What We’ll Cover

• An Overview: what’s antitrust all about
• What’s new: what to expect from the Obama Administration
  • DOJ
  • FTC
• Other recent developments
• Some practical guidance for addressing the new threats and managing new compliance issues
What’s All This I Hear About Antitrust, Anyway?

- Statutes and case law interpreting them that protect the process of competition that the U.S. relies upon to allocate resources in the economy and protect consumers from the exercise of market power
- The Sherman Act
  - “The Magna Carta of Free Enterprise”
  - Section 1 – conspiracies and agreements
  - Section 2 - monopolization
- Clayton Act
- Robinson-Patman Act
- Federal Trade Commission Act
- Antitrust and Consumer Protection laws in many states

Section 1

“Contracts, combinations and conspiracies in restraint of trade”

- Outlaws hard-core price-fixing and bid-rigging activity
  
  Treated as “per se unlawful”

- Also prohibits myriad other forms of agreements the effect of which is unreasonably to restrain trade

  Usually analyzed under the “rule of reason”

  - Agreements with competitors
  - Agreements with distributors
  - Agreements with suppliers
  - Agreements with customers
Some Applications of Section 1

- Joint ventures and other competitor collaborations
- Information sharing agreements among competitors, sometimes through trade associations
- Standard setting among competitors and their customers/suppliers
- Exclusive dealing arrangements
- Resale price maintenance

Section 2

“Monopolization and Attempted Monopolization”

- Applies to certain unilateral conduct that gives (or threatens to give) a firm monopoly power or allows it to maintain that power
- What is monopoly power?
- What kinds of unilateral conduct are actionable?
Section 2

- Not just for the robber barons and fat cats

- Consider:
  - High-profile cases in against Microsoft (by DOJ) and Intel (by AMD and EU), and new allegations against Google
  - Cases against the following have also recently survived dismissal:
    - Advanced Measurement & Analysis Group,
    - Atlantic Health System, Inc.,
    - Becton Dickinson & Company,
    - Clear Channel Communications, Inc.,
    - Dentsply,
    - Enforcement Technology Group, Inc.,
    - SecurityPoint Media, LLC,

There’s A New Sheriff In Town ....

“vigorous antitrust enforcement must play a significant role in the government’s response to economic crises to ensure that markets remain competitive ....”

Christine A. Varney
Assistant Attorney General for Antitrust
U.S. Department of Justice

“passive monitoring of market participants is not an option”
What Can We Expect?

- Continued record-setting pace of criminal enforcement against “hard core” Section 1 violations (and related civil litigation)
- Stepped up attention to unilateral conduct that excludes rivals
  - Bundled pricing
  - Exclusive agreements
- Civil investigation and enforcement against competitor collaborations
  - High tech, telecomm, rest of economy
- Resale price maintenance –
  - Ironically reinvigorated by the Supreme Court in *Leegin*
- Not all plaintiff-oriented rhetoric will be matched by substantive change

Section 1 – Price Fixing and Other “Hard-Core” Violations

- Naked agreements among competitors in restraint of trade
  - Price fixing (a rather broad concept)
  - Bid rigging
  - Customer or market allocation
  - Output reductions
  - Other agreements not to compete
- DOJ’s criminal program has never been more active
  - Prosecuting large companies and their executives
  - Also prosecuting small companies and their employees
- DOJ has unprecedented access to investigative tools
  - Wiretapping authority
  - Amnesty program

“What I did in Vegas didn’t stay in Vegas.”
DOJ Criminal Antitrust Enforcement – What DOJ is Saying

- Record-Setting Pace of Enforcement:
  Fiscal year 2007 saw ...
  - Record Number of Jail Days Imposed
  - Record Jail Sentences For Foreign Nationals Violating U.S. Antitrust Laws
  - Second Highest Total Annual Fines
  - Most Grand Jury Investigations in 15 years

Scott Hammond: “Continued vigorous anti-cartel enforcement by the Division and its partners abroad can be expected in the coming year, and it is likely that there will be new milestones to top those of the last year.”

DOJ Criminal Enforcement Trends

DOJ Criminal Enforcement Trends

Percentage of Defendants Sentenced to Jail

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999's avg.</td>
<td>37</td>
</tr>
<tr>
<td>2000</td>
<td>38</td>
</tr>
<tr>
<td>2001</td>
<td>46</td>
</tr>
<tr>
<td>2002</td>
<td>53</td>
</tr>
<tr>
<td>2003</td>
<td>50</td>
</tr>
<tr>
<td>2004</td>
<td>71</td>
</tr>
<tr>
<td>2005</td>
<td>67</td>
</tr>
<tr>
<td>2006</td>
<td>68</td>
</tr>
<tr>
<td>2007</td>
<td>87</td>
</tr>
</tbody>
</table>


DOJ Criminal Enforcement Trends

INCARCERATION TREND - Average Months

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Average Jail Time (in months)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999's avg.</td>
<td>8</td>
</tr>
<tr>
<td>2000</td>
<td>10</td>
</tr>
<tr>
<td>2001</td>
<td>15</td>
</tr>
<tr>
<td>2002</td>
<td>18</td>
</tr>
<tr>
<td>2003</td>
<td>21</td>
</tr>
<tr>
<td>2004</td>
<td>12</td>
</tr>
<tr>
<td>2005</td>
<td>9</td>
</tr>
<tr>
<td>2006</td>
<td>24</td>
</tr>
<tr>
<td>2007</td>
<td>31</td>
</tr>
</tbody>
</table>

**DOJ Criminal Enforcement Trends**

**ANTITRUST DIVISION**
Sherman Act Violations Yielding a Corporate Fine of $10 Million or More

<table>
<thead>
<tr>
<th>Defendant (FY)</th>
<th>Product</th>
<th>Fine ($ Millions)</th>
<th>Geographic Scope</th>
<th>Country</th>
</tr>
</thead>
<tbody>
<tr>
<td>F. Hoffmann-La Roche, Ltd. (1999)</td>
<td>Vitamins</td>
<td>$500</td>
<td>International</td>
<td>Switzerland</td>
</tr>
<tr>
<td>LG Display Co., Ltd</td>
<td>Liquid Crystal Display (LCD) Panels</td>
<td>$400</td>
<td>International</td>
<td>Korea</td>
</tr>
<tr>
<td>Société Air France and Koninklijke Luchtvaart Maatschappij, N.V. (2008)</td>
<td>Air Transportation (Cargo)</td>
<td>$350</td>
<td>International</td>
<td>France (Société Air France) and The Netherlands (KLM)</td>
</tr>
<tr>
<td>Korean Air Lines Co., Ltd. (2007)</td>
<td>Air Transportation (Cargo &amp; Passenger)</td>
<td>$300</td>
<td>International</td>
<td>Korea</td>
</tr>
<tr>
<td>British Airways PLC (2007)</td>
<td>Air Transportation (Cargo &amp; Passenger)</td>
<td>$300</td>
<td>International</td>
<td>UK</td>
</tr>
<tr>
<td>Samsung Electronics Company, Ltd</td>
<td>DRAM</td>
<td>$300</td>
<td>International</td>
<td>Korea</td>
</tr>
<tr>
<td>BASF AG (1999)</td>
<td>Vitamins</td>
<td>$225</td>
<td>International</td>
<td>Germany</td>
</tr>
<tr>
<td>Hynix Semiconductor Inc. (2003)</td>
<td>DRAM</td>
<td>$185</td>
<td>International</td>
<td>Korea</td>
</tr>
<tr>
<td>Infineon Technologies AG (2006)</td>
<td>DRAM</td>
<td>$180</td>
<td>International</td>
<td>Germany</td>
</tr>
<tr>
<td>SGL Carbon AG (1999)</td>
<td>Graphite Electrodes</td>
<td>$135</td>
<td>International</td>
<td>Germany</td>
</tr>
</tbody>
</table>

This is just top 10 out of a total of 71 fines over $10 million as of 5/22/2009


---

**Small, Domestic Companies Are Also Targeted**

- In past year, the following companies and/or their executives have been charged with criminal price-fixing, bid rigging or market allocation:
  - **Home City Ice Co.** – a packaged ice manufacturer in Ohio
  - **Kwik-Chek Food Stores** – a gas station and convenience store operator in Oklahoma
  - **El Paso Steel Doors & Frames** – a door and hardware supplier in Texas
  - **SK Foods** – a tomato processor in California
  - **Peck & Hale** – a Long Island supplier of straps to the U.S. Navy
  - **JMJ Environmental** – a wastewater treatment supply company in New Jersey
It’s so hot, Hollywood made a movie …

“The Informant!” - coming in September

Mark Whitacre becomes Matt Damon

Scene from The Informant!

DOJ Criminal Antitrust Leniency Program

- First participant to come forward, confess culpability, and offer cooperation receives amnesty from prosecution (and reduced exposure to civil liability).
- Aim is to turn conspirators into snitches.
- This is an opportunity for companies that have effective compliance programs, but find that they cannot prevent one rotten apple from misbehaving.
- But it is also a threat to companies that fail to prevent wrongdoing: a higher risk of detection and prosecution.

Scott Hammond: “Cooperation from leniency applicants has cracked more cartels than all other tools at our disposal combined -- searches, FBI "drop-in" interviews, informants, Interpol red notice watches, etc.”
More Aggressive Scrutiny of Unilateral Conduct

Varney: “going forward, the Department is committed to aggressively enforcing Section 2”

- Varney immediately withdrew the Section 2 report issued by the last administration, arguing that it was too permissive.
- No guidance provided in its place.
- No concrete evidence of elevated enforcement, yet.

Greater Attention to Vertical Relationships

Varney: “it is my hope that the Division … will have the opportunity to explore vertical theories”

- E.g., publicly-reported investigation of exclusive relationships between telecomm providers and handset makers
- Other possibilities include resale price maintenance agreements
  - FTC and states are already exploring ways to repeal Leegin and pursue enforcement under rule of reason
Other Developments

FTC Chairman Leibowitz: "the Commission should not be tied to the more technical definitions of consumer harm that limit applications of the Sherman Act when we are looking at pure Section 5 violations"

- FTC intends to enforce Section 5, which prohibits “unfair competition,” more broadly than the Sherman Act
- FTC (and possibly others) are exploring expanded theories of what sort of conduct is “anticompetitive,” sometimes dispensing with the need for market definition
- Private plaintiffs continue to bring price discrimination cases

Why Your Organization Should Care

- Serious criminal penalties
- Huge civil treble damages exposure (plus attorneys fees to prevailing plaintiffs)
- Potential for disgorgement of profits
- Costs of reversing or unwinding important business strategies
- Costs of responding to investigations or lawsuits
  - Litigation costs
  - Extensive discovery
  - Disruption
What you can do to manage new (and old) antitrust risks

- Awareness of risks
- Common sense steps to minimize exposure
- Proactive monitoring of company conduct as conditions evolve
- Rigorous compliance programs and processes

What kind of compliance program should you have?

- One that works! …
  → That prevents violations (and actions that inadvertently create evidence supporting an inference of a violation);
  → That establishes an effective process for legal review of conduct close to the line, so that conscious decisions can be made whether the conduct creates unacceptable antitrust risk; and
  → That effectively detects violations, deals with them appropriately, including appropriate punishments for employees who violate the company’s compliance policy, and allows consideration whether to seek amnesty
Implementation Expectations

Proactive and Practical

- Issues that make our phones ring
- Avoidable employee conduct
- Currently hot: pricing decisions
- Currently hot: exclusionary conduct
- Focus: risk awareness and prevention
- **Caveat**: U.S. issues only today
Today’s Focus

• Price-Fixing Conspiracy
• Bundled Discounts/Exclusionary Conduct
• Resale Price Maintenance

Price-Fixing Conspiracy

• Opportunities to conspire
• Centralized control of pricing decisions
• Little analysis before price changes
• Price “signaling” through media statements
• Stable market shares of competitors
**Bundled Discounts/Exclusionary Conduct**

- Discount offered for basket of products
- “Market power” in one product
- Small companies can have market power
- Federal and state law test is uncertain
- **Warning sign**: customers report that rivals complain they cannot offer same bundle

**Resale Price Maintenance**

- Maximum – caution but generally lawful
- Minimum – red flag despite *Leegin* ruling
- State law – may be illegal *always*
- Procompetitive justification?
- **Warning sign**: reports that customers are requesting restriction and/or practice is common in your industry
Antitrust Compliance Program
Best Practices

- Risk Assessment
- Antitrust Policy Development
- Program Design and Implementation
- Employee Education
- Monitoring and Detection
- Measure Efforts
- Re-Evaluate Program

Risk Assessment

- Risk Assessment
- Antitrust Policy Development
- Program Design and Implementation
- Employee Education
- Monitoring and Detection
- Measure Efforts
- Re-Evaluate Program
Antitrust Risk Assessment

- Drives policy development
- Informs education and audits
- Enterprise-wide, bottom/top, top/bottom
- Risks within company
- Risks within industry

Antitrust Policy Development
Antitrust Policy Development

"Are these just guidelines, or are they actual new policies?"

Antitrust Policy Development

- **Best Practice**: customize to organization
- Vertical distribution network or fully-integrated?
- Market share greater than or approaching 50%?
- Regulated industry?
- Licensing of intellectual property?
- Doing business abroad?
- Map to business process (e.g., pricing, sales and discount policies, payment terms, rebates)
Program Design and Implementation

- Best Practice: Benchmarking
- Outsourcing
- Overall Responsibility
- Operational Responsibility
- Management Buy-In and Leadership
- Resources and Formality
Outsourcing

• Use of outside counsel or consultants
  ✓ Policy development/Codes of conduct
  ✓ Program design/Program management
  ✓ Change management
• Use of other outside partners
  ✓ Ethics/compliance training
  ✓ Ethics/compliance management system
  ✓ Hotlines
Overall Responsibility

- Compliance Officer/Ethics Officer/General Counsel
- Industry Guidance – e.g., HHS
  - Pharmaceutical companies
  - Not “subordinate” to GC or CFO
  - Officer who can “effectuate change”
Operational Responsibility

- Centralized function or business units?
- Best Practice: Centralized
- Areas of deeper business unit involvement:
  - Developing policies and procedures
  - Updating applicable regulations
  - Monitoring compliance with policies
- Best Practice: Cross-Functional Teams
Management Buy-In and Leadership

- **Best Practice**: very visible senior leadership
- Must have full force and personality of CEO
- Emphasize importance of program to staff
- Executive staff cascades through management
- Involve local management in all phases
- Compliance becomes cultural
- Part of the fabric of the organization

Implementation Expectations

“Do you think now that we’re doing fewer illegal things we can scale back the legal department?”
Large Organizations – Expectations

- More formal operations
- Devote greater resources
- Encourage smaller business partners to implement effective compliance and ethics programs


Smaller Organizations – Less Expected

- Less formal
- Devote fewer resources
- Implement without dedicated staff
- Informal training – staff meetings
- Monitoring: regular “walk-arounds”
- Model after programs of others

Employee Education

- Risk Assessment
- Antitrust Policy Development
- Program Design and Implementation
- Re-Evaluate Program
- Measuring Efforts
- Monitoring and Detection
- Employee Education

Education Program Management
Education Program Management

- Cross-functional team very important
- Plan for strong internal marketing
- Advance announcements
- Workshops and open houses
- Design opportunities for quick wins
- Publicize success

Employee Education
Employee Education

- Enterprise or sub-enterprise assignments
- Antitrust Curriculum/Careful Communications
- Mandatory and incentives (evaluation/bonus)
- Face-To-Face Training
- Web-based training/other distance learning
- Testing knowledge
- Documentation and reporting

Advantages of Web-Based Training

- Reach all employees proactively
- Supplement face-to-face training
- Recapture resources for higher use
- No travel or other logistics
- Available 24x7x365
- Automated curriculum administration
- Automated tracking and reporting
Best Practice: Employee Certification

- Certify annually in writing (example)
  - Has read and understands antitrust policy;
  - Has not violated policy; and
  - Does not know of any violations of policy.
- Electronic
  - Email push and administration
  - Tracking and documentation
Monitoring and Detection

- System to report violation or seek advice
- Allow for anonymity and confidentiality
- Must publicize the system
- Best Practice: Hotlines (Helplines)
  - 800 number
  - Web-based forms
  - Many call centers outsourced

ETHICS AND COMPLIANCE HOTLINE

Here are the hotlines for maintaining a safe and secure workplace.

IF YOU PREFER TO REMAIN ANONYMOUS, CALL DOE'S ETHICS AND COMPLIANCE HOTLINE

This number is administered by an independent company. The National Business and Public Service and is accessible 24 hours a day, 7 days a week. The line is not monitored or substantiated by the government or your employer.

- Web-based forms
- 800 number
- Many call centers outsourced

HERE’S WHAT HAPPENS WHEN YOU CALL:

1. You report a violation by calling the number. You’re asked for your name and phone number. You don’t have to give your name, and you can call back to report additional violations.
2. Your concerns are reviewed by a representative who will take your call and pass it on to your employer.
3. Your concerns are reviewed by your company’s management or a representative.
4. If your concerns are substantiated, you and your employer will be notified. There are strict rules about additional violations or information being passed on to law enforcement or other authorities.

That’s all it takes. It’s quick, easy, and anonymous. The government has no way to trace your call. But it can make the difference.

SOME COMMON EXAMPLES OF UNETHICAL, ILLEGAL, AND UNSAFE ACTS

- Theft
- Improperly using company assets
- Discrimination or harassment
- Use of illegal drugs or alcohol
- Breach of confidentiality
- Creating or selling false or fraudulent transactions
- Improperly obtaining or using confidential information
- Violation of antitrust laws
- Bribery or conflicts of interest
- Collusion with competitors

THE COST OF MISCONDUCT

According to the Association of Certified Fraud Examiners, the average cost per case is $400,000, with a median cost of $300,000.
Program Tool: Internal Publicity

- Business unit leaders share lessons learned
- Written reports of violations detected
- Employee names removed
- Describes consequences
- Reinforces relevant policies
- Provides feedback to training resources

Program Tool: Random Audits

- Unannounced audit of employee files/email
- Begin at top of organization and fan out
- Repeated annually
- Legal Department investigated irregularities
- Imposed a remedy
- Updated training to address problems
Program Tool: Mock Depositions

- Company hired outside antitrust litigator
- Executive cross-examined in front of staff
- One hour of intense questioning
- Follow-up discussion of lessons learned
- Role-playing was “dramatic wake-up call”

Measure Efforts
Reporting

- Report to Board “information on the implementation and effectiveness of the compliance and ethics program”*
- No less than annually
- Do you have an implementation plan?
- Are you tracking the progress of execution?
- Have you defined metrics for effectiveness?


Metrics
Examples of Metrics

- Resources devoted to ethics/compliance
- Employee Education
  - Number of employees reached
  - Track course completions
  - Measure effectiveness (e.g., surveys)
- Hotline calls and other internal reports
- Investigations opened

Re-Evaluate Program

- Risk Assessment
- Antitrust Policy Development
- Program Design and Implementation
- Employee Education
- Monitoring and Detection
- Measure Efforts
Re-Evaluate Program

- Analyze Metrics and Feedback
- Re-Assess Risk
  - Address compliance failure incidents
  - Analyze any new legal requirements
- Lessons Learned (Implementation)
- New Cycle of Design and Execution

Takeaways for You …

- Remind sales and marketing personnel with pricing authority about potential risks
- Develop process to involve counsel in new pricing policies before implemented
- Develop process to involve counsel in potentially risky pricing decisions
(More) Takeaways for You ....

• Expect enforcers to be aggressive
• Expect private plaintiffs to be aggressive
• Additional compliance training
• Audit systems and assess risks
• Consult your antitrust counsel!