Corporate Law Forum:
Is Your Company’s Antitrust Compliance Strategy In Sync With its Risk?

February 27, 2018
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- Provides practical advice to clients facing government antitrust investigations, including clients seeking regulatory clearance for strategic mergers and acquisitions  
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Verizon Communications

- More than 20 years experience providing competition and strategic counsel  
- Successfully led many high-profile M&A and joint venture transactions through the regulatory process  
- Certified GRC Professional

Michelle Rindone  
*Acting Director of Criminal Enforcement Antitrust Division, Department of Justice*

- Served as Assistant Chief of Antitrust Division’s New York Office  
- Served in the Antitrust Division’s International Section  
- Received a 2012 Antitrust Division Assistant Attorney General Award of Distinction and a Criminal Investigation IRS Excellence Award
Welcome & Agenda

- Introductions
- Agenda:
  I. Growing Antitrust Risk for U.S. Businesses
  II. ROI: The Business Case for Investing in Robust Antitrust Compliance
  III. Building an Effective Antitrust Compliance Program
  IV. Proceed with Care: Factors that Can Exacerbate Risk
  V. Q&A
I. Growing Antitrust Risk for U.S. Businesses
Antitrust Risk: Criminal Enforcement

- **Criminal Antitrust Enforcement**
  - Investigate agreements among horizontal competitors to fix prices, rig bids and allocate markets

- **Maximum Penalties**
  - **Individuals:**
    - 10 years imprisonment
    - $1,000,000 or twice the gain or twice the loss, whichever is greater
  - **Corporations:**
    - $100,000,000 or twice the gain or twice the loss, whichever is greater
Antitrust Risk: Civil Liability

Government Enforcement

- Unique challenges and risks
  - Reputational impacts
  - No damages, but injunctive relief including disgorgement
- Government has been aggressive in challenging agreements between competitors
  - Anticompetitive agreements regarding online search advertising
    - *In the Matter of 1-800 Contacts, Inc.* (FTC 2016)
  - Sharing of competitively sensitive information with competitors
    - *US v. DIRECTV Group Holdings, LLC and AT&T, Inc.* (C.D. Cal. 2016)
  - Agreements among hospitals not to advertise in competitors’ territories
  - No-poach agreements between tech employers

Hundreds of Private Antitrust Suits Annually

- Treble damages
- Jury demands
- Extensive discovery

Hundreds of Private Lawsuits Filed Annually Alleging Violations of Federal Antitrust Law
New DOJ/FTC Leaders Signal Continued Vigorous Enforcement

“We are actively looking for good conduct cases.”
  ▪ Bruce Hoffman, Acting Director, FTC Bureau of Competition, Feb. 2, 2018

“My door is open. I am interested in hearing concerns or complaints ....”
  ▪ Christine Wilson, nominated to become Commissioner of the Federal Trade Commission, Feb. 14, 2018

 “[W]e are not complacent about enforcement ... I expect that to continue.”
  ▪ Bruce Hoffman, Acting Director, FTC Bureau of Competition, Feb. 2, 2018

“The [Antitrust] Division is committed to vigorous and sound enforcement ....”
  ▪ Donald Kempf, Deputy Assistant Attorney General, Antitrust Division, Department of Justice, Sept. 26, 2017

“By vigorously policing anti-competitive conduct ... the Commission can help ensure that firms compete on the merits ....”
  ▪ Joseph Simons, nominated to become Chairman of the Federal Trade Commission, Feb. 14, 2018
II. ROI: The Business Case for Investing in Robust Antitrust Compliance
Making the Case For Compliance

- Compliance Can Reduce Civil & Criminal Antitrust Liability
  - Quickly end any misconduct
  - Reduce criminal exposure
  - Limit exposure to civil penalties and reduce business disruption
  - Minimize harm to a company’s business relationships and reputation

- But, Antitrust Compliance Can Be A Hard Sell
  - Contrast with FCPA – budgets and management focus
  - Even if something only appears suspicious, an investigation can last years
  - Understanding the antitrust laws, at least on the civil side, often requires balancing and judgment
Criminal Enforcement: DOJ’s Leniency Program

- **Benefits of Early Detection and Reporting of Employee Conduct**
  - No charges filed against the company or cooperating covered employees
  - No criminal fine; de-trebling of damages in parallel civil actions
  - Promise of confidentiality

- **Available Only to the First Company to Report**

- **Must Meet Certain Conditions**

- **Leniency Plus**
  - Full immunity for newly reported conduct of a second conspiracy, plus a substantial additional discount in fine for participation in the first conspiracy
Criminal Enforcement: Compliance Credit

- “We have done our part to reward effective compliance programs . . . you have my commitment that we will continue to do so.”
  - Jeff Sessions, United States Attorney General, Apr. 24, 2017

- Even When Leniency is Not Available:
  - Reduction of fines based on early cooperation
  - Sentencing benefits for transformation of the company’s compliance culture

- The Antitrust Division frequently receives requests for compliance credit, but reserves such credit for only extraordinary, forward-looking compliance programs
III.
Building an Effective Compliance Program
Foundation: A Culture of Compliance

- **Enforcer’s Perspective**
  - Full support of senior executives and board of directors
  - Ensure that the entire company is committed to compliance efforts and can participate in them

- **In-House Perspective**
  - Entire organization must participate, be able to recognize potential concerns, and report violations without retaliation
  - Do not assume that small breaches aren’t important or that the agencies won’t find out
Building Blocks of Effective Compliance Programs

- **Clear, Written & Actionable Compliance Policy**
  - Accessible; risk-based
  - No “one size fits all” model; must be tailored; special difficulties in high risk areas
  - Real assessment done of all business units to identify all possible areas of risk
  - On-going; proactive – regular reevaluation

- **Effective Training**
  - Tailored to your business and risks
  - Keep it real; keep it interesting
  - Includes all appropriate participants – not just the sales team
  - Supported by/attended by senior management

- **Reporting & Communication**
  - Employees need to know how to report potential concerns
  - Encourage reporting
  - Address concerns about retaliation

- **Audits and Reviews**
  - Don’t wait until the government calls or process server comes knocking
  - Formal or informal?
  - Mine relevant data sources (people, documents, data)
IV.

Proceed with Caution:
Factors that Can Exacerbate Antitrust Risk
M&A Activities: Cautionary Tales

- **Improper Pre-Merger Coordination**
  - What is gun-jumping?
  - Not just HSR; can constitute a Sherman Act violation
  - Due diligence and integration planning bring competitors together to unusual extent
    - Particleboard merger (shuttered mill, shifted customers prior to transaction closing)
      - *U.S. v. Flakeboard America Limited* (N.D. Cal. 2014)

- **Increased Risk of Exposure**
  - Merging parties (and other industry participants) subject to extensive discovery of competition-related documents
  - Not just assessing the merger
    - ATMs investigation (obstruction)
    - Packaged Seafood investigation (price fixing)
Other Risks Associated with the Investigative Process

- Concealing and Attempting to Destroy Documents Relevant to a Civil Antitrust Investigation and Providing False and Misleading Statements During the Course of the Litigation
  - Tour Buses (monopolization investigation)

- Conspiracy to Obstruct a Federal Investigation and for Attempting to Obstruct Justice
  - Auto Parts (price fixing investigation)
New Tech: Enforcement & Compliance Challenges

- New Communications Technologies Create New Risks
  - Conspirators have used chat, texts, apps and social media to fix prices, rig bids, and allocate markets
  - Customized Promotional Products

- Computer Aided Conspiracies/Algorithms
  - Wall Art
    - U.S. v. Topkins (N.D. Cal. 2015)
    - U.S. v. Aston and Trod Limited (N.D. Cal. 2015)

- Staying Ahead of the Curve
Trade Association Activities

- **Trade Associations Often Bring Together Competitors in a Cooperative Environment**
  - Same concerns arise any time competitors gather
  - Not just about sales people and pricing

- **Even Legitimate Activities Can Veer into High-risk Behavior**
  - Participation in trade shows; informal communications
    - *U.S. v. DIRECTV Group Holdings, LLC and AT&T, Inc.* (C.D. Cal. 2016)
  - Benchmarking studies

- **Best Practices for Avoiding Risk in Trade Association Context**
Global Business Expansion

- **Global Proliferation of Antitrust Regimes**
  - Steady expansion of antitrust regimes and leniency programs
  - Formal and informal cooperation continues

- **Special Challenges for U.S. Businesses Doing Business Abroad**
  - Inconsistent standards
  - Practical challenges – lack of guidance, new regimes
  - Third-party business affiliates (i.e., local partners, suppliers, distributors, etc.)

- **Best Practices for Managing Risk for Global Enterprises**
V.

Q&A
Thank You!

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