

PUBLICATION

The New Tag Team – Antitrust and FCPA

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Is your company seeking new markets outside the U.S. and North America, or engaging more actively in industry trade associations, conferences and events? The attraction of foreign markets and enhanced industry participation carries a cautionary element: the need to develop and implement more sophisticated compliance apparatus. Compliance professionals now mention their concern with the Foreign Corrupt Practices Act (FCPA) in the same breath as compliance with antitrust/competition laws. This is not surprising, given the significant growth in federal efforts at FCPA enforcement and the major financial penalties, jail sentences, business disruption and costs that can be imposed for non-compliance. Due to this major growth in FCPA enforcement by the U.S. Department of Justice (DOJ), antitrust and FCPA have become the new "tag team" for federal compliance enforcement activity, with either area able to deliver a potent body blow to any business.

Recent examples of some "tag team" action include:

- Avon Cosmetics is reporting over \$175 million in legal and investigative costs due to an FCPA investigation that started in connection with activities in China and now has expanded worldwide. Avon has also fired several high level executives and been hit with shareholder derivative actions.
- The Connecticut Attorney General recently fined three hotel groups over an alleged price-fixing scheme for hotel rooms involving informal information exchanges or "call-arounds."
- Las Vegas Sands Corp. reports it is being investigated by the DOJ and the Securities and Exchange Commission for alleged FCPA violations arising out of business operations in China. It has already been fined by the Chinese government and is facing shareholder derivative actions.
- Major hotel chains (including Radisson, Starwood and Thistle) are reportedly being investigated by the United Kingdom for price-fixing.

There are many similarities between FCPA and antitrust/competition enforcement, and both should be emphasized in compliance training. Both laws share a core concept: prohibition of conduct that injures competition, with the FCPA focusing on bribery or payments to government officials to secure an "improper advantage" or in order to assist in obtaining or retaining business, and the United States antitrust laws focusing on injury to competition. As briefly summarized below, many of the principal themes stressed in antitrust compliance programs apply equally to FCPA compliance training.

Substantial civil and criminal fines – While antitrust violations have resulted in huge fines, the U.S. government is now seeking even larger fines for FCPA violations.¹ In 2010, the DOJ imposed almost \$1.8 billion in FCPA fines and penalties, over three times as much as the DOJ's Antitrust Division imposed during the same period for antitrust offenses. And foreign governments are imposing major penalties for violations of their versions of the FCPA. For example, Siemens recently was fined \$1.6 billion by the U.S. and Germany for bribery violations and reportedly incurred over \$1 billion in investigative and legal costs.

Substantial jail terms – The Antitrust Division has made incarceration of individuals a priority and has imposed record jail sentences for antitrust violations, some as long as 48 months. Similarly, the Criminal Division is seeking and obtaining substantial jail time for individuals convicted of violating the FCPA, even for seemingly small violations. For example, one corporate executive received a 57-month jail term for bribes paid

to obtain a Haitian telecommunications contract. Another corporate executive was sentenced to 87 months for paying bribes to Panamanian officials for a contract to maintain lighthouses and buoys.

Undercover surveillance and stings – Undercover surveillance, stings, informants and wiretaps have been frequently used by DOJ to collect incriminating evidence of antitrust violations. The most notorious examples are the Archer Daniels lysine price-fixing tapes where co-conspirators at price-fixing meetings were secretly videotaped while joking that the empty seats at the meeting table were for the FBI and the Federal Trade Commission. Similar techniques are now being used in FCPA enforcement, the most high profile example being the "shot show" sting operation where 21 employees of defense and security products were arrested at a Las Vegas trade show for attempting to bribe FBI agents posing as foreign government officials.

Leniency and amnesty – The Antitrust Division has a well-established and well-publicized amnesty program that provides substantial benefits for the first company to report an anticompetitive conspiracy. The DOJ has now begun to emphasize the benefits of voluntary disclosure in FCPA matters, with the DOJ stating that it gave "meaningful credit" to companies that voluntarily disclosed and cooperated in the form of lower fines. Moreover, the whistleblower/bountyhunter provisions of Section 922(a) of the Dodd-Frank Act provide significant financial rewards to whistleblowers who provide original information to the government, and this will likely increase the incentive for companies to self-report in the hope of obtaining some leniency.

International cooperation and enforcement – Recent antitrust enforcement has been marked by international cooperation, including coordinated and simultaneous worldwide dawn raids to execute search warrants. There has been a significant increase in coordinated international enforcement and cooperation in the FCPA/bribery area as well. More countries are becoming active enforcers of bribery laws, including the United Kingdom, Germany, Norway and Switzerland. The United Kingdom has just enacted its own FCPA counterpart, which in some respects is more stringent than the U.S. FCPA.

Follow-on private actions – Follow-on private treble damage class actions by allegedly injured parties with standing are a given in the antitrust area. Private actions based on FCPA violations or investigations are increasing. For example, follow-on securities class actions and/or derivative actions alleging breaches of fiduciary duty have been filed after the announcement of FCPA violations or investigations. In addition, competitors have filed lawsuits claiming the alleged bribery constituted unfair competition under state law and common law theories and unlawful commercial bribery under the federal Robinson-Patman Act.

Watch the company you keep – Antitrust compliance programs stress the need for utmost caution in dealing with competitors, especially in the trade association context. In the FCPA area, the company you keep must also be carefully managed, with special attention paid to intermediaries, consultants, partners or agents who deal with government officials. The FCPA imposes liability if you know your agent may be paying a bribe or if you consciously disregarded certain warning signs or red flags. These red flags are well-established and should be stressed in a compliance program, just like the antitrust red flags that arise in dealing with competitors.

The "everybody does it/we have always done it this way" defense doesn't work – Many antitrust compliance programs contain clear restrictions on contacts with competitors and limits on trade association participation and activity. Employees sometimes respond to those restrictions by saying "everybody does it" and "we have always done it that way." This is often a common response to FCPA training as well, especially in countries where bribery is the accepted way of doing business and there is a culture of corruption. FCPA training should stress that compliance is important to protect both the company and the individual employee, especially in this era of increased international enforcement with sophisticated investigative techniques and long jail terms. While everybody may be doing it, many are getting caught and facing substantial penalties and substantial jail time.

Significant investigative costs and business disruption – Just as in the antitrust area, FCPA investigations can open a Pandora's Box and unleash a parade of horrors beyond substantial penalties. This parade can include enormous investigative costs paid to outside professionals for internal investigations, with the government requiring an extensive in-house investigation of all contacts and dealings with foreign government officials world-wide, not just in the country where the offense was discovered. As discussed above, Siemens reportedly incurred over \$1 billion in investigative costs, and Avon is projecting FCPA-related investigative costs of \$175 million.

Loss of business and reputation – Companies that violate the FCPA often face the prospect of significant loss of business and reputation, just as antitrust violators are often regarded suspiciously by customers victimized by a price-fixing conspiracy. Many companies now routinely include contractual provisions requiring their third parties to comply with all applicable bribery laws and providing audit rights to ensure compliance. Given the enormous investigative costs and potential liability, no company wants to get swept up in a massive and expensive FCPA investigation because of the actions of one of its business partners. Moreover, companies can be suspended or face debarment from government contracts for FCPA violations.

Importance of a strong compliance program – As in the antitrust area, a strong and effective FCPA/anti-bribery compliance program can prevent and detect potential violations, and provide some credit in the event of enforcement action. Many of the essential components of an effective FCPA compliance program are similar to those in antitrust compliance programs, specifically: a clearly articulated and written compliance code, full management support with a strong and ethical tone (and consistent action) at the top, periodic training for all employees, risk assessments, periodic audits, internal procedures to report and address violations and due diligence of intermediaries, agents, and business partners. Importantly, given the enormous primary and secondary blows that either FCPA or antitrust enforcement can inflict on a business, compliance programs should stress the importance of avoiding the appearance of impropriety and the importance of seeking immediate legal advice if questionable activities are encountered.

¹ The FCPA is jointly enforced by the DOJ Criminal Division and the Securities and Exchange Commission, while price-fixing prosecution is the province of the DOJ Antitrust Division.