touting Varney's accomplishments, the DOJ lauded her efforts

working with the Federal Trade Commission to update horizontal merger guidelines, as well as the recent release by the DOJ of an updated merger remedy guide for antitrust practitioners.

“These policy undertakings combine to bring new levels of transparency and certainty to antitrust enforcement in the United States,” the DOJ said.

Thomas C. Arthur, a professor at the Emory University School of Law, said allowing antitrust practitioners and companies to have a clearer view of the department’s strategies and policies was likely to be Varney’s legacy.

“This isn’t Teddy Roosevelt and trust-busting, but it’s good administration,” Arthur said.

Alan Greene, antitrust partner at Hinshaw & Culbertson LLP, said the improvements in transparency were viewed as a positive step by many defense attorneys, even if they didn’t always agree with they agency's policies.

“She was fair and open regarding what she was doing, which isn’t always the case with government officials,” Greene said.

Varney also worked to strengthen the DOJ’s relationships with other antitrust agencies abroad, tapping a distinguished competition lawyer from London, Rachel Brandenburger, to serve as a special assistant on international affairs, said Eleanor Fox, law professor at New York University School of Law.

“This appointment really did help bridge the Atlantic, and it contributed to a change of tone of the Antitrust Division in dealing with counterparts around the world,” Fox said. “The change was helped by much more knowledge, which predictably resulted in more understanding and more respect.”

--Editing by Christine Caulfield and Andrew Park.

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