



aaai Annual Conference
June 2013

Enforcement Perspectives on Compliance

Presentation by

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- The views expressed are my own and not necessarily those of the FTC or its Commissioners

FEDERAL TRADE COMMISSION

How Does the FTC “Encourage” Compliance?

Final Orders – Require a Compliance Program

National Association of Music Merchants, C-4255 (2009)

- NAMM permitted and encouraged music instrument dealers to discuss strategies for minimum resale prices
- Order: Prohibits NAMM from those practices
 - **AND**: “Institute a program to comply with this Order and with the Antitrust Laws . . .” (Order, ¶ II. B.)
 - “Antitrust Compliance Officer”
 - “Antitrust Counsel”
 - Training:
 - Annual in person – Directors
 - Annual – employees and agents

NAMM (cont'd)

- Antitrust Compliance Officer to review:
 - Written materials and remarks
 - Agenda for Board meetings
- Guidance for NAMM meetings
- All speakers at NAMM meetings to certify they understand
- Procedures to encourage reporting violations
- Discipline for failure to comply
- Record meetings for review by Compliance Officer

Other FTC Orders:

- *Transitions Optical, Inc.*, C-4289 (2010)
 - Exclusive dealing in photochromatic lenses
 - Order: Cease and Desist, *and*:
 - Antitrust Compliance Program (§ III)
 - Training
 - Distribution of Order
 - Web site posting of materials
- *Pool Corporation*, C-4345 (2012)
 - Exclusive dealing, wholesale/retail pool materials
 - Order: similar to *Transitions Optical*

How do we assess failure to comply?

- Civil penalties, injunctive relief, Federal Ct.
 - \$16,000 (now) per violation – daily for continuing. FTCA § 5 (l).
 - “Up to . . .” That is, it’s the maximum
 - Meant to *penalize*.
 - Injunction to require coming into compliance
 - Contempt penalties if violate court’s judgment.
- (Same penalty scheme for HSR violations)
 - But only DOJ can seek HSR penalties

So, what does that all mean?

- Court looks to six “civil penalty factors”
 1. Harm to the public
 2. Benefit to the violator
 3. Good or bad faith of the violator
 4. Ability to Pay
 5. Deterrence – specific and general
 6. Vindicate Commission’s authority

U.S. v. Boston Scientific, 253 F.Supp.2d 85, 98 (D. Mass. 2003). Citing previous cases to the same effect

What *BSC* says about bad faith . . .

- “recalcitrance in not consulting with the FTC because of an apparent concern that the FTC staff would make things worse”
 - BSC, “had an obligation to disclose this issue to the FTC, not hide the ball.”
 - Flawed compliance report: “By not flagging this flashpoint, the compliance report did not fully describe” the issue.
- “The failure to seek an FTC advisory opinion regarding potentially violative conduct is evidence of bad faith. See *Reader's Digest*, 662 F.2d at 968.”
- “If BSC was uncertain of the reach of the Order, it had an obligation to do more than *see how close to the sun it could fly* with impunity.” (emphasis added)
- “Finally, and most significantly, BSC chose to take the risk of ignoring the FTC's staff interpretation once it took a position on the . . . dispute. At that point, an advisory opinion certainly should have been sought.”

BSC, at 100.

Bad Faith a Critical Factor

- Genuine efforts to comply? Or,
- Gross negligence? Or,
- Efforts to avoid?
- Simple, short-term mistakes that are quickly fixed with no harm – maybe no penalty
- But – serious bad acts call for high penalties
- **BSC was ordered to pay a \$7,040,000 civil penalty**

So, what does that mean for “compliance?”

- True efforts to do the right thing, *versus* efforts and arguments to avoid
- Ask staff for advice
- But, be prepared to live with the issue or take it up with the Commission
- Avoiding problems, fixing problems quickly, *versus* digging in your heels...

Benefits of Compliance Programs

- Prevents violations through the creation of a compliance culture
 - Avoiding investigation or litigation
 - Saving costs, resources and reputation
 - Avoiding fines, penalties and/or private suits
- Permits early internal detection of a violation
 - May allow firms to cure issues of potential antitrust concern
 - May eliminate the need for agency action; or may lead to reduced fines
 - May offer the firm an opportunity to seek leniency (first in)

US agency efforts to promote compliance

Advisory Opinions/Business Review Letters

- Non-binding advice on proposed conduct.
- *Practical tip* – Both agencies provide guidance on requesting and obtaining an advisory opinion on their websites.



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Advisory Opinions: Other Antitrust Issues

- Council of Better Business Bureaus, Inc.
 - Staff Advisory Opinion Letter from Michael Bloom, Assistant Director for Policy & Coordination, Bureau of Competition, to Alan L. Cohen, dated August 15, 2011
 - News Release
- Proposal of Rx-360 – A Not-For-Profit International Consortium Created By Members of the Biotech and Pharmaceutical Industries – To Implement Two Audit Programs Which Would Respectively (1) Permit Rx-360 Members To Share Certain Existing Supplier Quality and Safety Audits, and (2) Permit Rx-360 Members, Going Forward, To Conduct Joint Quality Audits of Pharmaceutical Suppliers
 - Staff Advisory Opinion Letter From Michael Bloom, Assistant Director for Policy & Coordination, Bureau of Competition, To Joanne Lewers of Drinker Biddle & Reath LLP, Dated September 15, 2010
 - Letter and Appendices Filed by Joanne Lewers, On Behalf of Rx-360, Requesting Staff Advisory Opinion
 - News Release
- Proposed Expansion of American Institute of Certified Public Accounts Independence Rule
 - Staff Advisory Opinion Letter From Michael Bloom, Assistant Director for Policy & Coordination, Bureau of Competition, To Kelly Hnat of Wilkie Farr & Gallagher, LLP, Dated April 9, 2010
 - Letter From AICPA Requesting Staff Advisory Opinion (Redacted Public Version)
 - Exhibits to AICPA Request (Redacted Public Version)
 - News Release
- Common Code for the Coffee Community
 - Staff Letter from Alden F. Abbott to Roxann E. Henry and Jacqueline I. Grise of Howrey LLP, dated April 4, 2007
- Statement of Chairman Majors Before the Antitrust Modernization Commission
March 21, 2006
- Commission Advisory Opinion Addressing Proposed Agreement Between Bristol-Myers Squibb Company and Teva Pharmaceuticals USA, Inc.



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Merger Enforcement
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Reports
Section 271 Applications

BUSINESS REVIEW LETTERS

2013	2010	2009	2008	2007	2006	2005	2004	2003	2002
2001	2000	1999	1998	1997	1996	1995	1994	1993	1992

2011 Reviews
August 26, 2011
11-1 Response to Quinn, Emanuel, Urquhart, Oliver & Hedges, LLP's Request for Business Review Letter
December 16, 2011
11-2 Response to Baker & Miller PLLC's Request for Business Review Letter

ACTION CENTER

Comment on Division Cases
Employment Opportunities
File an NCEPA Notification
Report Anticompetitive Conduct
After a Natural Disaster
Report Antitrust Violations
Request a Business Review
Request Public Documents
Website Comments and Suggestions

PROGRAM AREAS

Criminal Enforcement
International Program
Merger Enforcement

FEATURED RESOURCES

2012 Division Update
Antitrust Sites Worldwide
Competition and Real Estate
Compliance Assistance for Business

US agency efforts to promote compliance

Workshops and Hearings

- Identify areas of interest to the agencies
- FTC examples
 - Section 5 scope
 - IP rights in standard setting
 - Competition and IP
 - Healthcare markets
- *Practical tip:* When developing compliance programs, workshops may offer insight into future areas of agency activity that warrant attention.