The Three "Ds" of a Top-Marks Antitrust Compliance Program: Design, Deter, Detect

By Stacey Anne Mahoney

Introduction

After decades of disregarding antitrust compliance programs, the United States Department of Justice ("DOJ") has finally come around to providing some degree of credit to a target of a DOJ investigation for having an antitrust compliance program. This long-awaited recognition gives companies an additional tool in their toolbox to mitigate the exposure resulting from a finding of an antitrust violation as such a finding is expensive in numerous different ways, including (1) the costs involved in responding to and defending against the investigation and potential governmental and civil follow-on damages litigation, (2) the payment of any fines, restitution or damages resulting from the violation, (3) the negative reputational impact to the company that finds itself publicly branded as an antitrust violator, and (4) the loss of senior executives to jail time or through requirements that the company cease professional relations with all individuals who participated in the challenged conduct. Given these significant expenses, and the comparatively small expense of implementing a credible and effective antitrust compliance program, simple math will suggest that an antitrust compliance program is a worthwhile investment.

Antitrust Compliance Programs Were Previously Deemed Worthless

Historically, the Antitrust Division of the DOJ was one of, if not the only, DOJ Division to disregard the value of an existing corporate compliance program in the event that a company was found guilty of violating the antitrust laws.[1] The rationale could be summed up as follows: If the company committed an antitrust violation, any pre-existing antitrust compliance policy was not worth the paper it was printed on since it did not work (the Division's sentiment, not mine). The Antitrust Division believed that the compliance policy was its own reward; if it worked optimally, it prevented antitrust violations from occurring in the first place, and if the policy was less than optimally functional, but still worked somewhat, it would enable a company to detect an antitrust violation and self-report that violation to the government. Certain representatives of the corporate compliance community argued in response that the Antitrust Division's position discouraged companies from investing in meaningful and effective antitrust compliance efforts because, regardless of how well designed and implemented a compliance policy was, it could not prevent furtive and violative behavior by a rogue employee who was determined to engage in criminal conduct.

After years of disregarding these counter-arguments, the Antitrust Division recently seems to have conceded the soundness of their logic

What Changed?

In 2013, William J. Baer, an appointee of President Barack Obama, was sworn in as the Assistant Attorney General in charge of the Antitrust Division. Baer is a seasoned antitrust practitioner who, having spent much of his career in private practice, brought to his post a well-informed pragmatism about productive and unproductive enforcement efforts. He also brought to the Antitrust Division Brent Snyder, who became the Deputy Assistant Attorney General in late 2013. Antitrust Division policy regarding compliance programs historically was communicated to the bar through carefully crafted speeches made by senior Division personnel. This trend continued when, in 2014, Snyder addressed the International Chamber of Commerce ("ICC") in a speech entitled "Compliance Is a Culture, Not Just a Policy." That speech conveyed a tempered, but notable, trend-reversal regarding the Antitrust Division's treatment of corporate compliance programs: "[W]e are actively considering ways in which we can credit companies that proactively adopt or strengthen compliance programs after coming under investigation."[2] This new position brought the Antitrust Division into line with the United States Sentencing Guidelines, which provide that a Court can reduce the fine imposed on a company if that company had an effective compliance program in place when the offending conduct occurred.[3] This shift in Antitrust Division policy underscores the value for corporate America of prophylactic antitrust compliance programs.

What Should a Compliance Program Look Like?

Although the Antitrust Division takes the position that there is no "one size fits all" antitrust compliance program, there are certain things that should be included in all of them: (1) regular training,[4] (2) on-going compliance monitoring by someone whose job description (and her evaluation) makes her responsible for that monitoring, and (3) a defined reporting mechanism through which issues and concerns can be raised by employees.

Best practices in the creation (or modification) and implementation of an antitrust compliance program can be driven by the three "Ds" that inspired the title of this article—Design, Deter, and Detect. If you keep these highly interrelated principles top-of-mind when considering your company's program, you will be maximizing

the likelihood that your program will be efficient and effective.

Design

Your company's antitrust compliance program should be designed with the company, the industry and the specific applicable risk factors in mind; a generic out-of-the-box compliance program is not likely to be effective. You will want to conduct a realistic assessment of the particular risk areas for your company. That may be done by product, by job description, by geographic area, or with other characteristics in mind. In particular, you will want to assess who within the company has the greatest regular access to communications directly with competitors; these communications can occur, for example, at trade association meetings or even while passing competitors in the lobby of customers the companies regularly compete for. Frequently, companies are primarily (and properly) concerned with members of their sales forces, who have access to pricing and cost data, as well as future-looking business plans, and may be most likely to cross paths with their counterparts from competitors. Companies should also carefully consider the roles that their marketing and finance personnel play in creating external communications, i.e., shareholder conference calls in which statements can be made that could be perceived to be illegally signaling competing firms.

Crucially, effective compliance programs will also consider the impact of internal policies on personnel. For example, if sales targets substantially exceed reasonable expectations, it can be anticipated that personnel tasked to reach legally unobtainable goals might push the envelope in an effort to keep their jobs. Accordingly, compliance programs must be developed with the entire company in mind, as well as its specific constituents, in order to manage the particular risks attendant to that entity and its industry.[5]

The design of your compliance program must facilitate its universal and vigorous enforcement. Anything less will be a waste of time, effort and energy; not only will it not work to deter or detect any violations, but if a violation is uncovered, the Antitrust Division may infer an attitude of corporate non-compliance that could place the company in an even worse position than if it had had no compliance program at all. Participation and enforcement must be company-wide; senior executives must be required to attend the training, and optimally, will be voluble in their endorsement of the policy, including the training.[6] In order to enable enforcement, the reporting structure of the compliance executive should be designed so that he or she has direct, unencumbered access to the Board of Directors (the "Board"), or if there is no Board, to the highest levels of company management.

Deter

Of course, one of the primary goals of an effective antitrust compliance program is to deter company personnel from engaging in conduct that violates the antitrust laws.[7] That is easy to say, but can be harder to execute as a practical matter. For a business person, obtaining greater market penetration and/or increasing his or her company's profitability are laudable goals, and can be ones on which performance is evaluated and remuneration is based. And although business people can be clearly instructed not to talk about prices or allocate customers with competitors, a truly useful training module will provide them with hypothetical situations catered to the most likely types of potentially problematic situations they will find themselves in, and give them general and specific advice regarding how to respond appropriately. For example, if a competitor during a trade association meeting suggests that the attendees should boycott a customer that is driving a particularly hard bargain, the training could provide alternative responses to a suggestion made (1) one-on-one (a clear verbal rejection of the proposal by the recipient), or (2) on the floor of an association meeting (walking out of the room). Providing this type of concrete guidance will enable company personnel to react quickly, without having to conduct a possibly time-consuming weighing of the pros and cons of various responses and missing an opportunity to respond appropriately.

In addition, a program provides an effective deterrent when enforcement action is undertaken publicly within the company (names may or may not be omitted but the violative conduct should be explained) so that it puts other people on notice that the company takes its compliance obligations seriously. Since the DOJ will be publicizing information about the violation, a company would be wise to avail itself of such a teaching moment; minimizing the event will only create the impression among the other employees that this kind of conduct will be swept under the corporate rug. It is worth emphasizing that, in order for a policy to provide meaningful deterrence, it has to be applied evenly by the company across-the-board; neither the senior-most nor the junior-most people should be treated differently from one another. Engaging in disparate treatment of employees will not deter problematic conduct, and will likely invite the special ire of the DOJ.

Detect

It is important to have an action plan in place *before* a violation is detected. In the United States, a company may be able to obtain immunity from criminal prosecution of an antitrust violation, as well as contain civil damages, if it is the first to alert the Department of Justice of the illegal conduct. Accordingly, time is of the essence when a company believes it may have detected a violation.

The plan should clearly identify the various stakeholders within the company who must be consulted

immediately in order to make the initial determination regarding whether to alert antitrust authorities. In developing this list, companies should keep in mind that problematic conduct can have an international impact, so highly inter-related decisions may need to be made in very short time frames regarding possible notifications to numerous antitrust regulators around the world. In addition, while it is often the case that the front-line sales people are the primary personnel engaged in the conspiratorial communications, it is also often the case that the communications were made at the direction of, or with the knowledge of, very senior executives within an organization. Thus, care must be taken when developing the action plan that there are appropriate checks and balances in place to ensure that the plan will be executed, regardless of who within the company might be implicated by the resulting antitrust investigation.

Conclusion

It is no longer a reasonable conclusion for companies in America to decide to roll the dice on whether an antitrust compliance program is a worthwhile investment. With credit now being given by the DOJ for the existence of these programs, even when there has been a violation of the antitrust laws, it behooves all companies to engage in this self-help before disaster strikes. The savvy compliance executive will be able to use this shift at the Antitrust Division to justify to higher-ups that such a program will be worth the investment.

Endnotes

1. *Compare* U.S. Dep't of Justice, United States Attorneys' Manual, 9-28.300 (2008) (recognizing pre-existing compliance programs as a mitigating factor in charging generally) *with* U.S. Dep't of Justice, United States Attorneys' Manual 9-28.400(B) *and* 9-28.800(A)-(B) (carving out antitrust from that general rule) (U.S. Dep't of Justice 2008).
2. U.S. Dep't of Justice, Compliance Is a Culture, Not Just a Policy 9 (2014), http://www.justice.gov/atr/file/517796/download at 9.
3. U.S. Sentencing Guidelines Manual § 8C2.5(f)(1) (U.S. Sentencing Comm'n 2014).
4. Training should be engaging and memorable for at least two reasons: (1) you want employees to absorb the training so that even if they do not remember the particulars, they know when and how to elevate an issue, and (2) Antitrust Division lawyers will always ask employees if they were trained and what they remember from the training.
5. In addition to designing a compliance program that satisfies the mitigation requirements set forth in the United States Sentencing Guidelines, counsel can consult the ICC Antitrust Compliance Toolkit, available at http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2013/ICC-Antitrust-Compliance-Toolkit/, for further guidance.
6. Training is specifically called out here because companies can be inclined to excuse their senior executives from participation because they are too busy; this inclination should be resisted.
7. That this goal is critical has recently been reinforced by the September 9, 2015 Individual Accountability for Corporate Wrongdoing memorandum issued by DOJ Deputy Attorney General Sally Quillian Yates, available at http://www.justice.gov/dag/file/769036/download, which highlights the importance, from an enforcement perspective, of holding individual wrongdoers accountable.

Stacey Anne Mahoney focuses her practice on antitrust litigation, including representing clients as plaintiffs and defendants in federal and state courts throughout the U.S., in cases involving restraints of trade, monopolization, tying, exclusive dealing, price discrimination, false advertising, unfair competition, and related business torts; merger advocacy, including trial as needed, in the United States and abroad; and counseling, including advising on distribution and pricing issues, as well as joint ventures and other competitor collaborations. Stacey develops and updates antitrust compliance programs and materials, frequently conducts on-site training for clients, and has conducted clients' internal investigations. She regularly represents clients before the DOJ, FTC and state attorneys general in various matters, including regarding antitrust, consumer protection and privacy issues. Stacey is the Chair of the Antitrust and Trade Regulation Committee for the New York City Bar Association and is a former Chair of the Antitrust Law Section of the New York State Bar Association.