CLIENT ALERT

Cartel Enforcement Update: DOJ Antitrust Fines Appear To Be on the Rise Again

January 31, 2019

Between 2009 and 2015, the U.S. Department of Justice's Antitrust Division imposed nearly $10 billion in criminal fines and penalties. During this same period, the Antitrust Division charged 145 corporations and 417 individuals with criminal antitrust violations, which resulted in an average prison sentence of about two years. Most of these criminal prosecutions and sanctions resulted from four major international cartel investigations:

- ***Auto Parts***: Investigation of multiple price fixing, bid rigging, and customer allocation conspiracies involving various automobile parts. To date, this investigation has resulted in approximately $3 billion in fines and criminal convictions against 46 corporations and 32 executives.
- ***Foreign Exchange***: Investigation of conspiracies to fix prices in the foreign currency exchange spot market. To date, this investigation has resulted in six major financial institutions and two traders pleading guilty and approximately $3 billion in fines. (As discussed below, three traders charged in this investigation were acquitted this past summer by a jury in the Southern District of New York.)
- ***LIBOR***: Investigation of conspiracies to manipulate the submissions used to set the London Inter-bank Offered Rate (LIBOR), which is used as the interest rate benchmark for various financial instruments. To date, this investigation has resulted in six major financial institutions and three traders pleading guilty, jury convictions against two traders, and approximately $2 billion in fines. (The jury convictions of two other traders were vacated on appeal by the Second Circuit on Fifth Amendment grounds.)
- ***LCD***: Investigation of conspiracies to fix prices for transistor-liquid crystal display panels used in computer monitors, cell phones, and other household electronics. To date, this investigation has resulted in nearly $1.5 billion in fines and criminal charges against approximately 30 corporations and executives.

However, after imposing a record $3.6 billion in fines during fiscal year 2015,[1][1] the Antitrust Division experienced a significant decline in its fine totals during the next two fiscal years. In fiscal year 2016, the Antitrust Division's fines declined to $399 million. The following year (FY 2017), the Antitrust Division's fines fell to a mere $67 million. This decline in the Antitrust Division's fines was not surprising because the large investigations that accounted for most of its record fines during the previous years (*see* above) have been winding down, and because it often takes the Division a couple of years to fully develop its next set of investigations that will result in large fine totals.

The Antitrust Division's fine totals for fiscal year 2018 and the first few months of fiscal year 2019 suggest that we may be exiting the Division's fine "recession" from the past two years. In fiscal year 2018, the Antitrust Division – while still filing a relatively low number of cases – imposed approximately $110 million in fines and penalties, which nearly doubled the total from the prior year.[2][2] This upward tick has continued into the current fiscal year. In just the first quarter of fiscal year 2019, the Antitrust Division surpassed last year's total by roughly $30 million. Prior to the recent government shutdown, the Antitrust Division had already announced four corporate plea deals involving the imposition of approximately $142 million in fines and a plea deal with a fifth company that will push this number up when the company is sentenced. Thus, while still far lower than the multi-billion totals that were announced between 2009 and 2015, the recent signs from the Antitrust Division appear to be pointing toward a period of steadily increasing criminal prosecutions and fines, which is made all the more likely by the fact that certain large investigations (*see* below discussion about likely cartel enforcement in 2019) should be reaching the indictment and plea stages.

2018 Cartel Enforcement Year End Review

Key 2018 highlights from the Antitrust Division's criminal enforcement program include:

- ***New Leadership Team***: In May 2018, the Antitrust Division named Richard Powers as the new Deputy Assistant Attorney General for Criminal Enforcement. At the time of his appointment, Mr. Powers – who spent the first six years of his DOJ career as an Antitrust Division trial attorney – was serving as a trial attorney in the DOJ's Criminal Division.

  In addition, the Antitrust Division appointed a new leadership team in its Criminal I Section by naming Ryan Danks as Chief and Emma Burnham and Kevin Hart as the section's Assistant Chiefs. The Antitrust Division also appointed a new leadership team in its Criminal II Section by naming James Fredricks as Chief and Mark Grundvig and Megan Lewis as the section's Assistant Chiefs.

  Outside of D.C., the Antitrust Division named Manish Kumar as the Acting Chief of its San Francisco Office and Kalina Tulley as the Acting Chief of its Chicago Office.

- ***LIBOR and FX Trials***: In October 2018, the Antitrust and Criminal Divisions secured a guilty verdict against two former derivatives traders on charges that they conspired to manipulate LIBOR in order to increase the returns on their trading positions, thereby securing higher bonuses and other compensation. That same month, however, the Antitrust Division lost a multi-week trial against three other former derivatives traders, who had been charged with conspiring to fix prices in the foreign exchange spot market. The Antitrust Division is scheduled to try another former foreign exchange trader later this year.
- ***Expansion of R.E. Foreclosure Investigation***: Over the last several years, the Antitrust Division has been prosecuting real estate investors who conspired to rig bids during in-person public real estate foreclosure auctions in various parts of the U.S. after the 2008 financial crisis. In 2018, the Antitrust Division expanded this investigation to include auctions in Mississippi as well as online foreclosure auctions. To date, this wide-ranging investigation has resulted in charges against more than 130 individuals and dozens of guilty pleas. In light of its recent expansion, this investigation will likely continue to be active during the upcoming year.
- ***Increased Use of External Compliance Monitors***: In 2012, the Antitrust Division appointed its first ever external compliance monitor in a criminal case. This past year, the Antitrust Division continued to show a willingness to utilize, under appropriate circumstances, external compliance monitors by appointing an external monitor for Norwegian shipping company Höegh Autoliners AS, which plead guilty in 2017 to participating in a price-fixing conspiracy in the ocean shipping services industry.
- ***Continued Evolution on Sentencing Credit for Compliance Programs***: Until 2014, the Antitrust Division had categorically declined to give companies guilty of an antitrust crime any credit for their compliance programs. That year, the Antitrust

Division announced a policy shift by stating that under certain circumstances it would credit companies that proactively adopted or strengthened compliance programs subsequent to the start of an investigation. Last year, the Antitrust Division signaled another possible shift in its compliance program policy by indicating that it was actively considering whether it should begin giving companies credit for having robust compliance programs that nevertheless failed to prevent an antitrust violation. In doing so, the Antitrust Division indicated that it believes that such a policy shift, along with other measures being actively considered, could better promote compliance with the antitrust laws.

Looking Ahead: What Will Cartel Enforcement Look Like In 2019?

- ***Criminal No-Poach Prosecutions***: For the past two years, the Antitrust Division's senior leadership team has been promising to criminally prosecute naked "no-poach" agreements, where competitors for employees agree not to hire or recruit each other's employees. In addition, there have been public reports that the Antitrust Division has active no-poach investigations in the health care and financial services industries. Thus, 2019 could bring the Antitrust Division's first-ever criminal no-poach prosecution.
- ***Generic Pharmaceutical Investigation***: In December 2016, the Antitrust Division announced its first indictments in its investigation into various price-fixing, bid-rigging, and customer allocation conspiracies in the generic pharmaceutical industry. Since then, several generic drug manufacturers – many of whom are battling with various State Attorneys General in civil litigation – have disclosed that the Antitrust Division and FBI raided their offices. Consequently, the Antitrust Division could be in a position to announce additional charges in this ever-expanding investigation, which, according to public reports, was first opened in or around 2014.
- ***Government Contracts-Related Bid Ridding***: In November 2018, the Antitrust Division brought civil and criminal charges against three South Korean companies for orchestrating a decade-long bid rigging scheme that targeted fuel supply contracts for the U.S. military. These charges resulted in the companies entering guilty pleas and agreeing to pay $236 million in criminal fines and civil damages. The Antitrust Division has also recently prosecuted companies and individuals who participated in conspiracies to defraud the U.S. government's foreign aid program and to fix the prices that municipalities pay for public school transportation. The Antitrust Division's senior leadership team has made clear that prosecuting companies and individuals who participate in anticompetitive schemes that target governmental entities, and thus taxpayers, will be a top priority in 2019.
- ***Increased Collaboration with Latin American Enforcers***: In recent years, a number of Latin American antitrust enforcers have made prosecuting cartels a top priority. For instance, Brazil's antitrust agency (CADE) has imposed nearly USD $600 million in criminal fines during the past two years. In 2017, Mexico's antitrust agency (COFECE) brought its first cartel prosecution and imposed nearly USD $100 million in fines that same year. Given that Latin American antitrust enforcers are increasingly becoming active players in global cartel investigations and the Antitrust Division's ongoing focus on international cooperation, the Division's criminal enforcement program will likely continue to invest in building stronger ties with its Latin American counterparts through inter-governmental meetings/workshops and personnel exchange programs, as well as by continuing to serve as an informal advisor on investigations and prosecutions.

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[1] The fine totals used in this alert have been calculated based on the U.S. government's fiscal year, which runs from October 1 to September 30 of each year.

[2] This increase is largely attributable to the two corporate fines imposed during FY 2018: BNP Paribas USA Inc. ($90 million; Foreign Exchange investigation) and Maruyasu Industries Co, Ltd. ($12 million; Auto Parts investigation).

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