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Avoiding Antitrust Liability As the **Stakes Get Higher**

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UNTIL RECENTLY, the likely "worst-case scenario" for a corporation facing a criminal antitrust investigation by the Department of Justice (DOJ) was that the corporation might have to plead guilty and pay a criminal fine. Senior executives were rarely confronted with the prospect of personal criminal exposure.

Today, however, the stakes in the criminal antitrust arena are much higher, and vastly more personal. Since 1996, corporate and individual pleas and fines related to antitrust charges have increased significantly. In its 2009 fiscal year, the DOJ antitrust division collected over $1 billion in fines.[1]

Not only has the prospect of a criminal fine become more likely for individuals, but with increasing frequency executives are also facing imprisonment for antitrust violations. There has been a recent escalation in both the number and duration of such sentences.

Whereas corporate non-prosecution plea agreements used to cover most if not all company executives, rising numbers of them are being "carved out" from these plea agreements. In turn, the "carved out" individuals face the possibility of future prosecution and penalties, and the penalties arising from those prosecutions have risen precipitously.

In the 1990s, an average of 37 percent of defendants prosecuted by the antitrust division were sentenced to jail. Last year, 80 percent were.[2] From 1970 to 2002, executives were sentenced to an average combined total of 2,945 jail days per year (i.e., about eight years for all executives combined, per year). In 2007, courts imposed a total of 31,391 jail days (more than 86 years) on executives indicted for antitrust violations.[3]

Given the rapidly increasing penalties for criminal antitrust violations, outside counsel should advise corporate clients to implement effective antitrust-specific internal business practices at all levels of their organizations to avoid DOJ scrutiny in the first place, and to provide a record of legal conduct in the event an investigation is initiated.

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Such affirmative steps, taken long before the Antitrust Division contacts your client, can meaningfully help avoid, or at least minimize the impact of, a DOJ antitrust prosecution.

In the United States, criminal antitrust investigations and prosecutions are handled by the antitrust division of the Department of Justice (the other main U.S. antitrust regulator, the Federal Trade Commission, deals only in civil matters).

DOJ prosecutions historically have focused on what has come to be known as "per se" anticompetitive conduct: criminal price-fixing, bid-rigging, and market allocation offenses under Section 1 of the Sherman Act.[4]

In a recent speech, Deputy Assistant Attorney General for Criminal Enforcement Scott Hammond underlined the "growing global movement to hold individuals criminally accountable" for antitrust violations, and stated that the antitrust division "has spent the last two decades building and implementing a 'carrot and stick' enforcement strategy by coupling rewards for voluntary disclosure and timely cooperation…with severe sanctions."[5]

"Voluntary disclosure" has typically been facilitated through two DOJ-created amnesty programs. First, the DOJ instituted the Corporate Leniency Policy (CLP). Established in 1978, the CLP allows a qualifying corporation to avoid criminal prosecution for antitrust violations by confessing its role in the illegal activities, fully cooperating with the Division, and meeting other specified conditions.[6]

The CLP provides significant benefits for participants by: (1) making leniency automatic if application is made before an investigation is begun; (2) giving all cooperating officers, directors and employees who come forward with the first company protection from criminal prosecution; and (3) making leniency potentially available even to those who come forward after an investigation has begun.[7]

The CLP has been remarkably effective: according to Hammond, more than 90 percent of the $5 billion in U.S. fines for antitrust crimes collected since 1996 are due to use of the CLP.[8] The full immunity that it grants is considered necessary to induce cartel participants to self-report and provide information about others, and aids in the successful prosecution of the remaining cartel participants.[9]

Second, the DOJ established the Leniency Policy for Individuals (LPI), which provides immunity from criminal prosecution, under certain circumstances, to corporate executives who come forward independently of their corporation prior to the commencement of an investigation and commit to cooperation with the Division.[10] As with the CLP, the individual seeking leniency must not be the one who initiated the anti-competitive activity.

Increasing Carve-Outs

As recently as 15 years ago, plea agreements between corporations and the Division protected almost all company employees from prosecution.

Now, it is not uncommon for the Division to exclude certain employees, usually senior executives, from the non-prosecution coverage afforded by the plea agreement. These individuals are "carved-out" of the agreement and remain targets for future criminal prosecution by the antitrust division. Prior to the late 1990s, the Division carved out few, if any, employees from corporate plea agreements, but it now "routinely excludes multiple individuals from…non-prosecution coverage."[11]

The timing of a company's cooperation with the Division's investigation will affect the number of employees carved out of the company's plea agreement. According to the antitrust division, "[i]f a company and its employees wait to come forward to cooperate, the cooperation will be less valuable and a greater number of executives will face significant jail time."[12]

A company that is not the first to report illegal antitrust activity to the government will not qualify for complete amnesty under the CLP, but the sooner a company begins to co-operate, the fewer of its employees are likely to be carved out of a plea agreement. Recent DOJ action reflects that reality.

In the rubber chemicals investigation, Crompton (an early cooperator and the first to plead), had three individuals carved out of its plea agreement; Bayer, the next company to plead in that investigation, saw five executives carved out. Similarly, in the DOJ's DRAM ("Dynamic Random Access Memory") investigation, the carve-outs steadily increased as the investigation progressed: the first company's plea (Infineon) included four carve-outs; the second (Hynix) saw five; and the third (Samsung) had seven carve-outs.[13]

Four Steps to Avoid Liability

Given the trend toward more frequent prosecution of individuals, higher fines, greater numbers of carve-outs per company plea and longer prison sentences, it is critical that outside counsel advise senior executives to implement concrete policies for running their businesses in ways that will minimize their exposure to an antitrust investigation, and maximize their ability to prove their innocence in the event an investigation does occur.

The following are four practical, concrete steps that companies can take to lower the risk of criminal antitrust liability.

Step 1: Document Sources of Incoming Competitor Pricing Information. It is absolutely critical that senior executives be able to identify the source of any information that comes into the company about a competitor's pricing. In criminal antitrust investigations, the source of competitor pricing data found within the company can determine whether the company and its executives can be found criminally liable.

In general, competitive pricing information obtained from customers or from marketing surveys does not violate the antitrust laws.[14] Similarly permitted is pricing information obtained from publicly available trade sources or from analyses of market trends.[15] By contrast, pricing information obtained directly from a competitor is suspect and, even if innocently obtained, has often been construed as the basis of a price-fixing conspiracy.[16]

In most Sherman Act cases, prosecutors allege overt acts (using documentary evidence such as bids, price lists, price quotations, transmittal letters, telephone records, appointment books, etc.), but "[n]o overt acts need be proved, nor is an express agreement necessary"—anticompetitive offenses can be established by circumstantial evidence, such as a pattern of winning bids rotating among competitors.[17]

Accordingly, senior executives should carefully document each occurrence of the company receiving pricing information about a competitor, including:

(1) the date the pricing information was received;

(2) the source of the information (i.e., who provided the information and to whom);

(3) the substance of the information;

(4) the circumstances surrounding the receipt of the information (e.g., whether it was solicited or not); and

(5) any action taken by the company as a result of having received the information.

Senior executives should be prepared, in the event of an investigation, to provide a clear record for all information about competitor pricing that has found its way into the company; such a record can be used to rebut allegations that pricing data was obtained through an unlawful conspiracy.

Step 2: Limit Contact With Competitors. The hallmark of a price-fixing or bid-rigging conspiracy is a meeting among competitors, and documents reflecting such contacts frequently form the centerpiece of DOJ antitrust prosecutions. For example, in its investigation of a citric acid cartel, the DOJ discovered that senior executives from the various cartel members held a series of conspiratorial meetings under the guise of a legitimate industry trade association.[18]

The simplest way for senior executives to prevent even the appearance of antitrust impropriety is to avoid private meetings, telephone conversations and other non-public communication with competitors.

Even if the substance of such meetings is innocuous and does not involve the exchange of pricing information, the appearance of antitrust impropriety generated by such meetings often outweighs the legitimate business benefits obtained by maintaining relationships with competitors. If a senior executive must contact a competitor, the company's in-house attorneys should be involved in the process and the communication should be documented to ensure a clear record of "benign" competitor contact.

Senior executives should routinely copy the company's counsel on any written communication with competitors, including e-mail, and should include counsel in any telephone calls or other meetings with rival executives. Moreover, as described above, executives at all levels should be sure to document any unsolicited pricing information received from competitors during any such contact.

It is not uncommon now for the DOJ antitrust division to **exclude** certain employees, usually **senior executives**, from non-prosecution coverage afforded by a corporation's plea agreement; these '**carved out**' individuals then remain **targets** for **future** criminal **prosecution**.

Step Three: Supervise the Reporting Chain. Senior executives may face antitrust liability not only from their own personal conduct, but also from the conduct of those under their supervision.[19] Investigators will frequently assume that contacts made and information gathered at lower levels "must have" made its way up the chain to senior corporate executives.[20]

As a result, counsel should work with senior executives to design and institute an antitrust compliance program that:

(1) provides express instructions to executives and their subordinates about the limits of competitor contact and the appropriate handling of anticompetitive information;

(2) provides executives with an understanding of the flow of information up and down the reporting chain;

(3) includes close supervision of employees with access to, or who may receive, anticompetitive information;

(4) provides steps for monitoring and documenting the acquisition of pricing information received by subordinates; and

(5) includes a protocol for disciplining employees who fail to comply with company policies.

Absent such vigilance, the senior executive may be viewed (at least at the outset of an investigation) as culpable in an antitrust conspiracy simply by virtue of his or her position in the company, even in the absence of express evidence tying the senior executive to an anti-competitive scheme.[21]

Step 4: Carefully Formulate and Document Bids and Pricing Proposals. Illegal bid-rigging can take a number of forms, including participating in a conspiracy to submit bids that are known beforehand to be higher than a designated winning bid, or agreeing to submit bids that deliberately fail to comply with the requirements of a particular bid solicitation.

Senior executives should maintain records of all bids submitted by the company and should consistently document the pricing methodology behind all submitted bids and pricing proposals. Every bid should be backed by an internal documentary record that reflects the cost and margin considerations that led to the bid.

Prior to submission, all bids should be reviewed in the context of the company's historical bidding activity, to ensure that the methodology used is consistent with past practices and the profit margin built into the bid is consistent with historical margins.

By documenting all bids won or lost by the company, and carefully formulating bids prior to submission, the senior executive can establish a clear record that each bid, whether successful or not, was the product of competitive profit-seeking and not anti-competitive collaboration with industry competitors.

Conclusion

The DOJ antitrust division's accelerating criminal enforcement activity presents significant challenges for senior corporate executives. By implementing changes to their ordinary-course business practices, executives and their companies can ensure that their conduct complies with the antitrust laws and creates a sound factual record upon which to stand in the event of a future investigation.

Perhaps as importantly, these steps can be done with minimal interference with the business itself, leaving the company free to compete effectively in the global marketplace.

1. See Scott D. Hammond, "The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades," (Feb. 25, 2010), http://www.justice.gov/atr/public/speeches/255515.htm, at 5-6.
2. See Christine A. Varney, "Oversight of the Enforcement of the Antitrust Laws," (June 9, 2010), http://www.justice.gov/atr/public/testimony/259522.pdf, at 7.
3. Hammond, Feb. 25, 2010, supra note 1, at 9.
4. 15 U.S.C. §1; Antitrust Div., DOJ, "An Antitrust Primer for Federal Law Enforcement Personnel," http://www.justice.gov/atr/public/guidelines/209114.htm, at 4.
5. Hammond, Feb. 25, 2010, supra note 1, at 1.
6. See Antitrust Div., DOJ, Corporate Leniency Policy, http://www.usdoj.gov/atr/public/guidelines/0091.htm.
7. Id.
8. Hammond, Feb. 25, 2010, supra note 1, at 3.
9. Id. at 2.
10. See Antitrust Div., DOJ, Leniency Policy for Individuals, http://www.justice.gov/atr/public/guidelines/0092.htm.
11. Hammond, "Charting New Waters in International Cartel Prosecutions," (March 2, 2006), http://www.usdoj.gov/atr/public/speeches/214861.htm, at 17.
12. Id. at 17-18.
13. Hammond, Feb. 25, 2010, supra note 1,at n 16.
14. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 452-53 (1978); see also Antitrust Div., DOJ, "Statements of Antitrust Enforcement Policy in Health Care," (Aug. 1996), http://www.justice.gov/atr/public/guidelines/1791.pdf, at 49.
15. *Todd v. Exxon Corp.*, 275 F.3d 191, 213 (2d Cir. 2001).
16. See, e.g., *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 193-94 (3d Cir. 1970).
17. "An Antitrust Primer for Federal Law Enforcement Personnel," supra note 3, at 5.
18. William Kolasky, "Antitrust Compliance Programs: The Government Perspective," (July 12, 2002), http://www.justice.gov/atr/public/speeches/224389.pdf, at 7.
19. See, e.g., *United States v. Basic Const. Co.*, 711 F.2d 570, 571 (4th Cir. 1983), cert. denied, 464 U.S. 956 (1983).
20. See Theodore L. Banks, "Dealing With Antitrust Compliance and Noncompliance," 1739 PLI/Corp 777, 781, May-June 2009.
21. Id.

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