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NEW FEDERAL LAW PROVIDES ADDITIONAL "STICKS & CARROTS" TO ANTITRUST PROSECUTORS

by
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A tough bipartisan antitrust reform act, the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (H.R. 1086), was passed in bi-partisan fashion by the Senate on April 2, 2004 and approved by the House of Representatives on June 2, 2004. The President recently signed the law, which was introduced jointly by Senators DeWine and Kohl on October 29, 2003.

In the wake of the past few years' corporate scandals, the proposal seeks to do for antitrust violations such as price fixing, bid rigging and market allocation what the Sarbanes-Oxley Act of 2002 did for the securities industry.

Dramatic Enhancement of Criminal Penalties. The Act imposes significantly higher criminal antitrust penalties for businesses and individuals that commit violations under Section 1 or 3 of the Sherman Act or a violation of any similar state law: (1) the maximum corporate fine is raised to $100 million from $10 million; (2) the maximum individual fine is raised to $1 million from $350,000; and (3) the maximum prison sentence is increased to 10 years from 3 years.

Before this legislation, the government could exceed the $10 million maximum by using the alternative fine provision of 18 U.S.C. § 3571(d), which provides for a fine of twice the gain or loss resulting from the illegal conduct. Under the U.S. Sentencing Guidelines, to begin this calculation a court is directed to "use 20 percent of the volume of affected commerce," which is then multiplied by minimum and maximum multipliers, which in turn are affected by the organization's culpability score. The rationale for the 20% presumption, as set forth in Section 2(R)1.1 of the Sentencing Guidelines, is "to avoid the time and expense that would be required for the Court to determine the actual gain or loss." In practice, because of the large volume of commerce involved in recent cartel cases, criminal sentences have frequently exceeded the statutory maximum imposed on corporations. Consequently, the Justice Department has been able to obtain agreed-upon fines of up to $500 million in antitrust cases.

Where defendants do not agree to sentences, however, the government's standards of proof are high. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000) the Supreme Court held that "any fact that increases the penalty for a crime beyond the statutory maximum must be … proved beyond a reasonable doubt." On June 24, 2004, in a 5 to 4 decision in *Blakely v. Washington*, the Supreme Court applied the rule in *Apprendi* holding that Washington State's sentencing guidelines were unconstitutional because they allowed a judge to consider factors to increase a sentence, rather than a jury, in violation of the defendant's right to trial by jury. 542 U.S.___(2004). While neither case involved application of the federal sentencing guidelines, at least a half-

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dozen lower federal courts have applied its logic and held the guidelines to be unconstitutional; and there are presently two appellate decisions in conflict from the Seventh and Fifth Circuits. Thus, there is a risk that corporations view the cost of crime as a cost of doing business and that the government may not achieve fines large enough to deter crimes.

With the new legislation, the Department of Justice will benefit from the higher statutory thresholds. While it still will be able to use the alternate fine provision, a $100 million fine can be imposed regardless of the volume of commerce affected. It is likely that the average amount of fines imposed by the Division will increase accordingly, and that the deterrence effort will be greater.

De-trebling of Civil Damages for Cooperating Companies and Individuals. Since the Justice Department restructured its Corporate Leniency Policy in 1993, an individual or a corporation that is the first cartel member to cooperate with the DOJ's investigation is granted amnesty from criminal prosecution so long as they live up to their agreements with the government and cooperate. Others who follow do not obtain amnesty but may obtain reductions in sentences. Thus, by creating an incentive to confess and cooperate, the leniency policy undermines the essence of coordinated anticompetitive behavior — trust — and goes to the heart of antitrust conspiracies.

Cartel members, however, could still be deterred from participating in the Leniency Program because they remained liable for treble damages in civil litigation by private parties. The new legislation limits the private litigation exposure of the first cooperating cartel company or cooperating individuals to "actual" or "single" damages. An appropriate level of cooperation, defined by the Act, involves: (1) providing a full account of all facts relevant to the civil action; (2) furnishing all documents relevant to the civil action; and (3) making oneself available for interviews, depositions and testimonies in connection with the civil action.

This de-trebling provision has a five-year sunset, which evidences the government's desire (i) to test the effectiveness of this policy and (ii) to provide the requisite incentives to dismantle quickly a large number of cartels. Of course, the efficiency of this provision will depend on the individual parameters of each cartel, including (i) comparative cost and benefits of leniency versus the profits derived from the cartel and (ii) the likelihood that the cartel will be discovered.

Tunney Act Amendments. The Antitrust Procedures and Penalties Act of 1974 (the Tunney Act) requires courts to review consent decrees to determine whether they are within "the reaches of the public interest." Courts have afforded what some viewed as excessive deference to the Antitrust Division's consent decrees. To ensure scrutiny of settlements in DOJ's civil antitrust cases, the legislation now requires ("shall"), rather than merely authorizes ("may"), courts to consider certain identified factors when reviewing a consent decree, including the competitive impact of such judgment; and the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint.

The amendments add two factors that the court shall consider: (i) whether the terms of the decree are ambiguous and (ii) the impact of the decree on competition in the relevant market(s).

Another Tunney Act amendment allows the court to permit the government to disseminate consent decrees publicly through methods other than the Federal Register where using the Federal Register would be prohibitively expensive.

These amendments are relatively minor ones. Responsible judges have always scrutinized settlements, even requiring changes where decrees were ambiguous. Importantly, the adopted legislation rejected proposals to give third parties an enhanced role.

Conclusion. The additional "sticks and carrots" defined by the new legislation will certainly help the government identify and prosecute criminal conduct as corporations and their employees have increased incentives to come forward to be the first to cooperate in investigations. International developments may also increase the effect of the legislation. As more and more countries adopt leniency policies, the incentive to cooperate increases and helps to undermine international cartels more effectively. Additionally, the higher jail terms and fines up the ante to help to deter antitrust crimes.

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