Criminal Antitrust Update

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If you have any questions or if you require additional information, please contact:

Andrew M. Friedman
202-457-5267 (Direct)
202-457-6315 (Fax)
afriedman@pattonboggs.com

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INDUSTRY SCORECARD

Credit Card Fees: Since it suffered an adverse ruling from the European Commission in 2007, MasterCard has been trying to overturn a ruling that prohibited the company from imposing interchange fees. Banks that issue MasterCard credit cards had been charging merchants a fee to process transactions. The General Court of the European Union agreed with the EC that the interchange fees were excessive and interfered with competition, rejecting MasterCard's argument that the fees were necessary for its payment system to function. MasterCard has strongly suggested it will appeal the ruling; primary competitor Visa publicly distanced itself from the ruling though it has been involved in similar litigation in Europe, claiming that it has strived to negotiate and resolve disputes rather than contest them in court.

Banking/Financial: Lloyds Banking Group suspended traders in their derivatives group as a result of ongoing investigations of allegations that banks conspired to manipulate the LIBOR interest rate. A number of banks have apparently suspended or terminated staff that may have been implicated in collusion related to LIBOR rates. In a recent related development, Community Bank & Trust, a Wisconsin bank, recently sued a number of large U.S. banks for artificially depressing the LIBOR for a number of years. The small community bank, which filed its suit as a class action, claims that smaller banks were damaged by significant loan interest losses and could not, unlike the large banks, benefit from government bailouts.

The fallout in the municipal derivatives bid-rigging and price-fixing investigation continued this month as JPMorgan Chase obtained preliminary approval for its $45 million civil settlement. The plaintiffs who might benefit include municipalities and government agencies. Municipal derivatives are a financial instrument created to facilitate investment of bond proceeds while the funds are not being used to pay for long-term public projects. Wachovia Bank, Bank of America, and UBS have all settled claims by civil plaintiffs and/or state attorneys general related to antitrust claims associated with the municipal derivatives.

On the enforcement side of the municipal derivatives investigation, three former UBS executives are preparing for their criminal auction bid-rigging trial. The executives recently won a small victory when they convinced a New York federal magistrate to exclude evidence due to privilege concerns. Ironically, a government taint team had voluntarily redacted documents and audio recordings made by cooperating witnesses based on third-party privilege claims. To date, the defense and the prosecutors have only been provided with the redacted versions. Despite that the recordings may have contained some factual information, in addition to legal advice, the court ruled that the government enforcement team failed to satisfy the

"substantial need" showing necessary to justify disclosure of attorney work product.

Publishing: Penguin Group and Holtzbrinck Publishers (also known as Macmillan) recently answered allegations by the U.S. Justice Department's Antitrust Division (the Division) that they colluded with Apple to fix the price of E-books. Both publishers claimed the government's case is based only on circumstantial evidence and "piles innuendo on top of innuendo." Both publishers had contractual relationships with Apple to sell E-books through Apple's iBookstore. In addition, they have denied agreeing with each other or any other publisher regarding E-book pricing. As Apple initially argued when the Division announced that it was filing suit, both publishers claim that iBookstore actually enhanced E-book competition by serving as real competition to Amazon's dominant presence in the E-book market.

Automotive: Autoliv, a Swedish auto parts manufacturer, pleaded guilty and agreed to pay $14.5 million for its role in a conspiracy to fix the price of steering wheels, air bags, and seat belts. Because most of the guilty pleas in this investigation have focused on collusion that occurred among Asia-based manufacturers, this result may signal that the Division is turning more attention to parts manufacturers in other regions.

A Yazaki executive will serve 14 months in prison for his role in a conspiracy to fix the price of wire harness assemblies. Yazaki already agreed to pay nearly $500 million to resolve criminal price-fixing allegations for its role in the auto parts antitrust conspiracy.

LCD Screens: AU Optronics and its executives failed to obtain reconsideration of their price-fixing convictions in federal court. In denying the defendants' motions for acquittal or for a new trial, Judge Susan Illston held that the defendants surrendered some arguments by stipulating to certain jury instructions at trial. AU Optronics has maintained that its conduct failed to justify jurisdiction under the Foreign Trade Antitrust Improvements Act (FTAIA). The March convictions will undoubtedly be appealed to the Ninth Circuit Court of Appeals.

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outbind://259/ - 01COMPLIANCE TIP: ANTITRUST CHALLENGES FOR TRADE ASSOCIATIONS

Trade associations present a series of relatively unique antitrust compliance issues. U.S. regulatory authorities have historically devoted some enforcement efforts to trade associations with a fairly high degree of success. Trade associations have been sanctioned for adopting codes of conduct that could influence member bidding behavior[1]; the American Bar Association's accreditation practices led to a consent degree and a substantial fine when violations of the decree occurred[2]; and standard-setting activity often draws attention from enforcement authorities.[3] While the Division often reviews issues related to trade associations, the Federal Trade Commission (FTC) has been particularly active in this area.

The activities that are most likely to violate antitrust laws are those that would be considered per se violations of the Sherman Act. These include price-fixing, allocating customers or geographic territories, or adopting industry-wide rules that might adversely affect competition. An agreement to adopt an industry-wide fee or surcharge to address specific economic challenges, for example, would be highly problematic. Group boycotts or other kinds of exclusionary behavior may also be considered per se illegal. For example, when a lawyers' association decided to boycott serving as court-appointed counsel as a way to obtain more competitive rates of compensation, the FTC prohibited future boycotts, and the U.S. Supreme Court ultimately upheld the FTC's order. Federal Trade Comm'n v. Superior Court Trial Lawyers' Ass'n, 493 U.S. 411 (1990). However, boycotts or group actions not designed to affect categories that are generally considered per se illegal may be evaluated under the "rule of reason" and may therefore be less vulnerable to regulatory problems or civil litigation. The unsettled legal landscape surrounding group boycotts means that trade associations should pay particular attention to any group activity that might be interpreted to

exclude parties from a market or otherwise limit or eliminate competition.

Prosecutors investigating potential antitrust violations tend to focus heavily on opportunities for competitors to meet and forge agreements; trade association meetings present the possibility of this kind of risk. Ideally, trade association literature or oral advice provided at meetings will caution members against sharing certain kinds of information, and a lawyer that represents the association should attend and monitor meetings. Members who find themselves in a discussion of issues that could lead to antitrust problems would be well-advised to excuse themselves from the meeting and to openly indicate they are doing so because they are not comfortable discussing particular issues. Informal 'break out' meetings pose a significant risk.

While trade associations serve a valuable function in providing a forum for sharing industry-wide concerns and information, the manner in which information is presented should be evaluated carefully in advance. If a trade association were to facilitate sharing specific competitor pricing information, it could very easily become the focal point of illegal activity. A trade association may be able to share industry-wide pricing or cost data if it is presented as summed-up group data in a manner that does not easily allow the participants to determine with any precision how competitors are pricing products or services. To the extent a trade association decides to compile and distribute aggregated pricing information, the data should be sufficiently distant from current pricing to avoid concerns about price-fixing; sharing current aggregate pricing information is much more likely to draw adverse attention from regulators. It is also important to carefully guard the data that is aggregated and to establish a means for returning or destroying the information to ensure that other members cannot obtain individual competitor data. Legal counsel to a trade association can serve a very important role in ensuring that information sharing benefits the association but avoids, to the greatest extent possible, antitrust problems.

Finally, trade associations should craft and distribute codes of ethics. A sound code of ethics can help avoid antitrust concerns and, perhaps more importantly, enhance the association's role in promoting positive behavior in an industry. Ideally, an association's code of ethics will establish the purpose of the association, set standards that can be applied uniformly and objectively, and identify conduct that should be avoided (such as group exclusionary behavior, standards that allow powerful members to veto competitor initiatives), both in association meetings and in the industry at large.

1. *Nat'l Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679 (1978).
2. http://www.justice.gov/atr/public/press_releases/2006/216804.htm
3. *See Allied Tube v. Indian Head, Inc.*, 486 U.S. 492 (1988)(upholding treble damage award after trade association members used standard-setting process to exclude competing products).