

ANTITRUST & TRADE PRACTICES

Alert

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Antitrust in the Obama Administration: Are You Prepared for Heightened Enforcement?

March 24, 2009

Key Points

- Early signs point to heightened antitrust enforcement in the Obama administration.
- An effective antitrust compliance program is your company's best defense to avoid potentially devastating criminal and civil penalties.

Early Signs Point to Heightened Enforcement

"Change" – It appears likely that President Obama's campaign slogan will apply to antitrust as all signs are pointing to a renewed focus on antitrust enforcement in the new administration. During the campaign, President Obama submitted a written statement outlining his positions on antitrust to the American Antitrust Institute. In the statement, he was highly critical of the Bush administration, opining that the "current administration has what may be the weakest record of antitrust enforcement of any administration in the last half century." He promised that, as president, he would "reinvigorate antitrust enforcement;" "step up review of merger activity and take effective action to stop or restructure those mergers that are likely to harm consumer welfare," and take "aggressive action ... to ensure that firms, wherever located, that collude to harm American consumers are brought to justice."

President Obama's statement also singled out the healthcare industry: "[T]he consequences of lax enforcement for consumers are clear. Take health care, for example. There have been over 400 health care mergers in the last 10 years. The American Medical Association reports that 95% of insurance markets in the United States are now highly concentrated and the number of insurers has fallen by just under 20% since 2000. These changes were supposed to make the industry more efficient, but instead premiums have skyrocketed ..."

President Obama's appointments to the antitrust agencies confirm that these were not empty campaign promises. In January, Christine Varney, a former FTC commissioner, was nominated to head the Department of Justice's Antitrust Division. During her time at the FTC, she became known as an aggressive enforcer of antitrust laws. In a statement on her nomination, the White

House noted that as an FTC commissioner, Ms. Varney “focused her efforts on health care issues, vigorously enforcing the antitrust laws in that industry ...”

In March, Jon Leibowitz, an FTC commissioner since 2004, was designated to be the next chairman of the FTC. Mr. Leibowitz has, in the past, advocated that the FTC take a more aggressive approach in enforcing the antitrust laws. For example, on a number of occasions he dissented from FTC decisions because he favored harsher civil penalties or remedies. It is likely that Chairman Leibowitz will push the agency toward a more aggressive enforcement posture.

Is Your Antitrust Compliance Program Up To The Task?

Since heightened antitrust enforcement is on the horizon, now is the time for companies to take a close look at whether their antitrust compliance programs are effective. The admonition of Former DOJ Deputy Assistant Attorney General William J. Kolasky that “an effective antitrust compliance program can literally mean the difference between survival and possible extinction to a corporation whose responsible officers or employees are tempted to engage in -- or are engaging in -- an antitrust conspiracy” is perhaps even more important today. An effective compliance program is a company’s best defense to prevent and detect violations and put the company in the best possible position for leniency if antitrust problems occur.

Given the potential for severe criminal sanctions and civil liability, preventing antitrust violations from happening in the first place is imperative. An individual can receive a prison sentence of up to 10 years and a fine of up to \$1 million. During 2007, 87% of executives were sentenced to jail time with an average sentence of 31 months. A corporation can be hit with a criminal fine of up to \$100 million or twice the gain or loss caused by the unlawful conduct.

Further, government antitrust enforcement actions are almost always followed by private civil suits, often class actions, that can result in staggering exposure since a successful plaintiff can recover treble damages and attorneys’ fees. Insurance coverage for antitrust violations is rarely available, and even a successful defense will be extremely expensive and disruptive. Recent settlements of class actions related to alleged price fixing bear out the potential enormity of civil liability: Vitamins: \$2.4 billion; Brand Name Prescriptions: \$850 million; High Fructose Corn Syrup: \$531 million; and Rubber Chemicals: \$320 million.

If an antitrust violation does occur, early detection is crucial. The longer a violation goes undetected, the greater the likelihood that a company will face criminal sanctions and high civil damages. Under the DOJ’s Corporate Leniency Policy, the company that is the “first in the door” to report an antitrust violation will not be charged criminally and will not have to pay a criminal fine. In addition, the company’s cooperating executives will not face criminal prosecution and the company can reduce its exposure in a civil lawsuit to actual damages rather than treble damages.

An effective antitrust compliance program involves much more than a paragraph in a company’s code of conduct. Rather, it must include written policies tailored to the company’s unique risk profile, an emphasis on compliance from top management, and appropriate training and communication on the company’s antitrust policies. Reviewing your compliance program and assessing its effectiveness now should be a top priority.

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