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Adapting to change: Compliance in the era of heightened antitrust enforcement

By Richard A. Powers, Daniel Tracer, and Renee E. Turner

Under the Biden administration, antitrust enforcement in the U.S. has risen to a level not seen in at least 40 years. The U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) are now opening more investigations, bringing more cases, and using more aggressive theories than in recent memory.

Substantial updates and revisions to key competition enforcement policies have accompanied the increased enforcement. Compliance and in-house professionals at companies of all shapes and sizes attempting to keep pace with these changes should consider four key points as they update their compliance policies in response to these changes:

1. Promoting competition in the labor markets (e.g., employee no-poach and noncompete agreements) remains a priority enforcement area;
2. Sharing competitively sensitive information with competitors creates significant litigation risk;
3. DOJ has public procurement under the microscope; and
4. Mergers and acquisitions (M&A) overlap with other competition enforcement areas, so additional due diligence should be considered for reportable deals.

Background

DOJ and FTC enforce federal antitrust laws nationwide. With respect to civil enforcement, DOJ and FTC review proposed M&A to assess potentially negative impacts on competition. In one recent example, the U.S. federal district court blocked Penguin Random House's proposed acquisition of Simon & Schuster, finding that the merger would likely lessen competition for top-selling books.[1] For both DOJ and FTC, civil antitrust enforcement also includes "conduct" cases, such as the monopolization cases against Google[2] and the recent competitively sensitive information-sharing case against three poultry processors.[3] DOJ prosecutes criminal antitrust violations, such as price fixing, bid rigging, market allocation, and, in certain circumstances, monopolization. Individuals convicted of antitrust violations can face up to 10 years in prison, and companies face substantial financial penalties, with some in the hundreds of millions of dollars. Even if an individual or company is not ultimately charged or convicted, the economic and reputational costs of defending against a government investigation or enforcement action are substantial.

Antitrust enforcement is a top priority for President Joe Biden, who, in July 2021, issued an executive order on promoting competition in the American economy.[4] The executive order was the first time a U.S. president directed a "whole-of-government" approach to address market concentration and consolidation, with the goal of strengthening antitrust enforcement by all federal agencies.[5] While President Biden's whole-of-government approach to antitrust enforcement is a new concept, criminal antitrust enforcement has historically enjoyed broad bipartisan support. Consistent with the mandate laid out in the executive order, the Biden administration sought and received an increase to FTC's and DOJ's budgets of $54 million and $23 million, respectively, which has been used to increase the number of investigations and bring additional cases.[6] Indeed, under current leadership, DOJ has repeatedly said it is committed to litigating more cases, including cases based on newer theories and with litigation risk. In 2022, Assistant Attorney General Jonathan Kanter said, "We are more committed than ever to litigating when we believe a violation has taken place."[7]