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2011 Spring Update: Outcome of Threat to Cooperative Business Model



Christine Varney, Eric Holder & Tom Vilsack

Last year MACC provided you updates about the five workshops that were held across the country and led variously by Agriculture Secretary Tom Vilsack, U.S. Attorney General Eric Holder, and Assistant Attorney General in charge of the DOJ's Antitrust Division, Christine Varney. The workshops covered a wide range of issues and topics, including crop and hog farming; the poultry and dairy industries; the livestock sector; and, an examination of margins along the supply chain from producers to consumers. Ms. Varney acknowledged that the knowledge DOJ gained at the workshops would help identify potential violations and targets for prosecution. A close review of Ms. Varney's public comments, in particular, at the various workshops reveals five likely DOJ future enforcement trends in the agriculture sector:

1. **Close cooperation between DOJ and USDA:** DOJ has not only hired and maintains a staff of trial attorneys who specialize in agricultural issues, it has also formed an "unprecedented cooperation and collaboration" with USDA staff. "We have lawyers who are now sitting together on a day-to-day basis looking at these very important issues with the expertise that the USDA staff brings to the marketplace and the competition expertise that DOJ staff has". During the workshops, DOJ and USDA agreed to form a joint task force to determine how best to utilize what they learned to promote competition in the nation's agricultural marketplaces.
2. **Potential Patent Abuse Cases:** Ms. Varney briefly remarked on the potential illegal extension of patents in the biotech industry, stating that DOJ "is going to be looking very closely at any attempt to maintain or extend a monopoly through an abuse of the patent law".
3. **More Merger Challenges:** Ms. Varney acknowledged that DOJ took seriously the concerns expressed during the public workshops about industry consolidation. She highlighted how DOJ has "a number of staff whose principal job in Washington is to be looking at consolidation that's happened in the agriculture sector...and trying to determine whether or not all the rules and laws are being adhered to". Ms. Varney also stated that DOJ is receptive to concerns about future mergers and acquisitions. She referred to DOJ's close examination of any resulting concentration from a merger and its willingness to litigate and "block mergers that substantially lessen competition". Ms. Varney highlighted DOJ's and various States Attorney Generals' recent lawsuit against Dean Food's acquisition of Foremost Farms because of concerns of "too much concentration in milk in Wisconsin, Illinois, and Michigan".
4. **More Section 2 Challenges:** Ms. Varney acknowledged audience concerns' about "big agricultural companies in the chain, wherever they are...and how much power they have". She stated that, "when you have a tremendous amount of market share, you have the responsibility to behave in ways that keeps the competitive field open". She stated that DOJ would look "very, very closely" for businesses with market power. Following DOJ's recent settlement of its first case since 1999 in the healthcare sector against a monopolist alleged to have been engaging in traditional unilateral conduct, we can expect future Section 2 challenges by DOJ against alleged dominant agriculture companies in relevantly defined markets.
5. **Prosecution of Price-Fixing Activity:** Ms. Varney emphasized that "if there's price-fixing going on, we will prosecute you and you will go to jail". She referred to how DOJ has brought over 100 milk bid rigging cases in the past decade, and that DOJ will work with the U.S. Attorney's Office and industry participants to uncover "any illegal price-fixing activity going on, whether it's at the corporate level or at a smaller level".

While DOJ keeps its "watch eye on this industry", the agriculture sector also faces the threat of civil antitrust lawsuits. The increased government scrutiny has led to current antitrust litigation over commodities such as beef, chicken, pork, eggs, mushrooms, potatoes, milk, tomato and seeds. In addition, the sector faces future regulatory change with the current Administration proposing antitrust rules that would impact the current Packers and Stockyards Act of 1921. Federal officials have also looked at the operation of the Capper-Volstead Act 1922, which allows farmers to form for-profit associations to collectively market their products.

Agribusiness may want to evaluate their antitrust risk and review their compliance procedures based on specific business and local market risks in light of DOJ's commitment to antitrust enforcement in this sector, its significant prosecutorial discretion and the broad scope of antitrust offenses: "You have my commitment that we [DOJ] are going to do everything we can to make sure that it's a competitive agriculture economy".

Excerpt from: www.antitrustlawblog.com/2011/03/articles/article/government-targets-agriculture-industry-for-increased-antitrust-scrutiny/

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