

Guidance for Companies Developing and Implementing Antitrust Compliance Programs

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Recent policy statements by the U.S. Department of Justice's Antitrust Division ("DOJ") highlight the factors companies should consider when developing and implementing antitrust compliance programs. Effective antitrust compliance programs help companies avoid anticompetitive conduct altogether or identify potentially anticompetitive activity soon enough to eliminate or reduce the repercussions to the company. When a company learns of potentially anticompetitive activity within its ranks, the company should act quickly.

Recent Statements by the Department of Justice

The United States Department of Justice's Antitrust Division ("DOJ"), through comments by Deputy Assistant Attorney General Brent Snyder ("DAAG Snyder") on September 9, 2014¹ and by Assistant Attorney General Bill Baer ("AAG Baer") on September 10, 2014,² has provided important guidance regarding antitrust compliance programs. With the explosion of antitrust enforcement in the United States and in other jurisdictions resulting in billions of dollars in fines levied against companies found responsible for violations, effective antitrust compliance programs are now a hallmark of sound corporate governance. Effective antitrust compliance programs result in extensive corporate savings over time, both by avoiding anticompetitive conduct in the first place and by rapidly identifying potentially anticompetitive activity and allowing corporations to minimize exposure or to take advantage of the DOJ Corporate Leniency Program.

Antitrust Compliance Programs

The DOJ has historically avoided providing specific guidelines for antitrust compliance programs, instead referring to general standards and encouraging companies to customize their own programs based on the specific features of their businesses. In the recent presentations, DOJ made clear that there is no "one-

¹ "Compliance is a Culture, Not Just a Policy," Brent Snyder, Department of Justice, Sept. 9, 2014, available at <http://www.justice.gov/atr/public/speeches/308494.pdf>.

² "Prosecuting Antitrust Crimes," Bill Baer, Department of Justice, Sept. 10, 2014, available at <http://www.justice.gov/atr/public/speeches/308499.pdf>.

size-fits-all” antitrust compliance program. Each company must review its own business practices and tailor specific features of the program to develop effective compliance. As DAAG Snyder explained, “Compliance programs should be designed to account for the nature of a company’s business and for the markets in which it operates.” Companies may glean general standards from the U.S. Sentencing Guidelines,³ the International Chamber of Commerce Antitrust Compliance Toolkit,⁴ and recent recommendations by the DOJ in U.S. sentencing proceedings.⁵ As summarized by AAG Baer and DAAG Snyder, an effective antitrust compliance program includes:

- The involvement of senior officials, including executives and the board of directors. In the words of both AAG Baer and DAAG Snyder, an effective antitrust compliance program “starts at the top,” and a company effectively creates a culture of compliance where those in leadership prioritize compliance. Specifically, this includes ensuring senior people are fully knowledgeable about the program, have available all necessary resources (including a sufficient support team), and actively monitor the program.
- Company-wide commitment to compliance efforts, including educating employees and providing training, where appropriate, for subsidiaries, distributors, agents, and contractors. Company-wide commitment also includes providing guidance and anonymous reporting mechanisms for potential or actual criminal conduct, without fear of retaliation.
- Proactivity, including regularly monitoring/auditing at-risk activities and conducting periodic evaluations to identify potential areas for program improvement. There should be special focus in reviewing the practices of personnel and corporate departments that have an opportunity to interact with other players in the industry. While interactions with competitors may be completely legitimate in certain contexts, these interactions may also present opportunities for inappropriate communications. An effective compliance program must be able to monitor such activities and identify potential problems as soon as possible.
- A disciplinary process for individuals who personally violate antitrust laws or otherwise engage in conduct inconsistent with the compliance program. As explained by DAAG Snyder, “A company’s retention...of culpable employees in positions where they can repeat their conduct, impede a company’s internal investigation and cooperation, or influence employees who may be called upon to testify against them raises serious questions and concerns about the company’s commitment to effective antitrust compliance.”

With those general guidelines in mind, companies should remember that sincerity is at the heart of an effective antitrust compliance program. A company may not simply go through the motions with the hope that the existence of a compliance program in and of itself will be effective. An effective antitrust compliance program must be designed and enforced in ways that allow maximum effectiveness. It will take time and effort, but an effective antitrust compliance program must be based on the company’s unique business and industry practices and accompanied with true commitment.



³ See U.S.S.G. §§ 8B2.1 (amended 2013); 8C2.5(f) (amended 2010).

⁴ See ICC Commission on Competition, International Chamber of Commerce Antitrust Compliance Toolkit (2013).

⁵ See, e.g., Exhibit C to Declaration of Heather S. Tewksbury in Support of United States’ Sentencing Memorandum, U.S. v. AU Optronics Corp., No. CR-09-0110 SI (N.D.Cal. Sept. 11, 2012), ECF No. 948-3.

DOJ Corporate Leniency Program

Even where an antitrust violation occurs, an antitrust compliance program may minimize a company's exposure when the program leads to early detection of antitrust violations. Early detection of an antitrust violation affords a company the option of being the first to report the conduct and qualify for the DOJ's Corporate Leniency Program.

As explained by AAG Baer, under the Corporate Leniency Program, the DOJ "will not prosecute the first qualifying corporation to report a cartel, fully admit to its role in the conspiracy, identify its co-conspirators and the events of the conspiracy, and provide complete and timely cooperation." Avoiding prosecution through the leniency program, where culpability exists, can save companies millions of dollars in fines. But participation in the program is often more time-consuming than applicants initially realize, requiring complete cooperation with the DOJ throughout the DOJ's investigation and resulting prosecutions of other co-conspirators. Applicants should be prepared, on a rapid schedule, to conduct a thorough investigation, provide detailed proffers of the reported conduct, produce (and translate) documents, and make witnesses available for interviews.

Potential applicants to the Corporate Leniency Program should also be prepared for the ramifications. An applicant will not have the opportunity to limit the parameters of its cooperation. For example, an applicant cannot choose to cooperate with respect to one market (where the applicant is eligible for leniency) but not cooperate with respect to another market (where the applicant is not eligible for leniency). Cooperation must be complete. Also, coming forward as a leniency applicant may expose other potential violations including fraud, tax evasion, or corruption. The Corporate Leniency Program governs only the DOJ's prosecution of antitrust violations: it does not prevent the prosecution of other potential crimes.

If a company learns of anticompetitive conduct within its ranks, the company should act quickly. Furthermore, if a company becomes aware of an investigation of a product that is in its industry, there is a good likelihood that the similar products it produces may be the next target, since the competitors involved in the first investigation may seek leniency in other areas under the "leniency-plus" approach. In such circumstances, the company should contact outside counsel right away and begin the process described in our [September 2013 client alert](#). Counsel will work with the company to address the issues identified, conduct an internal investigation and ascertain the appropriate course of action with enforcement agencies, including the possibility of coming forward as a leniency applicant. It is important to engage outside counsel, in addition to the in-house legal team, to maximize the protection of attorney-client privilege early in the investigation.

When Leniency is Not an Option

The primary benefit of an antitrust compliance program is to avoid or catch quickly anticompetitive conduct within the company. Companies that identify anticompetitive conduct after another leniency applicant has already come forward are unlikely to avoid prosecution and are less likely to receive more lenient sentences even if the company had an antitrust compliance program in place.⁶ The DOJ has argued that if the antitrust compliance program neither prevented the anticompetitive conduct nor alerted the company early on to the anticompetitive conduct, then the antitrust compliance program was not effective and is therefore undeserving of credit against prosecution or in sentencing.

⁶ The U.S. Sentencing Guidelines allow for a reduction in liability with the existence of a compliance program, but this reduction has historically not been given to defendants in antitrust actions. See U.S.S.G. §§ 8B2.1 (amended 2013); 8C2.5(f) (amended 2010).

That said, two benefits may exist for companies preparing to plead guilty to an antitrust violation. First, the existence of a compliance program may allow a company to avoid additional oversight by the court and by the DOJ.⁷ In addition, AAG Baer and DAAG Snyder in their recent remarks referenced the DOJ's efforts to reward companies that, after coming under investigation, proactively accept responsibility for any wrongdoing, assist the DOJ with the DOJ's investigation, and adopt or strengthen existing compliance programs (requiring the company demonstrate the sincerity of its efforts). These statements suggest that the reduction in liability allowed under the U.S. Sentencing Guidelines may be more readily available in antitrust cases than it has been in the past.

Conclusion

With the explosion of antitrust enforcement around the world, effective antitrust compliance programs are an essential part of sound corporate governance. Effective antitrust compliance programs result in extensive corporate savings over time. Companies, with the assistance of experienced counsel, should develop and implement antitrust compliance programs that are informed by the unique features of the company's business and industry practices. If a company learns of anticompetitive conduct within its ranks, the company should act as quickly as possible to develop an appropriate course of action.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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 ⁷ See, e.g., Judgment in a Criminal Case, U.S. v. AU Optronics Corp., No. CR-09-0110 SI (N.D.Cal. Oct. 2, 2012), ECF No. 974 (Imposing as a condition of probation the appointment, at defendants' expense, of an independent monitor to monitor defendants' antitrust compliance program for the duration of defendants' three-year probation period).

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