# insights



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# Antitrust Compliance Programs: Their Need and Operation



ith the increased enforcement of competition laws (both within the U.S. as well as globally), it has become increasingly

important for all companies, regardless of size, to have in place good corporate policies and programs to ensure compliance with the law. Corporate fines in the U.S. are routinely in the high eight figure range today and criminal penalties for individual violators have been increased to up to ten years in a federal penitentiary, coupled with fines for individuals up to one million dollars.



civil damage actions against companies and their executives are also reaching the high eight figures range for settlements and jury awards. Millions of dollars are

Consequential

By Michael M. Briley

being spent in defense costs, for even successful defense cases. Simply stated, antitrust violations are no longer an acceptable business risk for either a company or its individual employees. Also, the government's new discovery tools and initiatives regarding "Big Data" retrieval by use of enhanced data analytics has made compliance with federal subpoenas inordinately expensive, Antitrust violations are no longer an acceptable business risk for either a company or its individual employees.



burdensome and risky.

Conversely, companies with viable and federally compliant compliance policies and procedures are not only receiving substantial consideration from the enforcement agencies and courts in the event of an investigation or violation, but, moreover, studies have shown that the likelihood of violation is substantially (if not completely) reduced when employees are presented with a clear corporate policy, focused training and a useable process which offers them access to answers when they have questions, as well as attentive receptors when they have concerns. It used to be the case that antitrust compliance programs were perceived to be a necessity for only the "big guys," the

leaders of industry. This is a fallacy today. The majority of federal indictments for criminal violations of the antitrust law in this country over the last ten years has been against smaller (and in some cases family owned) companies which were "drawn in" to anticompetitive behavior by larger companies or by their peers. For example, in the last two years a number of small, family owned companies have been criminally charged in the automotive parts price fixing cases and our firm has defended small, local companies in both criminal and civil antitrust cases on a number of occasions. As a consequence, no seller of goods or services today can afford to ignore this reality. Good business practice requires a good compliance program.

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## So what does such a program consist of?

Consistent with the requirement of the U.S. Sentencing Guidelines and Department of Justice pronouncements, an antitrust compliance program should consist first of a clear statement by corporate leadership of a commitment to compliance with the law. The commitment by corporate leadership to not only embrace a policy of compliance, but also to the allocation of sufficient resources to support a good compliance program, as well as necessary enforcement measures, are critical to success. In addition to the adoption of a formal, written corporate policy, a successful program will also contain the following features, all of which are necessary for compliance with federal guidelines:

- operational oversights and creation of a senior management responsibility for the maintenance of training programs and necessary records;
- disciplinary measures for violations;
- training programs for the education of employees (which also affords the opportunity for questions by employees and the testing of employees of measuring their knowledge and understanding of the law);
- establishment of a "hot line" for the reporting of concerns or response to inquiries;
- periodic audit of operating units or divisions to ensure ongoing compliance;
- establishment of a good record retention policy (if one does not already exist);
- establishment of a non-retaliation policy (if one does not already exist); and
- establishment of employee instructions for special events (e.g., trade shows, trade association meetings, etc.).

A "best practices" compliance program should go beyond federal guidelines and should also include such things as employee instructions and training about how to respond to government investigations or audits (e.g., "dawn raids by the FBI"), how to respond to unlawful advances or suggestions from competitors, how to be aware of circumstances where the company itself may be a victim of anticompetitive behavior and so forth.

#### Why is a program needed now?

In addition to the reasons given above, during the period 2009-2013, 109 corporations and 311 individuals were indicted for criminal violation of the U.S. antitrust laws; government fines alone exceeded \$2 billion in 2013.\* The average sentence for individual violations has gone from eight months in 1990-1999 to 25 months in 2013.\* The maximum jail sentence was changed by Congress several years ago from three to ten years. Ensuing civil suits (following criminal prosecutions) have become increasingly expensive. Some examples are \$1.2 billion paid by MasterCard and Visa in 2011, \$1.4 billion paid by Pilkington Glass and Asahi Glass, \$1.6 billion paid by the international air cargo defendants and a \$1 billion jury award last year against Dow Chemical in its participation in the urethane price fixing cartel. In the currently pending automobile parts cases, many individual defendants have been indicted and a number of small, family companies will be required to pay millions in the ensuing civil cases.

Most antitrust criminal investigations and indictments today are the result of co-conspirators applying for amnesty under the Antitrust Criminal Penalty Enhancement Reform Act (ACPERA), which offers large and attractive incentives (including complete corporate and individual executive immunity from prosecution) for price fixers to "drop the dime" on co-conspirators. A recent *U.S.A. Today* analysis of U.S. Federal Sentencing Commission data (2006-2011) revealed that with respect to convicts who get a reduced sentence in exchange for providing assistance to the government, the highest percentage (67%) is for antitrust indictees; higher than for any other crime (including for example, drug trafficking, racketeering, tax offenses, fraud, murder, firearms, robbery, drug possession, etc.). Competitors, disgruntled existing and former employees, employees in trouble with the law for something else and unhappy customers provide rich sources of information to the government concerning potential antitrust violations. Unfortunately, very often senior management is unaware of unlawful antitrust activity existing within their company. Now, more than ever, good compliance programs are essential to the protection of companies and their employees in an increasingly competitive global economic environment.

Our firm is a leader in the development and implementation of state-of-the-art compliance programs. We can work with any sized company to create or maintain a new program or to enhance any existing one. The cost depends upon the size of the company and the availability of its existing staff (e.g., legal department or outside counsel), but it is surprisingly inexpensive, especially given the risk level involved. New, state-of-the-art programs for employee training and testing are being developed to enhance the effectiveness and deliverability of such programs.

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### Footnote

\* U.S. Department of Justice data.