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Navigate the Compliance Universe

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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]

Key points

Antitrust enforcement continues in the labor markets

In 2016, DOJ and FTC released its *Antitrust Guidance for Human Resources Professionals* in which the agencies announced, for the first time, that DOJ would criminally prosecute no-poach and wage-fixing agreements not sufficiently tied to separate legitimate collaborations.[8] DOJ filed its first wage-fixing case in December 2020 and has since filed six more wage-fixing and no-poach cases.[9] In April 2022, DOJ obtained its first conviction in a labor-related case when a defendant in *United States v. Jindal* was found guilty of obstructing the underlying FTC investigation (the defendant and his codefendant were acquitted on the antitrust charges).[10] Despite this conviction, DOJ has had difficulty obtaining convictions in the other criminal labor market cases that have gone to trial. All have resulted in acquittals.

Notwithstanding these trial losses in the no-poach cases, DOJ has consistently defeated pretrial motions to dismiss, affirming the underlying legal theory that these cases can be prosecuted criminally under the antitrust laws. Indeed, Kanter and other senior officials have said repeatedly that they intend to continue bringing these cases where the evidence supports it. In a 2023 speech at the American Bar Association Annual Antitrust Spring Meeting, Kanter said that criminal labor cases are "righteous cases, and we will continue, when the facts and the law support it, to bring those cases."[11]

In addition to no-poach enforcement, and consistent with guidance in the 2021 executive order, FTC proposed a rule in January 2023 that would ban employer–employee noncompete agreements across the country, with only a few limited exceptions.[12] This proposed rule remains pending; it is anticipated to become final in 2024.

Given DOJ and FTC's continued commitment to enforcing the competition laws in labor markets, companies should enhance their compliance to avoid engaging in conduct that could be prosecuted as a criminal violation and continue to monitor developments related to noncompete agreements. In addition to updated policies, these enhancements should include ensuring that the right company personnel are educated on these issues, including, for example, human resource professionals who deal with hiring.

Antitrust enforcement of information sharing, AI, and algorithms

In February 2023, DOJ withdrew three antitrust policy statements related to information sharing, which means that there are no longer "safe harbors" for competitor companies to share competitively sensitive information.[13] Principal Deputy Assistant Attorney General Doha Mekki said the division is particularly concerned about the use of "data aggregation, machine learning, and pricing algorithms" that may lead to "tacit or express collusion."[14] To anticipate future trends and challenges, DOJ has hired data scientists, computer scientists, and economists to identify anticompetitive conduct in new technologies. DOJ has also announced an artificial intelligence (AI) initiative called "Project Gretzky," which will allow DOJ to use "its own algorithms to identify patterns that indicate criminal agreements, such as bid-rigging in public procurement or price-fixing in online markets."[15] In view of the current focus on these issues, companies should update their antitrust compliance policies and programs to educate employees on the ways in which sharing competitively sensitive information, including via AI tools, can create antitrust risks. Companies should also consider their own efforts to monitor and control their developing AI and machine learning technologies.

Antitrust enforcement in public procurement

DOJ is also focused on preventing and detecting collusive conduct in public procurement. In November 2019, DOJ's Antitrust Division formed the Procurement Collusion Strike Force (PCSF)—an interagency law enforcement effort that deters, detects, investigates, and prosecutes antitrust crimes, such as bid-rigging, price-fixing, and other collusive schemes that undermine competition in government procurement at all levels of government.[16] The PCSF is a partnership among the Antitrust Division, multiple U.S. attorneys' offices, the Federal Bureau of Investigation, and the inspectors general for multiple federal agencies.[17] In the past four years, the PCSF has trained more than 30,000 government employees, opened more than 100 investigations, prosecuted over 60 companies and individuals, obtained more than 45 guilty pleas and convictions, and secured more than $60 million in criminal fines and restitution.[18]

Last September, the PCSF announced it had uncovered a number of collusive schemes targeting U.S. defense spending, set-aside programs, and infrastructure contracts.[19] Noting the trillions of dollars the federal government expects to distribute in government contracts, the PCSF also announced that it is collaborating with law enforcement agencies domestically and internationally to conduct proactive investigations in key sectors of the American economy.[20] To do so, the PCSF stated it is deploying more aggressive tools, such as wiretaps, undercover agents, data analysis, and human source development.[21] The PCSF also warned "heavily regulated industries" and "companies that are heavily dependent upon government contracts" that criminal penalties in the government contracts space will not be limited to debarment, but will likely mirror the extraordinary penalties imposed by DOJ in the generic drug industry, which included, for the first time, mandatory business-line divestitures.[22] The PCSF is on high alert for potential misconduct in government contracting. In this current regulatory environment, government contractors should establish an effective and tailored compliance program.

New merger guidelines and M&A risk

In July 2023, DOJ and FTC issued draft merger guidelines that are expected to replace the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines.[23] The draft guidelines—which are expected to be finalized in early 2024—place a greater emphasis on targeting mergers that may increase the likelihood of coordinated interactions among competitors by closely scrutinizing transactions involving companies with a history of

collusion or anticompetitive information sharing. The new guidelines also place a greater emphasis on the impact of mergers on labor markets. This focus on both coordinated effects and labor markets increases deal risk for companies with insufficient compliance measures in place to address the no-poach agreements discussed earlier. Last fall, DOJ also announced a M&A safe harbor policy for acquiring companies.[24] Under this policy, companies that self-disclose misconduct found in the acquired company within six months of the closing can qualify for a declination. Antitrust compliance is important for companies to consider when pursuing M&A transactions. By timely self-disclosing criminal misconduct discovered during the M&A process, acquiring companies can avoid costly and disruptive enforcement actions.

Best practices and considerations for establishing an effective compliance program

In 2019, DOJ published guidance to antitrust prosecutors on how to evaluate corporate compliance programs. This document—which tracks other, similar guidance issued by DOJ components prosecuting other violations (e.g., Foreign Corrupt Practices Act violations)—is an essential tool for creating or enhancing a compliance program to prevent and detect antitrust violations.[25] In the detailed guidance document, DOJ does not endorse a strict, formulaic approach to assessing the effectiveness of antitrust compliance programs. Instead, it takes a practical approach, framed by three basic questions: "1) Does the company's compliance program address and prohibit criminal antitrust violations? 2) Did the antitrust compliance program detect and facilitate prompt reporting of the violation? 3) To what extent was a company's senior management involved in the violation?"[26] These questions are designed to help prosecutors determine whether a compliance program "is merely a 'paper program' or whether it was designed, implemented, reviewed, and revised, as appropriate, in an effective manner."[27] From there, the guidance goes through nine factors that guide the evaluation that DOJ prosecutors will conduct.

DOJ's emphasis on compliance—consistent with recent guidance issued by the deputy attorney general[28] —makes it more critical than ever for companies to have in place an active and effective compliance program that demonstrates a clear and unambiguous commitment to antitrust compliance. The benefits of an effective antitrust compliance policy are clear: prevention, early detection to minimize harm, and timely self-disclosure to mitigate subsequent legal risk. As compliance and in-house professionals continue to update their policies, it is imperative to do so in the context of an administration with the resources and determination to aggressively enforce antitrust laws.

Takeaways

- 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) is increasingly scrutinizing information sharing, artificial intelligence (AI), and algorithms to safeguard against potential harm to competition.
- DOJ is also prioritizing antitrust enforcement in public procurement and new merger guidelines jointly issued by DOJ and the Federal Trade Commission place heightened emphasis on assessing the potential impact of mergers on labor markets.
- DOJ's emphasis on compliance makes it more important than ever for companies to have in place an active and effective compliance program that demonstrates a clear and unambiguous commitment to antitrust compliance.

- DOJ's guidance to antitrust prosecutors is an essential tool for creating or enhancing a compliance program to prevent and detect antitrust violations.

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