

## ANTITRUST COMPLIANCE PROGRAMS

By Alan S. Gutterman<sup>1</sup>

It is essential for companies of all sizes to develop some sort of formal program and procedures relating to antitrust law compliance. In designing the specific program, reference should always be made to the general guidelines that apply to establishing any corporate compliance program. The two principal objectives of an antitrust compliance program should be “prevention” and “detection.” The benefits of prevention should be obvious, including relief from large potential fines and crippling damage to the reputation of the company and its executives. Early detection, on the other hand, can be important to minimize potential damages and create a case for mitigating sanctions that would otherwise be imposed under the applicable sentencing guidelines.

### A. Benefits of Establishing and Maintaining Compliance Program

There are a number of important benefits to establishing and implementing an effective antitrust compliance program, including the following:

- While some managers continue to view antitrust compliance as a necessary evil, enlightened executives realize that the rigorous analysis of markets and business strategies that occurs during the compliance effort can pay dividends in formulating company strategies with respect to pricing, distribution, and customer relations.
- Effective antitrust compliance increases the likelihood that the company will avoid substantial fines, settlements, and judgments, as well as the legal costs associated with defending against antitrust claims. The press consistently reports substantial awards against antitrust defendants; and the costs of defending an antitrust suit, even if a company should prevail, are quite high due to the need for extensive document production and preparation for depositions and testimony at any actual trial.
- Filing of a civil action, or instigation of a criminal investigation, against a company for antitrust violations can have a significant adverse impact on the company’s reputation, even if the company is later vindicated. By establishing an effective antitrust compliance program, a company can frequently head off trouble before it begins and comes out into public light. In many cases, evidence that a company has a compliance program in effect will be sufficient to convince a prosecutor not to indict a potential defendant.

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- A compliance program can prevent company executives from being exposed to litigation and investigations that can cause substantial and irreparable damage to their business reputations and personal lives.
- A compliance program has become an essential element in showing that the directors of the corporation have fulfilled their fiduciary duty of care. By establishing a compliance program that includes the elements described herein, directors are more likely to meet the burden of showing that procedures were established to bring potential antitrust problems to the attention of the board in a timely manner as a matter of ordinary operations.
- If, after all is said and done, the company is nonetheless unsuccessful in defending an antitrust action, the existence of a compliance program may be a mitigating factor that the judge will consider under the federal sentencing guidelines.

## **B. Components of Compliance Program**

Among the components commonly included in a comprehensive antitrust compliance program are the following:

- A formal company antitrust compliance policy statement that requires employees and other company agents to comply with all applicable antitrust and competition laws;
- A compliance manual for distribution to personnel responsible for compliance activities that explains the relevant laws and preferred internal procedures;
- Training programs for employees that explain how the antitrust laws impact their specific jobs and activities on behalf of the company and the steps that are expected from them in order to ensure compliance;
- Document creation guidelines to avoid the use of phrases and other information in company files that might increase exposure in the event of litigation or government investigations;
- Policies and training programs for employees who may be involved in trade associations or other similar industry groups; and
- Procedures for monitoring and implementing the program and conducting formal investigations.

In addition, when the volume of specific activities is constant and substantial, larger companies will often need to address specific potential problem areas in greater depth. For examples:

- Procedures for formal review of material contracts and agreements that generally raise significant potential antitrust law issues, notably license agreements, distribution agreements, mergers, joint ventures, and other contracts with competitors;
- Procedures for formal review of pricing decisions, which may arise in distribution arrangements, purchase contracts with customers, and promotional and advertising policies;
- Special training programs for their personnel involved in the analysis and evaluation of potential acquisitions, including guidance on making sure that pre-contract communications do not run afoul of antitrust and competition laws;

- Training sessions for sales and marketing staff to make sure that they understand how the antitrust laws can impact pricing initiatives; and
- Special procedures for companies who are likely to be regulated by foreign competition laws.

Antitrust law concerns should be factored into company policies dealing with document retention and information storage and exchange, including the Internet and e-mail. Also, many companies make an effort to build antitrust compliance into other employee-related issues, such as incentive programs. For example, sale personnel should be rewarded for selling more goods and services, not for selling fewer units at a higher price that has been illegally set.

Counsel can assist the client in preparing an effective antitrust compliance program through the use of an antitrust compliance checklist to focus clients on areas of concern that need to be addressed in the formal compliance program once it has been approved. The following is an example of such a checklist; however, readers should not use this checklist as a substitute for competent legal advice:

## **ANTITRUST COMPLIANCE CHECKLIST**

### **I. Protection of Attorney-Client Privilege**

(1) An antitrust compliance program will involve an exchange of information between a business and its antitrust counsel that may include the counsel's assessment of the antitrust risks associated with the business's conduct. In order to help prevent a potential plaintiff from obtaining access to this information and using it as a road map for an antitrust complaint, it is important to take steps to bring this information within attorney-client privilege.

(2) To help assure that attorney-client privilege attaches to a business's antitrust compliance efforts, a management policy similar to the following should be adopted and widely disseminated in writing that makes it clear that communications between all employees and the business's antitrust counsel are privileged:

“All employees of [name of company] (the “Company”) are authorized and instructed to consult directly and confidentially with [name of antitrust counsel] (“Antitrust Counsel”) about compliance with the antitrust laws, all matters relating to these laws, and any questions that may arise about the applicability of these laws to any course of conduct or action. Furthermore, Antitrust Counsel is to be consulted immediately, directly, and confidentially about any known or suspected deviation from, or violation of, these laws, or if there is any reason to suspect or believe that the Company or any employee, officer, director, or agent is, may be, or may become involved in any way in any investigation, grand jury proceeding, lawsuit, or administrative proceeding relating in any way to these laws.”

## **II. Elements of an Effective Antitrust Compliance Program**

(1) **Commitment.** The business must be committed to antitrust compliance. All personnel from top management down must be convinced that compliance with the antitrust laws is both essential and mandatory, and that there is no rational alternative to such compliance.

(2) **Education.** At all levels of the business, there must be continuing education in the basic requirements and purposes of the antitrust laws. Company personnel must be provided with clear guidelines for compliance with these laws and on when to seek legal advice from an attorney who has both an in-depth understanding of the antitrust laws and the consequences of violating these laws.

(3) **Consultation.** There must be constant two-way communication between antitrust counsel and all levels of company personnel. Company personnel must consult with antitrust counsel whenever an antitrust problem materializes, whenever it appears that such a problem may materialize, and whenever action is to be taken that raises antitrust questions. Antitrust counsel, on his or her part, must be available, responsive, and ready to advise as to the risks involved in continuing or initiating the actions or practices under consideration, and as to practical and lawful alternatives of achieving all or most of the economic objectives of a doubtful program, practice, or action. Antitrust counsel must know both the business of the company and the personnel of the company well enough to give the necessary legal advice, even if such advice has not yet been sought.

(4) **Monitoring.** There must be diligent, conscientious monitoring, supervision, and administration of the entire program by antitrust counsel, supported by top management, and the board of directors or other governing body. When necessary, corrective and/or punitive action must be taken to promote compliance in the future.

## **III. Trade Associations and Other Coordinated Activities with Competitors**

(1) Because they necessarily involve cooperative activity by competitors, trade associations involve particular antitrust risks.

(2) There must be diligent, conscientious monitoring, supervision, and administration of all trade association activities of the company and its personnel by antitrust counsel, to assure compliance with the antitrust laws by company personnel and by the trade associations in which they participate.

(3) Among the areas involving trade associations, and any other coordination between competitors, that should be covered by an effective antitrust compliance program are the antitrust problems associated with:

- (a) Pricing activities, including the advocating of terms or conditions of sale.
- (b) Customer, territory, or product allocation activities.

- (c) Bid registries or bid depositories.
- (d) Bid rigging and complimentary bidding.
- (e) Exchanges of information.
- (f) Certification or standard-setting programs.
- (g) Joint marketing, joint venturing, and research and development programs.
- (h) Codes of ethics.
- (i) Industry self-regulation.
- (j) Lobbying activities.
- (k) Labor relations and negotiations.
- (l) The lack of availability of trade association membership, information, or services to nonmembers.

#### **IV. Education**

(1) To sensitize all levels of management to the necessity and advisability of effective antitrust compliance programs they should be acquainted with:

- (a) Criminal penalties that have been levied against specific other executives and other companies, including reports of the actual time spent in jail, and of the actual heavy personal and company fines paid.
- (b) The stiff civil individual and class action judgments being handed down, which were automatically trebled.
- (c) Injunctive relief that has been awarded and has removed important aspects of the business from the control of management.
- (d) The loss of the fruits of the unlawful conduct, particularly where these same fruits could have been obtained lawfully.

(2) It should be explained to all levels of management that their risks of antitrust attack are even greater than normal if they are:

- (a) In a business with a history of price fixing.
- (b) If an industry in which the government enforcers have shown particular interest.
- (c) In an industry where there is considerable opportunity for contact with competitors' personnel.
- (d) In an industry with a history of private or class action antitrust suits.
- (e) In a business with a monopoly position or one that has few competitors.
- (f) In a business that is acquisition or joint-venture oriented.
- (g) In a business involving dealers or distributors.
- (h) In a business with attentive or activist consumer customers.
- (i) Involved in government work (governmental entities regularly and systematically review bids for anticompetitive patterns).