Antitrust Cartel Compliance Roundup

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Adam Hemlock

Today’s Topics

- “No poach” and wage fixing
- Procurement collusion task force
- DOJ Antitrust Division policy on compliance programs
- DOJ focus on individual prosecutions
- DOJ’s leniency program
“No Poach” and Wage Fixing

- Cartel-type agreements between employers are illegal and subject to criminal prosecution by the U.S. Department of Justice ("DOJ")
- There is increased government vigilance in light of COVID-19
- A robust compliance program is critical to mitigate antitrust liabilities and reduce potential antitrust penalties

A labor market, like any other market, however, is ripe for manipulation due to potential anticompetitive conduct and transactions.

Assistant Attorney General Makan Delrahim

Weil, Gotshal & Manges

Typical Cartel Conduct

- DOJ criminally prosecutes “naked” competitor agreements – agreements that are not reasonably necessary to a separate, legitimate transaction or collaboration between companies
  - Price fixing
  - Bid rigging
  - Market allocation
  - Output restrictions
- Naked agreements are *per se* unlawful
  - There are no justifications, and the agreement is illegal without any inquiry into its effects on competition
Cartels and Labor Markets

- Agreements not to recruit certain employees or not to compete on certain compensation terms can violate the antitrust laws
  - No-poach agreement: agreement with another employer to refuse to solicit or to hire the other employer’s employees
  - Wage-fixing agreement: agreement with individuals at another company about employee salary or other terms of competition, either at a specific level or within a range
- DOJ will criminally prosecute naked no-poach or naked wage-fixing agreements

DOJ Enforcement of Cartel-Type Labor Agreements

**In re: High Tech-Employee Antitrust Litig.**
- Beginning in 2010, DOJ sues large tech companies for “no poach” agreements

**2016 Antitrust Guidance for HR Professionals**
- DOJ will proceed criminally against naked wage-fixing and no-poaching agreements

**Spring 2018 DOJ Update**
- DOJ “intends to zealously enforce the antitrust laws in labor markets and aggressively pursue information . . . to identify and end anticompetitive no-poach agreements that harm employees and the economy”
Recent DOJ Enforcement Developments

COVID-19 Agency Warning (April 2020)

- The DOJ and FTC announced they are “closely monitoring” coordination among employers that would “disadvantage workers”
- “COVID-19 does not provide a reason to tolerate anticompetitive conduct that harms workers, including . . . essential service providers on the front lines of addressing the crisis”
- The statement reminds businesses of DOJ’s policy to “criminally prosecute companies and individuals who enter into naked wage-fixing and no-poach agreements”
- Additionally, the statement encouraged anyone with information concerning harm to competition in a labor market to contact the government

Procurement Collusion Strike Force (“PCSF”)

- Federal training initiative, announced in November 2019, to focus on investigating and prosecuting procurement collusion and other anticompetitive conduct impacting government contracting
- Interagency partnership consisting of prosecutors from DOJ’s Antitrust Division and U.S. Attorney’s Offices, as well as investigators from the FBI, DOD, USPS, and other federal offices
- The scope of PCSF investigatory efforts encompasses direct federal contracting, as well as state and local contracts that rely on federal grants
Recent DOJ Enforcement Developments
July 2019 Policy Incentivizing Compliance Programs

- At both the charging and sentencing stages, antitrust prosecutors must assess the adequacy and effectiveness of a compliance program to determine
  - (a) whether and how to bring a corporate criminal case
  - (b) a company’s culpability score under the U.S. Sentencing Guidelines and resulting fine range
  - (c) whether an independent monitor is required post-resolution
- Organized around “three fundamental questions” for prosecutors to ask
- Lists antitrust factors for prosecutors to consider (but “not a checklist”)

DOJ’s Evaluation of Corporate Compliance Programs
Three Fundamental Questions – Question One

- Is the corporation’s compliance program well designed?
  - Risk assessment
  - Effective and comprehensive format
  - Training and communication
  - Adequate integration
  - Accessible resources
DOJ’s Evaluation of Corporate Compliance Programs
Three Fundamental Questions – Question Two

- Is the corporation’s compliance program applied earnestly and in good faith?
  - Commitment and encouragement by top management
  - Seniority, autonomy, and authority in program’s operations
  - Adequate resources
  - Incentives and disciplinary measures

DOJ’s Evaluation of Corporate Compliance Programs
Three Fundamental Questions – Question Three

- Does the corporation’s compliance program work in practice?
  - Periodic review, monitoring, and auditing
  - Detection of misconduct
  - Confidential reporting
  - Remedial efforts
Key Takeaways from July 2019 Policy

- Compliance programs are not assessed in a vacuum
- Senior management’s involvement is “critical”
- DOJ seeks a “culture of compliance”
- Aim for maximum effectiveness in preventing and detecting wrongdoing
- Tailor the program to the company
- Empower employees to “do business confidently”

Key Takeaways from July 2019 Policy
Continued

- Autonomy and authority of a program is significant to the DOJ’s assessment
- A “paper compliance program” is not an effective one
- Emphasis on the need for continuous improvements to meet evolving risks and developments
- Remedial efforts are relevant at the time of a violation and following the violation for charging decisions or sentencing recommendations
Potential Criminal Penalties

- Under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA)—set to expire this year, unless renewed by Congress—maximum sentences are
  - Jail term of 10 years
  - Corporate fine: $100 million, or double the loss/gain
  - Individual fine: the greater of $1 million, or double the loss/gain
- In 2015, former Deputy Attorney General Sally Yates specified the DOJ’s policy to “fully leverage its resources to identify culpable individuals at all levels” in both criminal and civil corporate cases

Recent trends

- In 2019, DOJ issued charges and obtained guilty pleas and convictions in 13 different cartel investigations
  - Guilty pleas from 12 individuals and eight companies
  - Over $200 million in cartel investigation fines
- Average term of imprisonment for all antitrust defendants is 18 months

Individual Liability for Cartel Conduct

Packaged Seafood Investigation

- DOJ charged two companies and four executives with conspiracy to fix the prices of packaged seafood (conduct began as early as 2010)
- Three senior vice presidents of sales pleaded guilty and agreed to pay fines
  - At least $25,000 fines for two individual defendants
  - Prison sentence TBD
- The former CEO of a defendant company was convicted following a four-week jury trial, in which three senior vice presidents testified
  - Sentencing is pending

Individual Liability for Cartel Conduct

Online Promotional Products Cartel Investigation

- DOJ charged five companies and six individuals with conspiracy to fix prices of online customized promotional products (alleged conduct began as early as 2012)
- In 2019, DOJ filed two new charges against a company and its CEO, and obtained guilty pleas from four other individuals
  - Owner and president – fined $20,000 and sentenced to eight months in prison
  - Two executives – each fined $20,000, one sentenced to six months in prison and the other to three months
  - Former executive sentenced to six months in prison
DOJ Leniency Program

- Significant investigative tool for detecting cartel activity
- Corporations and individuals involved in antitrust crimes can self-report and avoid criminal convictions
  - The first to confess participation, fully cooperate with DOJ, and satisfy other specific conditions receives leniency for the reported antitrust crime
  - Low initial evidentiary standard for obtaining “marker”

DOJ Leniency Program

Corporate Leniency Policy

- Two types of corporate leniency
  - Type A leniency: available only before DOJ receives any information about the reported activity from another source
    - All directors, officers, and employees of the corporation who admit their involvement as part of the corporate confession will receive leniency as well
    - Employees who do not fully cooperate can be “carved out” of the conditional leniency letter
  - Type B leniency: available to the corporation even after DOJ receives information, but DOJ has greater discretion for excluding protection for “highly culpable” employees
  - “First-in-the-door” requirement applies to both Types A and B
DOJ Compliance Credit

- Companies that fail to obtain leniency but maintain effective compliance programs may qualify for a deferred prosecution agreement (DPA) and avoid a felony conviction
- “Leniency is and will continue to be the ultimate credit for an effective compliance program that detects antitrust crimes and allows prompt self-reporting.” Deputy Assistant Attorney General Richard A. Powers (Feb. 19, 2020)

DOJ Leniency Program

**Individual Leniency Policy**

- Must not have approached DOJ as part of a corporate leniency application for the same conduct
- As with a corporate applicant, an individual applicant is disqualified from obtaining leniency if he or she is the single organizer or single ringleader of a conspiracy
- Absent qualification for leniency or other discretionary immunity, defendants may also seek to reduce their sentence through cooperation