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US Antitrust Compliance Programs

By the Association of Corporate Counsel

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Key Points:

- *With the Biden administration, there is a renewed focus on antitrust enforcement.*
- *Companies should have good compliance programs in place, and not wait until wrongdoing is uncovered.*
- *Big tech has drawn the attention of the US Department of Justice, which has brought cases against Google and Facebook.*
- *Most antitrust cases are brought by the federal government under federal law, but the District of Columbia brought an antitrust action against Amazon under D.C. law.*

Enforcement of antitrust laws by the US Department of Justice (DOJ) tends to change depending on the administration in the White House. Since Joe Biden became president, the DOJ has moved towards stronger enforcement of the antitrust laws, particularly against big tech companies.

With this renewed focus on antitrust enforcement, companies should strengthen their compliance programs. This article outlines recent developments, and includes tips for companies.

This article is based on a presentation at the ACC 2021 Annual Meeting, “Antitrust & Big Tech Cases: What They Mean for Your Compliance Program” by Saralisa Brau, Managing Chief Counsel, Antitrust, McKesson Corp., Helen Lee, Senior Compliance Counsel, Accenture, Dionne Lomax, Managing Director, Antitrust and Trade Regulation, Affiliated Trade Monitors, and Joe Miller, Member and Co-chair Antitrust Practice, Mintz.

Key US Antitrust Statutes

The federal statutes upon which most antitrust actions are based are **Sherman Act sections 1 and 2**, which protect fair competition, and the **Clayton Act section 7**, which deals with mergers and acquisitions. The Sherman Act prohibits conduct that unreasonably interferes with competition, which is per se unlawful. Engaging in that type of conduct can result in criminal charges.

Sherman Act section 2 bars monopolizing. While a company can have a large market share, it can't engage in predatory conduct to obtain a monopoly.

Section 7 of the Clayton Act deals with mergers and acquisitions. A company can't buy a competitor where it would result in a lessening of competition.

Recent Developments

Several cases involving the Sherman Act and the Clayton Act have been filed in the last few years against big tech companies such as Google and Facebook.

In October 2020, the US Department of Justice (DOJ) filed [suit](#) against Google in the U.S. District Court for D.C., claiming Google had maintained monopolies in search results in violation of Sherman Act section 2. The government alleged that Google had entered into exclusive agreements with other companies to have Google's search engine on mobile devices in exchange for revenue sharing.

The government's complaint noted that Google did not have any "bad documents." The DOJ argued that, while there were no bad documents, Google employees were specifically instructed not to use certain words in e-mails that would indicate Google's market power. The government asked the court to stop Google's anticompetitive behavior and restore competition.

In December 2020, the Federal Trade Commission (FTC) filed an antitrust [suit](#) against Facebook, claiming Facebook engaged in anticompetitive behavior by acquiring Instagram in 2012, and WhatsApp in 2014. The FTC argued in the D.C. District Court that Facebook acquired the two companies to eliminate competitors to its monopoly.

It is notable that the FTC had approved the two acquisitions at the time but is now seeking to unwind the deals and impose new restrictions of Facebook. In this case, the initial complaint was dismissed, then refiled on Sept. 8, 2021.

Antitrust actions are not always brought under federal law. In *District of Columbia v. Amazon*, the District sued Amazon for anticompetitive behavior under the D.C. Code. The District [alleged](#) Amazon illegally maintained pricing power with contracts that control the prices third-party sellers can charge on Amazon's site. The District claimed that the contracts keep sellers from selling on other platforms, which harms competition.

Need for Compliance Program

Considering these new developments, companies need strong compliance programs. If a company does not have a compliance program, one should be put in place, and improvements should be implemented as soon as any problems are uncovered.

Companies need to ensure that key employees are aware of the compliance program. A company's chief compliance officer may not be working at the company in 10 years from

now, so there is a need for continuity in the compliance program. Continuity is achieved by having **key employees trained** on antitrust law and document management.

A developing compliance program should be tailored to the needs of the company. Even if there is an existing compliance program in place, it should be reviewed to make sure that it is still meeting the company's needs.

Compliance programs should be part of a company's culture. A company's business development team should be trained to look for antitrust violations.

Document retention policies are important, and employees should be trained to **assume all communications or presentations are public**.

In focusing on avoiding anticompetitive behavior, it is helpful to determine what types of behavior federal agencies such as the DOJ are looking at. Big tech companies have used employee no-poaching agreements with other tech companies, by which they agree not to recruit each other's employees. Companies compete for employees, but a no-poaching agreement with competitors can be viewed as anti-competitive behavior.

On July 9, 2021, President Biden signed an [Executive Order](#) to curtail the use of non-compete agreements, noting they unfairly limit a workers' ability to change jobs. A company should review all its non-compete agreements and non-solicitation agreements it may have with competitors.

Companies should also evaluate any product lines where they have market share, or "must have" technology, to look for anti-competitive effects.

Learn More

Read "[Creating and Implementing an Antitrust Compliance Program](#)" by Magdalena Jakubicz, *ACC Docket*, January/February 2017, pp. 27-35.

Read "[Antitrust Training for Your Sales Team](#)" by Erika Ahern, J. Paul Allen, Jill Jacobson.

Read "[Building a Compliance & Ethics Program When You Must Do So with More Influence than Resources](#)" by Laurel Burke, ACC Member.

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