Updates
March 03, 2020

“See Something, Say Something”: Prompt Reporting of Criminal Antitrust Violations Is Critical

When the DOJ is deciding whether to charge a company with a criminal antitrust violation, or agreeing to a deferred prosecution agreement (DPA), the effectiveness of a company's antitrust compliance program is only one factor. Companies are always expected to promptly report evidence of criminal antitrust violations; a "wait-and-see" strategy, hoping to later receive a DPA, will not work.

Last summer, the DOJ announced that it will formally consider the efficacy of a company's antitrust compliance program at both the charging and sentencing stages of criminal antitrust prosecutions, offering the possibility of a company avoiding criminal charges and receiving a DPA instead. A recent speech and a recent DPA from the generic drug investigation provide important guidance to companies hoping to escape a felony conviction.

Deputy Assistant Attorney General Richard Powers, while addressing antitrust practitioners at the ABA's International Cartel Workshop, said that companies that uncover antitrust price-fixing conspiracies or other cartel conduct should report violations to the DOJ's Antitrust Division as soon as possible after detection.

Some have suggested, Powers said, that a company may want to delay reporting evidence of its participation in an antitrust conspiracy. Even if another company applies for leniency (which is only available to the first company to report the violation), the thinking goes, the division may still give the second-to-report company a DPA based on its effective compliance program.

Powers made clear that strategy will not work. Any delay in reporting evidence of a criminal violation could nullify the benefits to be gained from the new policy and result in a criminal prosecution that otherwise might have been avoided. He explained that the adequacy and effectiveness of a company's antitrust compliance program is just 1 of 10 factors in the DOJ's charging decision and sentencing recommendation and that it will also consider how quickly the company reported illegal conduct.

On March 2, the DOJ announced a DPA with generic pharmaceutical company Sandoz, Inc. Although the company will pay a $195 million fine and cooperate with the DOJ's ongoing investigation, it escaped a felony conviction. Assistant Attorney General Makan Delrahim was quoted in a news report that such a conviction might have prevented Sandoz from competing in the market for providing drugs to the Medicare program, which itself would be an anticompetitive outcome.

Takeaways

These recent developments underscore the importance of an effective compliance program and prompt reporting. The prospect of debarment might be a strong factor in favor of receiving a DPA. Failing to report violations uncovered by compliance tools will not. Companies should take a fresh look at the following:

1. The company's code of conduct for antitrust and competition and whether to provide a link to the company's entire antitrust policy
2. Messages from the CEO or other senior officers emphasizing the company's "culture of compliance" and the importance of reporting violations

3. The company's written antitrust policy and whether it requires updating to address new or different risks, such as the DOJ's pronouncements in 2016 that agreements among employers to fix wages or not compete for workers will be prosecuted criminally
4. The adequacy and effectiveness of different methods available to employees to report suspected violations
5. The frequency of employee training
6. The procedures for obtaining approvals for employees to attend industry events or trade association meetings or participate in standard-setting organizations

Now is also a good time for companies to consider whether to implement tools to monitor and test the effectiveness of its antitrust compliance program in preventing and detecting potential violations, including potentially reviewing internal emails and conducting other types of audits. These recent developments are a good reminder to contact counsel and schedule new training sessions, especially for sales, marketing, and other employees more likely to have contact with their counterparts at competitor firms through industry events, trade association meetings, or standard-setting organizations.

Authors

Shylah R. Alfonso

Partner
SAlfonso@perkinscoie.com 206.359.3980

Jon B. Jacobs

Partner
JBJacobs@perkinscoie.com 202.654.1758

Explore more in

Antitrust & Unfair Competition Consumer Protection Corporate Governance Public Companies White Collar & Investigations

Related insights

Update

Ninth Circuit Rejects Mass-Arbitration Rules, Backs California Class Actions

Update

CFPB Finalizes Proposed Open Banking Rule on Personal Financial Data Rights