An Ounce of Prevention: An Effective Antitrust Compliance Program

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Those who think antitrust is relevant only for big mergers or acquisitions, should think again. Failing to recognize antitrust risk is costly.

Violations of the antitrust laws may result in penalties for individuals of up to $1 million and 10 years' imprisonment and for corporations of up to $100 million. At the ending of fiscal 2009, the Antitrust Division of the U.S. Department of Justice had 144 grand jury investigations pending, the most since 1992. It filed 72 cases against 65 individuals and 22 companies, the most in a year since 1993. The Division obtained more than $1 billion in fines during FY2009, the second highest amount in a single year. The average prison sentence reached 24 months in FY2009, totaling more than 25,000 jail days. The overwhelming majority, 80%, of individual defendants were sentenced to prison. In the last 30 years, dozens have been sentenced to serve one year or more of jail time for antitrust crimes. One of these executives was sentenced to a ten year term. There is no parole from federal sentences.

The risk of antitrust exposure and liability is substantial, because co-conspirators have an incentive to cooperate with the government. The DOJ's corporate and individual leniency policies encourage whistle-blowing by essentially giving the first member of a conspiracy who provides evidence to the government a "get out of jail free" card.

Inevitably in the wake of government enforcement, and often even before government action once a violation is exposed, private lawsuits are filed seeking injunctions and treble damages, and attorneys' fees for the plaintiffs' attorneys. Antitrust litigation can be very expensive and time-consuming.

For all of these reasons, antitrust should be taken seriously at all levels within a company. No matter the size of the company, business people should pay attention to these issues. Every business decision that involves customers, competitors, and business planning with respect to output, sales, and pricing potentially raises antitrust issues. Government enforcement officials repeatedly note their surprise at the number of companies that are investigated for antitrust violations and have no compliance policy in effect. Companies – even some large, publicly traded ones – sometimes become sloppy when it comes to antitrust compliance. In today's climate, this makes no sense.

The development, implementation and continuous review of a comprehensive antitrust compliance program is a necessity. Antitrust compliance programs reduce risk and save money in the long run. Of course, merely having a compliance program is not a get-out-of-jail-free card. However, a well-designed and implemented antitrust compliance program helps prevent antitrust problems from arising and aids in detecting and resolving those that do arise. On a concrete level, if a compliance program is effective enough to detect a violation before the government does, and the offender self-reports, the self-detection will affect the enforcement agency's prosecutorial discretion calculus. Self-reporting in

advance of the agency discovering the crime will likely result in the offender being granted leniency. Aside from the benefits in a criminal context, an effective antitrust compliance program also reduces the risk of civil exposure.

An Ounce of Prevention

An effective antitrust compliance program:

- clearly establishes compliance standards;
- assigns responsibility to oversee compliance;
- takes reasonable steps to communicate standards and procedures effectively to employees;
- consistently enforces standards through appropriate disciplinary measures; and
- takes reasonable steps when an offense occurs.

Any compliance program should include a statement of the company's commitment to comply with the antitrust laws and a practical set of do's and dont's. The statement should be followed up with an active training program. The corporate law department should regularly attend management meetings and visit with employees to detect problems. The company should have a reporting system in place so everyone knows what to do if they think they spot a problem. Finally, the company should conduct regular audits to monitor compliance. Violations often occur, not at the policy setting level, but at the execution stage.

The compliance program should be written in plain terms that can be understood by non-lawyers. Employees should be given concrete examples of what types of situations can lead to a compliance problem. It may also help to coordinate the creation of the compliance program with the marketing department so that the program may be better communicated to the employees and, if possible, the program can be linked with a specific product or service roll-out. The most common mistake made when creating a compliance program is failing to simultaneously creating a company-wide culture of compliance that goes hand-in-hand with the written program. An antitrust compliance program must be more than a booklet given to new employees or merely a portion of an employee handbook.

There are several very important principles to convey as part of any compliance program:

- Never discuss with a competitor past, present, or future prices, pricing policies, bundling, discounts or allowances, royalties, terms or conditions of sale, costs, choice of customers, territorial markets, production quotas, allocation of customers or territories, or bidding on a job.
- Be careful of conduct. An "agreement" that violates the antitrust laws doesn't have to be in writing. It can be inferred from conduct, or discussions or communications of any sort.
- Make every output-related decision (pricing, volume, etc.) independently, in light of costs, market conditions and competitive prices.
- Carefully monitor trade association activity. These fora frequently create opportunities for competitors to engage in antitrust violations.

- Consult with counsel before doing any of the following: (1) refuse to sell to any customer or prospective customer on grounds other than poor credit; (2) enter into any new distribution or supply agreement which differs in any respect from those previously approved; (3) condition a sale on the customer's purchasing another product or service, or on not purchasing the product of a competitor; (4) agree on a minimum or maximum resale price of the company's products; (5) impose restrictions on the geographic area to which customers may resell products; (6) require a supplier to purchase products from the company as a condition of purchasing products from that supplier; or (7) offer different prices, terms, services, or allowances to different customers who compete or whose customers compete in the distribution of commodities.
- If the company has a dominant or potentially dominant position with respect to a particular product or market, the law imposes rigorous standards of conduct upon it. Consult with counsel before selling at extremely low prices or engaging in any bundling practices.
- Keep management and counsel fully informed of competitive strategies and conditions in any areas where the company may have a significant market position.
- Immediately inform counsel if local, state or federal enforcement officials request information from the company concerning its operations.

This list highlights areas that should be monitored carefully for antitrust sensitivity. An effective antitrust compliance program is an essential tool for minimizing risk and prudently managing a business.