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PERSPECTIVE

2017 IN REVIEW

Criminal antitrust enforcement likely to keep pace

By Nell Clement and James Allison

2017 has brought a new presidential administration and a new head of the Antitrust Division of the Department of Justice. Despite these leadership changes, it appears that criminal enforcement of antitrust violations will continue under President Donald Trump to the same extent as enforcement under the Obama administration. This article examines this year's updates in the area of criminal antitrust, including ongoing and new criminal antitrust cases and important policy updates related to criminal antitrust.

New Head of the Antitrust Division

In March, Trump nominated Makan Delrahim to serve as the U.S. assistant attorney general for the Antitrust Division. Delrahim comes from private practice — most recently, the law firm Brownstein Hyatt Farber Schreck — where he worked as a lawyer and lobbyist for large corporate clients (in addition to being a frequent op-ed contributor to the Daily Journal). He had previously served as deputy assistant attorney general for the Antitrust Division in the early 2000s. Delrahim was formally confirmed by the Senate in September, and is expected to continue aggressive criminal enforcement. Delrahim's support for greater international cooperation during his previous stint at the division suggests that he will continue the division's ongoing push for increased international coordination in cartel enforcement.

Selected Case and Investigation Updates

The Antitrust Division's investigation into price-fixing in the electrolytic capacitor industry has been



New York Times photo service

Makan Delrahim, the new head of the Antitrust Division at the Department of Justice and a member of President Trump's transition team, in Washington, Nov. 7.

extremely active, with multiple corporate and individual guilty pleas since the beginning of the year. To date, seven companies have entered guilty pleas and one additional company, Nippon Chemi-Con, has been indicted. Nine individual executives have been indicted and the division obtained its first individual guilty plea in the capacitor investigation when Satoshi Okubo, a former Matsuo sales manager, pled guilty to price-fixing in May and was sentenced to one year and one day.

The capacitor cases are assigned to Judge James Donato of the Northern District of California, who was the source of some unexpected drama in his rejection of a number of corporate antitrust pleas earlier this year. After continually expressing displeasure with the amount of fines included in the corporate plea agreements in the capacitor cases, Judge Donato rejected the guilty pleas of Matsuo Electric Co. Ltd., Elna Co. Ltd., and Holy Stone Holdings Co. Ltd. Each of the rejected pleas was a Federal Rule of Criminal Procedure 11(C)(1)(c) plea, meaning Judge Donato, if he accepted the plea, was bound to impose the recommended fine agreed to in the plea agreement. In reject-

ing each plea, Judge Donato set the cases for trial on an extremely short timeframe, which required the Division and the pleading companies to work quickly to address the judge's concerns. The resolution for each was to change the plea to a Rule 11(C)(1)(b) plea, allowing Judge Donato discretion to reject the recommended fine included in the agreement and impose the fine he believes to be appropriate.

This fall Judge Donato accepted the 11(C)(1)(b) pleas and Matsuo, Elna and Holy Stone are each set to be sentenced in early 2018. Given that Judge Donato will not be bound by the recommended fine in the plea agreement, it will be interesting to see what fine he ultimately imposes for each company and whether that fine is significantly greater than the fine recommended by the Division in the plea agreement.

The Antitrust Division's investigation into Sherman Act violations in the customized promotional products industry is in its early stages. In early August, the division obtained the guilty pleas of Zaapaaz, Inc. and its president to a one-count criminal violation of the Sherman Act. Zaapaaz agreed to pay a \$1.9 million criminal fine. Later that same month, as part of the same ongoing investigation, the division obtained the guilty pleas of Custom Wristbands Inc. and its top executive. Both are charged with violating the Sherman Act. Custom Wristbands agreed to pay \$409,342 in criminal fines. Unique from the many traditional price fixing conspiracies in which co-conspirators meet in person or over the phone, in these cases the defendants and co-conspirators tried to avoid exposure of their conduct through use of text messaging, social media platforms and encrypted messaging applications. Acting Assistant

Attorney General Andrew Finch stated that this case demonstrates that "criminals cannot evade detection by conspiring online and using encrypted messaging." As a result of these two companies cooperating in the division's ongoing investigation in the customized promotional products industry, there is a high likelihood that additional companies and individuals will be charged.

The division has secured three guilty pleas, one corporate and two individual, in the packaged seafood industry related to a conspiracy to fix prices for packaged tuna in the United States. In January the government filed its plea agreement with a vice president at Bumble Bee Foods, LLC and in June another Bumble Bee executive pled guilty before Judge Edward M. Chen, also of the Northern District of California. Then, in August, Bumble Bee Foods, LLC pled guilty to Sherman Act violations and agreed to pay a \$25 million fine. In September, Tri-Union Seafoods LLC, the U.S. subsidiary of Thai Union Group P.C.L., announced that it had received conditional leniency under the Antitrust Division's Corporate Leniency Program, indicating that it had been the first company to cooperate in the investigation and its continued cooperation would allow the company and its employees to avoid criminal prosecution.

Policy and Other Updates

Civil/Criminal Collaboration. In September 2015, then Deputy Attorney General Sally Yates issued a memorandum issuing directives for DOJ attorneys. One of these directives was for civil and criminal DOJ attorneys to collaborate during all stages of their respective investigations. Two recent criminal cases brought by the Antitrust Division, the packaged seafood

case and a criminal obstruction of justice case in the hop-on, hop-off bus industry, demonstrate that the division is implementing the Yates directive of civil-criminal collaboration.

The civil side of the Antitrust Division recently investigated a proposed merger between Thai Union Group P.C.L., owner of Tri-Union Seafoods, LLC and Bumble Bee Foods, LLC. During the civil division's review of the proposed merger, the division discovered evidence of Sherman Act violations and referred the case to their criminal counterparts at the division, resulting in the investigation in the packaged seafood industry referenced above.

In 2015, civil attorneys at the division obtained a settlement in the New York City hop-on, hop-off bus industry, where two major bus companies agreed to pay \$7.5 million in disgorgement of profits based on allegations that the companies used a joint venture to gain an illegal monopoly in the industry. During their civil investigation, division attorneys learned of potential spoliation and obstruction and referred

the case to criminal prosecutors. In late 2016, a former executive for one of the companies pled guilty to obstruction of justice charges and was sentenced in March, 2017 to 15 months in prison.

Enforcement of Illegal "No-Poaching" Agreements. In September, then-Acting Assistant Attorney General Finch announced that the Antitrust Division will investigate and prosecute illegal "no-poaching" and "wage-fixing" agreements entered into by employers. These agreements involve competing companies agreeing not to hire each other's employees, or setting compensation at a level designed to prevent competition between companies for the employees. The DOJ and FTC announced the policy change in late 2016 and made clear they would seek criminal penalties, as opposed to merely civil penalties, in no-poaching and wage-fixing cases. Notably, illegal agreements are not only between companies that compete in the consumer marketplace, but also between companies that compete to hire the same employees, even if those companies are not tradi-

tionally considered competitors. With this new focus, the division is using antitrust law to not only protect consumers, but also to protect employees.

Criminal Antitrust Anti-Retaliation Act. In April, Sens. Chuck Grassley and Patrick Leahy introduced proposed legislation titled the Criminal Antitrust Anti-Retaliation Act of 2017. This act contains anti-retaliation protections for employees who blow the whistle on antitrust violations. Although the act provides for an aggrieved employee to receive compensatory damages, including back pay and attorney fees, the act does not provide any whistleblower payouts, such as those provided by the SEC and IRS whistleblower programs. The Senate passed the act unanimously last month and the House has until Jan. 2, 2019 to vote on the bill.

Conclusion

In 2017, the Antitrust Division marched forward in its criminal enforcement, obtaining many successful case resolutions in various cartel investigations and initiating

new cartel investigations and cases. New guidance from DOJ and the Antitrust Division demonstrates increased efforts at cooperation and collaboration between civil and criminal attorneys within the DOJ. This cooperation and collaboration greatly facilitates the division's ability to conduct criminal antitrust probes and subsequently bring related criminal cases. Proposed legislation, if enacted, will add to the division's tool chest in its criminal enforcement efforts, creating protections for employee whistleblowers in the antitrust arena. All of these updates demonstrate that the Antitrust Division's criminal enforcement will continue to remain active in the near future and will potentially venture into new areas, such as criminally prosecuting anti-poaching and wage fixing agreements.

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