

Expect More Criminal Enforcement & What you Can do to Minimize Your Risk

Article By:

Justin P. Murphy

Alexandra Lewis

Antitrust cartel and related collusive scheme enforcement is poised to increase. Several factors support this: (1) the Antitrust Division (the Division) has a 10% budget increase for Fiscal Year (FY) 2021; (2) proposed legislation that would increase its budget by \$300 million; (3) Democratic administrations have traditionally been more aggressive in enforcing antitrust laws; (4) according to the US Department of Justice (DOJ), last year the Division opened the most grand jury investigations in almost 20 years and by the end of 2020 had the most open grand jury investigations in a decade; (5) increased coordination with international law enforcement agencies, including the Division recently signing a number of cross-border agreements, maintaining active memberships in multilateral organizations dedicated to cross-border antitrust enforcement cooperation and a DOJ official recently noting they have been working at strengthening their relationships with international law enforcement agencies during the pandemic and they expect this to benefit international coordination on investigations and (6) as pandemic limitations on in-person investigative tactics subside (including search warrants and knock and talk interviews, among others), expect a return to overt tactics related to open grand jury investigations.

Historically, cartel enforcement has increased following economic downturns and substantial federal stimulus packages. For example, after the 2008 financial crisis and the 2009 Recovery Act, the DOJ filed 60% more criminal cases than in prior years. We expect this trend to continue in the wake of the unprecedented government stimulus packages passed in 2020 and 2021 and additional potential government spending on infrastructure. In addition to the increased resources, the Division has stepped up its criminal enforcement program with the creation and recent expansion of the Procurement Collusion Strike Force (PCSF), the expansion of criminal investigations and prosecutions into labor markets, [higher expectations for corporate cooperators](#) and new potential benefits for corporate entities with [compliance programs addressing antitrust violations](#).

Below we discuss the sectors most likely to be implicated by increased criminal antitrust enforcement, the PCSF and what steps can be taken to prepare and minimize risk in this environment.

IN DEPTH

EXPECTED INDUSTRY FOCUS

Based on the trends described above and our recent experience at the DOJ, we expect antitrust criminal enforcement to focus in at least the following industries:

- Healthcare – The DOJ remains active in this sector with its ongoing generics investigations and prosecutions and other cases relating to market allocation and labor markets. In fact, all of the charged labor market cases thus far have been in the healthcare industry. The DOJ has stated that investigations and prosecutions for violations in the healthcare sector remain its top focus and stimulus spending will likely serve to increase the DOJ’s attention to healthcare markets. Although healthcare compliance policies have often focused on other fraud and abuse issues, such as the Anti-Kickback Statute and Stark Law, compliance with antitrust laws – including for human resources – is now more critical than ever. In addition, the recently signed Competitive Health Insurance Reform Act significantly narrows the exemption for health and dental insurers from the federal antitrust laws.
 - **Practice Note:** In January 2021, the McCarran-Ferguson Act (the Act), which generally provides that insurance-related conduct is exempt from the US federal antitrust laws, was amended only to the “business of health insurance” (defined to include dental insurance), curbing the breadth of the Act’s antitrust exemption and generally removing the prior health insurance-related antitrust protections.
- Financial Services –In addition to its historical activity in this sector, [the DOJ announced last fall](#) it intends to further “lean in” and ramp up its focus on antitrust enforcement in the financial services sector. This includes forming an enhanced relationship with the SEC and [signing a memorandum of understanding](#) that permits the two agencies to confer and share information regarding law enforcement and regulation of competition in the securities markets.
- Labor Markets – Since the DOJ’s 2016 proclamation that it intends to investigate and charge wage fixing and naked no-poach agreements as *per se* criminal violations, the Division has indicted three labor market cases since December 2020. The DOJ has also stated that investigating and prosecuting labor market violations is a “top priority” and that additional charged cases are expected this year.
- Technology – Technology is currently at the forefront of aggressive antitrust enforcement but companies need to think beyond Big Tech platforms such as Google, Microsoft and Facebook as the DOJ remains focused on broader exclusionary conduct that technology and digital market companies engage in to prevent competition.
- Energy – The expected focus in this sector coincides with the Biden Administration’s emphasis and priority on climate change and clean energy policies, as well as recent investigations and prosecutions in this area. (See: [here](#), [here](#), [here](#) and [here](#).)
- Construction – The DOJ has historically been active in the construction industry, including its most recent charges relating to companies allegedly defrauding federal programs in the small business administration (SBA) context and public works contracts. (See: [here](#) and [here](#).) With the Biden Administration’s proposed \$2 trillion infrastructure plan, we expect this enforcement trend to continue, particularly with the rise of the PCSF.

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- Defense/Procurement – As discussed below, the DOJ is focused on collusion that victimizes the government and recently expanded the PCSF to include both a domestic and international focus.

THE PCSF WILL AFFECT MANY INDUSTRIES

Investigations and prosecutions relating to procurement are not just about traditional government defense contractors, rather, the PCSF is active in a broad array of industries that contract with the government, including construction, healthcare, defense and energy. The PCSF leads the DOJ's coordinated national response to combating antitrust crimes and related schemes in government procurement, grant and program funding fraud at the federal, state and local government level. The PCSF has prioritized trainings on recognizing antitrust crimes and red flags of collusion and to date has trained over 10,000 law enforcement agents, analysts, auditors, lawyers and procurement officers from over 500 offices and agencies that investigate a broad swath of conduct in numerous industries. The PCSF recently expanded its domestic reach and in 2021, we expect the PCSF to (1) further expand its platform with PCSF Global; (2) further build out its data analytics program and mine available procurement data, among others, to identify patterns that indicate or suggest collusion and (3) advance some of its dozens of open investigations to the charging stage, where appropriate.

Companies doing business with government agencies – even if it's only a small percentage of their business – should expect increased scrutiny for bids and the bid award process, including potential changes to the bid award process. Companies should be attentive in ensuring their compliance with the antitrust and government procurement laws, particularly in light of the DOJ's compliance program guidance (discussed below). Based on our recent experience with the PCSF, companies can minimize their risks in the following ways:

- Carefully review and document any no-bid or high-bid decisions and provide business justifications for such decisions
- Have counsel review any decisions to the team and/or joint bid with other companies in advance
- Have counsel review any sub-contracting arrangements with other companies that bid (or regularly bid) on the same projects in advance
- Ensure bids are legitimate and pricing decisions are determined in good faith and without collusion
- Monitor the procurement process
- Understand the red flags of collusion (indicators, patterns and/or circumstances where collusion may exist) and other indicators that suggest to the government that additional scrutiny of the bid process is warranted.

The DOJ's recently charged cases provide insight into the breadth of future conduct the PCSF will investigate and pursue, both domestically and abroad and against individuals and corporations. [For example](#), the Division has aggressively investigated and prosecuted individuals for allegedly defrauding the SBA for more than \$250 million, as well as [bid-rigging at General Services](#)

[Administration \(GSA\) Auctions](#) where the alleged loss (less than \$70,000) is miniscule in comparison. The DOJ has shown its willingness to step into regional corporate conduct allegedly defrauding the government (See: [here](#) and [here](#).), as well as aggressively pursuing allegedly fraudulent conduct on an international scale. (See: [here](#), [here](#) and [here](#).) Simply put, the PCSF is not limited to only large-scale or domestic investigations. The emergence from a global pandemic and the unprecedented government stimulus spending just as the PCSF is expanding its reach should bolster the PCSF's efforts in the coming year.

Practice Note: [In the Division's ongoing North Carolina Drainage public works contract investigation](#), the indictment alleged bid-rigging between a manufacturer and its supplier, which is typically a vertical relationship and generally subject to the Rule of Reason rather than *per se* criminal analysis. However, the DOJ alleged the manufacturer and its supplier held themselves out as competitors when submitting the bids in question over a 10-year period. In a recent ruling on a motion to dismiss, the US District Court for the Eastern District of North Carolina (EDNC) held that the allegations were subject to *per se* criminal analysis. This prosecution demonstrates that the DOJ is willing to aggressively investigate and prosecute competitor relationships that are traditionally examined under a Rule of Reason analysis and instead focus on the specific, alleged transaction(s) between vertical entities. Such prosecutions may be more common where joint ventures or similar teaming agreements are not in place.

WHAT CAN YOU DO TO PREPARE FOR THIS ENVIRONMENT AND MINIMIZE RISK?

Historically, the Division provided no credit to corporate entities for their compliance programs at the charging recommendation stage in criminal antitrust investigations. In a substantial shift, the DOJ announced it would consider corporate compliance programs at the charging and penalty recommendation stages and published its guidance for prosecutors to evaluate such compliance programs. (See: [here](#) and [here](#).) More importantly, the DOJ now allows criminal antitrust violations to be resolved with deferred prosecution agreements (DPA).

This is a significant development and opportunity for companies to proactively consider and reevaluate their antitrust compliance programs. An antitrust violation can be costly – it may result in substantial criminal fines, potential suspension or debarment, the criminal investigation and/or prosecution of corporate executives, up to treble damages in parallel civil proceedings and reputational damage. An effective antitrust compliance program may entirely avoid, significantly avoid or lessen these costs. It may also allow detection of potential violations and provide an opportunity to seek leniency or ultimately receive a DPA if leniency is not available.

Based on our recent experience at the DOJ, the following corporate compliance considerations are critical:

- Establish a clear corporate policy of full antitrust compliance
- Encourage management oversight/tone at the top
- Conduct antitrust audits, monitoring and training
- Conduct risk assessment appropriately tailored to business and industry, accounting for prior antitrust concerns in industry and employees having high-risk communications or interactions with competitors, and the use of technology and data analytics in such efforts

- Establish best practices for competitor communications/information exchange
- Be diligent. Adapt compliance program as necessary

With appropriately tailored antitrust compliance programs that will identify and detect potential violations, companies should be well-positioned to avoid or minimize risks from the expected DOJ increase in domestic and international criminal antitrust enforcement.

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