Antitrust: How to Mitigate a Perilous But Underappreciated Risk Area

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Antitrust Enforcement Risks

> After a decade of robust enforcement, some signs of a slowdown
  - Fewest criminal cases in more than a decade
  - Recognition leniency programs have become burdensome
  - Inherent Risk (probability + impact) of enforcement remains
  - Impact should still be the key driver of compliance efforts
  - Probability of detection still should not be understated

Source: US Department of Justice, Antitrust Division
Understanding the Risk Factors: Cartel Conduct

- DOJ criminally prosecutes three types of conduct:
  - Price fixing
  - Bid rigging
  - Allocation of markets or customers
- Other conduct enforced civilly (e.g. attempted monopolization, information exchange, tying, predatory pricing)
- Risk of enforcement globally
  - European Commission, Brazil, China
- Civil damages actions, class actions
  - Treble damages

Antitrust Division Compliance Guidance

DOJ Antitrust Division recently announced it will credit companies for effective corporate antitrust compliance programs in charging decisions and penalty recommendations.

- Division also issued guidance on how it will evaluate programs
  - Runs parallel to DOJ Criminal Division’s guidance for corporate compliance programs and recent policy guidance for FCPA, OFAC sanctions, and FCA compliance
- Announcement included that the Division will enter into Deferred Prosecution Agreements (“DPAs”), as appropriate (effective corporate compliance program, self-reporting, cooperation, remediation)
  - Historically, the Division has disfavored DPAs to avoid undercutting the corporate leniency program
- New policy will complement corporate leniency program
Fundamental Questions for Prosecutors

Three “fundamental questions” for prosecutors:

- Is the compliance program well-designed?
- Is the program being applied earnestly and in good faith?
- Does the compliance program work?

In addition, three questions specifically on antitrust:

- Does the company’s compliance program address and prohibit criminal antitrust violations?
- Did the antitrust compliance program detect and facilitate prompt reporting of the violation?
- To what extent was a company’s senior management involved in the violation?

Antitrust Division Compliance Guidance

Nine factors in evaluating a compliance program:

- Design and comprehensiveness – program design, format, comprehensiveness, and integration into company’s business
- Culture of compliance – extent to which corporate management has articulated company’s commitment to good corporate citizenship
- Responsibility for the compliance program – whether those with operational responsibility have sufficient means, authority, and autonomy
- Risk assessment – extent to which program is tailored to company’s business and provides opportunities to detect violations through periodic collection and review of metrics and information
- Training and communication – whether employees receive adequate training and communications about antitrust compliance
Antitrust Division Compliance Guidance

Nine factors in evaluating a compliance program (cont’d):

> Periodic review, monitoring and auditing – whether program has review procedures and proactive audits specifically to uncover antitrust violations

> Reporting – whether program includes mechanisms allowing employees to anonymously and confidentially report antitrust violations

> Incentives and discipline – whether company implements proper incentives and discipline to ensure the program is integrated and enforced

> Remediation and the role of the compliance program in discovery of the violation – remedial actions taken to prevent recurring violations

Risk Assessment is Key to Effective Compliance

> Risk assessment allows you to most effectively allocate resources – focusing preventative and detective measures on your highest risk areas

− No “off the shelf” or “one size fits all” process; need to assess the specific risks for your company, industry, and jurisdiction(s)

− Learn the business model / go to market strategies by interviewing business and legal / compliance teams

− Assessment should consider a range of antitrust risks: cartel, information exchange, monopolization, vertical, M&A, bespoke risks (e.g. HR)

− Formal risk assessment recommended at least once a year; always be alert to changing risk factors (new laws, new inquiries, shifting business risks)
Design and Comprehensiveness

> Administering antitrust controls presents a challenge to most companies
  - Safeguards can be put in place ex ante to reduce potential exposure, but they can be difficult to administer
  - Prohibiting or requiring pre-clearance for interactions with competitors can be effective, but can be difficult to successfully implement and maintain

> Potential to focus resources on safeguards for higher risk areas:
  - Controls for trade associations and conferences
  - Safeguards for information exchange activities
  - Communication controls to flag suspicious conduct

Conducting Antitrust Audits

> Audits are an important and effective tool for antitrust compliance
  - “What monitoring or auditing mechanisms does the company have in place to detect antitrust violations? For example, are there routine or unannounced audits (e.g. a periodic review of documents / communications from specific employees; performance evaluations and employee self-assessments for specific employees; interviews of specific employees)? Does the company use any type of screen, communications monitoring tool, or statistical testing designed to identify potential antitrust violations?”

> Audits should be tailored to the risk assessment and antitrust controls
  - Monitor antitrust controls for potential compliance breaches
  - Conduct in-depth audits of higher risk business areas
Questions?