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, 2014\(^1\) 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-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, the International Chamber of Commerce Antitrust Compliance Toolkit, and recent recommendations by the DOJ in U.S. sentencing proceedings. 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.

**Download: Guidance for Companies Developing and Implementing Antitrust Compliance Programs**


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