

NY Attorney General Launches Antitrust Investigation Into Maker of EpiPen

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New York Attorney General Eric Schneiderman recently announced that his office would commence an investigation into Mylan Pharmaceuticals (“Mylan”). Mylan, an American global generic and specialty pharmaceutical company, is the maker of the EpiPen, an epinephrine auto-injector used to treat severe allergic reactions, like anaphylaxis, to insect stings, foods, drugs, and other allergens. Mylan’s EpiPen4Schools program, which provides schools across the county with discounted EpiPens, is the program now under investigation. Following a preliminary review, the Office of the Attorney General has determined that Mylan may have included “potentially anti-competitive terms into its EpiPen sales contracts with numerous local school systems” effectively barring schools from buying the life-saving product from the company’s competitors.

Joining Schneiderman in his alarm were U.S. Senators Amy Klobuchar (D-Minn.) and Richard Blumenthal (D-Conn.), who recently asked that the Federal Trade Commission investigate Mylan’s EpiPen4Schools program to determine whether the company took unlawful steps “to protect its EpiPen product from the competition.” “As the cost of EpiPens skyrocketed, schools seeking relief turned to Mylan’s ‘EpiPen4Schools’ program, which offered a significant discount for the lifesaving drug,” reads a statement from the senators. “Some of these schools were required to sign a contract agreeing not to purchase any products from Mylan’s competitors for a period of 12 months.”

Senator Charles Grassley, the head of the Senate Judiciary Committee, has also requested information relating to the dramatic increase in the price of the drug over the last few years. By way of background, in 2009, the price of an EpiPen was approximately \$100, however, today; the drug sells for approximately \$600. This dramatic increase in the price of the popular medication has led to a firestorm of criticism over the last few weeks.

All parties are concerned that if Mylan has a monopoly on the market for this type of drug, the contracts it entered into with various schools could violate Section 5 of the Federal Trade Commission Act (“FTC Act”), which generally outlaws the implementation of unfair methods of competition by commercial entities, and Section 2 of the Sherman Antitrust Act (“Sherman Act”), which forbids companies from attempting to obtain a market monopoly and then operate as a monopoly.

In his statement, Schneiderman stated that “[n]o child’s life should be put at risk because a parent, school, or health-care provider cannot afford a simple, life-saving device because of a drug-maker’s anti-competitive practices.” He continued by saying that “[i]f Mylan engaged in anticompetitive business practices, or violated antitrust laws with the intent and effect of limiting lower cost competition, we will hold them accountable. Allergy

sufferers have enough concerns to worry about — the availability of life-saving medical treatment should not be one of them. I will bring the full resources of my office to this critical investigation.”

Mylan, in a recently released statement, defended the EpiPen4Schools program, stating that it has been successful in providing over 700,000 free EpiPens to more than 65,000 schools since the program's commencement in 2012. The spokeswoman for Mylan is adamant that “the program continues to adhere to all applicable laws and regulations. There are no purchase requirements for participation in the program, nor have there ever been to receive free EpiPen Auto-Injectors. Previously, schools who wished to purchase EpiPen Auto-Injectors beyond those they were eligible to receive free under the program could elect to do so at a certain discount level with a limited purchase restriction, but such restriction no longer remains.”

While the legality of Mylan’s actions remains under investigation, all participating school administrators should keep an eye out for further developments that could affect the price, availability, and regulation of EpiPens.

If you have any questions or concerns regarding education or employment related issues, please contact James G. Ryan at jryan@cullenanddykman.com or at 516-357-3750.

Thank you to Bridget Hart, a law clerk at Cullen and Dykman, for her assistance with this blog post.