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Antitrust Update:

Sarbanes-Oxley Implications in the Antitrust Field

The Sarbanes-Oxley Act of 2002 became law on July 30 amidst great publicity. It makes dramatic changes in the law governing not only public companies but also accounting firms, law firms, investment banks, and securities firms as well. Sarbanes-Oxley is, of course, a response to public outcry over recent corporate scandals relating mainly to the securities laws and accounting practices. But the Act contains several important provisions that reach beyond those fields into many other realms -- including antitrust.

It is critical that in-house and outside counsel -- as well as businesspeople -- familiarize themselves with Sarbanes-Oxley in general. Attached is a memorandum from the WCP Corporate and Securities Practice Group (http://www.wilmer.com/docs/news_items/ACFC8AE.pdf) that briefly overviews the Act's principal requirements applicable to boards and management of publicly-traded companies, including foreign companies listed on US exchanges. We think it is useful, however, briefly to highlight several provisions, discussed in more detail in the attached memorandum, that are particularly relevant to the antitrust area.

- **Document Destruction and Tampering.** The Act imposes severe criminal penalties, including up to a 20-year prison term, for (a) destroying, altering, or falsifying records with the intent to impede an investigation "of any matter within the jurisdiction of any department or agency of the United States," (b) tampering with a record "with intent to impair the object's integrity or availability for use in an official proceeding," or (c) obstruction of an official proceeding. These penalties apparently will apply with full force to antitrust investigations by the Department of Justice and Federal Trade Commission, such as investigations of alleged price fixing or other anticompetitive practices and merger investigations. They dramatically reinforce the importance of scrupulous attention to document preservation practices during, in anticipation of, or even if suspicions arise about possible government antitrust investigations.

- **Attorney Obligations to Report Wrongdoing.** Sarbanes-Oxley directs the Securities and Exchange Commission to promulgate rules of professional responsibility requiring attorneys practicing or appearing before it to report evidence of a material violation of the

securities laws or breach of fiduciary duty or similar violation by a company to the chief legal counsel or CEO. Whether these reporting obligations will be deemed to apply to suspected antitrust violations will turn largely on the outcome of the SEC's upcoming rulemaking process. But the forthcoming SEC rules could well impose on in-house and outside counsel a new ethical obligation very quickly to raise to senior corporate officers evidence of possible antitrust violations.

- **CEO/CFO Certifications.** The Act requires the SEC promptly to promulgate rules under which CEOs and CFOs will be required to certify in writing each annual and quarterly report filed with the SEC. Among other things, these officers will need to certify that they (a) are responsible for reviewing and designing internal controls to ensure that material information relating to the company is made known to them and for evaluating the effectiveness of the internal controls, (b) have evaluated the effectiveness of the internal controls within 90 days before the report, (c) have presented in the report their conclusions about the effectiveness of the internal controls, and (d) have disclosed to the company's auditors and audit committee all significant deficiencies in the internal controls. Whether and how these provisions will apply to internal controls relating to antitrust compliance will depend on the implementing SEC rules. But there seems a significant possibility that the rules will impose new obligations on corporate officers to be familiar with antitrust compliance efforts and any deficiencies relating thereto.

- **Whistleblower Protection.** Sarbanes-Oxley imposes criminal penalties of up to a 10-year prison term for retaliation against a person who provides law enforcement with information relating to "the commission or the possible commission of any federal offense." This provision, on its face, criminalizes retaliation against whistleblowers who report suspected price fixing or other antitrust offenses, making it all the more imperative that corporate officials and counsel ensure that employees reporting possible antitrust violations are protected.

If you have any questions about the implications of Sarbanes-Oxley for the antitrust field or any other questions concerning US or foreign antitrust/competition law, please contact us.

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