

CLIENT ALERT

DOJ Antitrust Division Announces Organizational Changes Focused On Increasing Prosecution of Consent Decree Violations and Civil Conduct Offenses

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On August 20, 2020, the U.S. Department of Justice Antitrust Division announced three organizational changes that, if fully implemented, could significantly influence the manner in which it conducts its civil investigations and enforces its judgments and consent decrees. Specifically, the Antitrust Division announced: (i) the creation of an Office of Decree Enforcement and Compliance, which will be responsible for investigating and prosecuting both merger and non-merger judgment and consent decree violations; (ii) the establishment of a permanent Civil Conduct Task Force, which will be responsible for investigating and prosecuting non-merger-related anticompetitive business practices; and (iii) the reallocation of certain industries and related commodities among its civil Sections.

A key question that remains is whether these significant organizational changes can be fully implemented by the Antitrust Division's current leadership team prior to the upcoming election. Another key question is whether such changes will be continued by the Antitrust Division's next leadership team, especially if there is a change in administration and/or significant pushback from the Division's career attorneys and economists. Nevertheless, these proposals reflect and reinforce the priorities of the current Antitrust Division leadership team.

If these changes are fully implemented, companies should expect the Antitrust Division to: (i) vigorously monitor and enforce their compliance with civil judgments and consent decrees, including through contempt proceedings; (ii) ensure that the Division's civil conduct investigations are no longer "deprioritized" due to the staffing and resource needs of merger investigations, which must be completed within statutory or negotiated deadlines; and (iii) alter the manner in which the Division conducts investigations in the industries that will now be handled by new Sections and personnel with potentially different enforcement approaches.

Office of Decree Enforcement and Compliance

During the past three years, the Antitrust Division has taken several steps intended to strengthen its ability to successfully prosecute consent decree violations as well as to increase the penalties imposed on companies that fail to comply with their decree obligations. For instance, the Antitrust Division's standard civil consent decree template now includes provisions that: (i) lower the evidentiary standard that the Division must satisfy when seeking to enforce a consent decree in court (*i.e.*, the Division need only satisfy the preponderance of evidence standard rather than the clear and convincing standard that typically governs contempt proceedings); (ii) require companies to reimburse the Division for its investigatory and litigation costs if a decree violation is established; and (iii) allow the Division to secure a decree extension equal to the term of the decree if a violation is established.

As part of these decree enforcement efforts, the Antitrust Division promised two years ago to create an Office of Decree Enforcement and Compliance, which it has now done. In announcing the creation of this office, the Antitrust Division stated that

the office’s mandate will be to “hold parties fully to account for the agreements they enter with the Antitrust Division” and to “ensure the American consumer fully benefits from the Antitrust Division’s hard work identifying anticompetitive mergers and conduct.”

In terms of the office’s responsibilities and structure, the Antitrust Division provided the following details:

- The office will have primary responsibility for the enforcement of judgments and consent decrees in civil matters.
- The office will work closely with the Antitrust Division’s attorneys, as well as monitors and corporate compliance officers, to ensure the effective implementation of and compliance with the Division’s judgments and decrees.
- The office will serve as the central repository for receiving and responding to whistleblower and citizen complaints regarding potential judgment and decree violations.
- The office will advise the Antitrust Division’s criminal Sections when parties seek credit at the charging stage for their corporate compliance programs.
- The office will be led by Lawrence Reicher, who has been with the Antitrust Division for nearly four years. Prior to this role, Mr. Reicher served as Counsel to Assistant Attorney General Makan Delrahim, where he helped oversee the Antitrust Division’s ongoing initiative to review nearly 1,300 “legacy” decrees (*i.e.*, decrees that have been in place for several decades and do not have a sunset provision) and thereafter determine which decrees should be terminated.

In discussing the rationale for creating the Office of Decree Enforcement and Compliance, which is similar to a comparable office at the Federal Trade Commission, AAG Delrahim stated that the Antitrust Division needed to establish an office that focuses exclusively on monitoring and enforcing compliance with the Division’s consent decrees because far “[t]oo often, companies make promises to the American people, only to turn their back on some of those obligations when they feel that the cops are not on the beat.”

Civil Conduct Task Force

While reports indicate that the Antitrust Division specifically and DOJ more generally have dedicated significant resources to the ongoing “Big Tech” antitrust probes, the Division’s civil conduct investigations have traditionally taken somewhat of a backseat to its merger investigations because conduct investigations are not subject to any deadlines. Consequently, when faced with a significant increase in the number of merger investigations or the demands of such investigations, the Antitrust Division has often shifted staffing and resources away from its civil conduct matters to its merger matters, which must be completed within the statutory or negotiated timeframe. This resource strain creates the risk that civil conduct investigations will unnecessarily linger for extended periods, thereby subjecting companies to the uncertainty, costs, and stress associated with having a DOJ investigation hanging over their heads. Conversely, this resource strain creates the risk that potentially meritorious civil conduct investigations will be closed prematurely or unnecessarily narrowed in scope.

To help address these risks, the Antitrust Division announced the creation of a permanent Civil Conduct Task Force, which is intended to “energize and prioritize non-merger civil enforcement” by establishing “an independent group [that] . . . will have the dedicated resources and a consistent mandate to investigate and, ultimately, prosecute civil conduct violations[.]” While the Antitrust Division’s announcement did not provide much detail, it suggests that this task force will be taking over certain conduct investigations that are presently being conducted by the Division’s six civil Sections. According to the Antitrust Division’s announcement, this task force will help ensure that civil conduct investigations are conducted in an efficient and effective

manner by providing “additional focus and resources” and by creating “greater accountability [within the Division].” Reports have indicated that the task force will be comprised of three core members and nine members from the Antitrust Division’s civil Sections and field offices that have expertise in conduct matters.

The types of civil conduct investigations that the task force could take over include investigations related to corporate employment practices (*i.e.*, no-poach and non-solicitation agreements), state and federal government procurement contests, intellectual property licensing restrictions, standard-setting rules, and exclusive dealing arrangements.

Realignment of Assigned Industries and Commodities

The Antitrust Division announced the following changes concerning the allocation of industries and commodities among its civil Sections:

- The currently-named Media, Entertainment and Professional Services Section will no longer be responsible for media and entertainment issues, but now will be responsible for handling matters related to the financial services, fintech and banking industries. These industries and their related commodities were previously divided across four civil Sections. The Antitrust Division’s decision to centralize its civil enforcement in the financial services, fintech and banking industries, along with its recent decision to formalize its ongoing cooperation with the Securities and Exchange Commission through a Memorandum of Understanding, signals that the Division fully intends to continue being active in financial markets.
- The Telecommunications and Broadband Section will expand its existing portfolio to include – in addition to the telecommunications industry – the media and entertainment industries.
- The Technology and Financial Services Section will no longer handle matters related to the financial services industry and instead will focus exclusively on technology markets and the competitive characteristics of digital platform business models.
- Each of these sections will be renamed to reflect their new industry and commodity assignments.

The last time that the Antitrust Division reallocated industries and commodities among its civil Sections was nearly 20 years ago. In explaining these changes, the Antitrust Division stated that “technology has reshaped the competitive dynamics in several industries” and “the way Americans consume [various] services.” The Antitrust Division also said that the consolidation and reassignment of these industries and related commodities will make the Division a “more efficient and more effective” enforcer in these areas.

In the past, the Antitrust Division’s career lawyers and economists have strongly resisted any efforts to change how industries and commodities are allocated among the civil Sections, which could occur once again with respect to these changes, especially given that we are less than 80 days prior to a presidential election. But the practical impact is that, absent significant personnel transfers, companies in the affected sectors may find themselves dealing with different career staff and Section leadership who do not have the background knowledge or history of prior dealings. Of course, this new dynamic could present both challenges and opportunities for companies involved in merger and civil non-merger investigations.

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