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Two top officials at the United States Department of Justice, Antitrust Division (DOJ), Assistant Attorney General (AAG) Bill Baer and Deputy Assistant Attorney General (DAAG) for Criminal Enforcement Brent Snyder, recently issued remarks on the importance of corporate antitrust compliance policies in the area of criminal antitrust enforcement. These remarks emphasized the importance of creating a culture of antitrust compliance and the hallmarks of effective compliance programs. The DOJ provided few specifics, but this is a topic that has been seldom discussed by the Antitrust Division, so the mere fact that these two enforcers spoke on the issue on consecutive days signals that the DOJ takes compliance programs very seriously. In an era of increased criminal antitrust enforcement, these comments serve as an important reminder that effective antitrust compliance policies are a critical tool for preventing antitrust violations and detecting them at an early stage if they do occur, which can significantly mitigate the potential consequences.

Background – A Primer on Criminal Antitrust Enforcement

Criminal prosecution of antitrust violations is typically pursued by the DOJ in cases involving serious horizontal antitrust conspiracies, such as price-fixing, market allocation and bid rigging. A criminal violation of the Sherman Act carries serious consequences. It provides for felony convictions that can lead to personal fines of up to $1,000,000 per offense and/or imprisonment for as long as 10 years. In addition, a company is subject to fines of up to $100,000,000 for each offense. Individuals recently have been sentenced to fines of up to $10 million and prison terms of up to three years, and fines between $100 million and $300 million have been imposed on companies for price-fixing in the video components and automobile parts industries. Criminal enforcement has also been on the rise in recent years. In 2013, the DOJ issued over $1.1 billion in fines for criminal antitrust violations, and the average length of prison sentences has been steadily rising since 1990.

In addition to prison sentences and fines, antitrust violations also expose a company to long-term or even permanent injunctions which could have a significant impact on its ongoing business. Companies subject to criminal antitrust prosecutions are also susceptible to private class action lawsuits brought by injured customers seeking treble damages and attorneys’ fees, as well as possible enforcement actions by state attorneys general under state antitrust laws, which are often empowered to bring their own treble damage suits on behalf of injured consumers in their states. Of course, antitrust prosecutions also often result in collateral consequences such as negative publicity and distraction from the company’s business.

The Importance of an Effective Antitrust Compliance Program

Because the consequences of a criminal antitrust violation are quite serious, the first and most obvious reason for implementing an effective antitrust compliance program is to prevent antitrust violations from occurring in the first place. If an antitrust violation does occur, however, a compliance program can also offer a number of benefits to help a company to mitigate the worst of the potential consequences.

Before discussing the benefits of a compliance program, it should first be stressed that the mere existence of a
compliance program will not likely protect a company from being prosecuted or reduce its punishment in the event of a criminal prosecution by the DOJ. AAG Baer and DAAG Snyder both confirmed that the DOJ rarely recommends that companies receive credit at sentencing simply for having a pre-existing compliance program. The reason for this, according to the Antitrust Division, is that if a compliance program failed to prevent or stop the violation at an early time, then the company does not deserve any credit for the program.\[5\]

In a notable shift in position, however, DAAG Snyder indicated that the DOJ is “actively considering ways in which we can credit companies that proactively adopt or strengthen compliance programs after coming under investigation.” However, he stated that the Division has not “finalized [its] thinking in this area.” It remains to be seen whether this will result in an official change in policy.

Regardless, when implemented properly, a compliance program can allow a company to detect violations at an early stage and take proactive steps to address them. Most notably, as explained by AAG Baer, under the DOJ’s Corporate Leniency Program, the Division will not prosecute the first company to admit its role in a cartel, identify its co-conspirators, and cooperate with the DOJ’s investigation. If granted leniency, the company can stand to avoid significant fines and possible prison sentences. AAG Baer stressed that leniency applicants must be prepared to provide real cooperation, including conducting an internal investigation, providing detailed proffers, producing translations of documents, and making witness available for interviews. In addition, companies seeking leniency must provide “complete and candid testimony about the full scope of his or her wrongdoing,” including in all markets. Companies who seek to limit their responsibility may find their request for leniency denied. It should also be noted that cooperation with the Division does not foreclose prosecution for other potential crimes by other law enforcement agencies.

Even if a company is unable to take advantage of the leniency program because it is not the first member of the conspiracy to self-report, AAG Baer clarified that a company that accepts responsibility by pleading guilty and providing cooperation can receive a lower culpability score under the Sentencing Guidelines and therefore a lower fine range. Early cooperation increases the chances that the company will be able to provide substantial assistance to the DOJ, which is taken into account by the Division when it makes sentencing recommendations.

In addition, having an effective compliance policy can help a company avoid certain burdensome penalties. For example, if a company that comes under investigation lacks a compliance program and makes no effort to strengthen it, it is far more likely to receive probation. Second, the existence of a compliance program may avoid the appointment of a corporate compliance monitor. Although the DOJ has only sought the appointment of a monitor in one criminal case, both DAAG Snyder and AAG Baer indicated that the Division will take a more aggressive approach in the future in seeking monitors in cases where companies either refuse to recognize their wrongdoing, keep culpable senior executives in positions of substantial authority, or otherwise demonstrate a risk of recidivism. Both officials pointed to the DOJ’s approach in the AU Optronics case as an example of situations where appointment of a monitor was appropriate because the defendant failed to accept responsibility for its conduct, did not attempt to implement a compliance program, and continued to make defiant public statements.

What Constitutes an Effective Compliance Program?

Given the importance of an effective compliance program in both preventing and mitigating the consequences of criminal antitrust violations, the next logical question is: what is an “effective” compliance program? Unfortunately, the DOJ historically has not provided precise guidance as to what it entails, and neither AAG Baer nor DAAG Snyder suggested that it intends to change that stance any time soon. Its view is that a “one size fits all” approach would not work, because a compliance program must be tailored to suit the needs of the company’s business and its industry. However, both AAG Baer and DAAG Snyder made some points of general application that are worth noting:

- Effective compliance must “start at the top,” meaning that senior executives and members of the Board of Directors must take compliance obligations seriously and make compliance a part of the corporate culture.
- The entire company must be involved, which means educating and training managers and most employees, particularly those with sales and pricing responsibilities, and may also include training subsidiaries, distributors, agents, and contractors. It also allows all employees to report potential violations without fear of retaliation.
- A compliance program must be proactive, meaning that there should be ongoing monitoring and auditing of antitrust compliance as well as periodic evaluation of the compliance program itself.
- A company should be willing to discipline employees who participate in antitrust violations or fail to prevent them from happening. This is a key point that was emphasized by both AAG Baer and DAAG Snyder. Although the DOJ does not require termination of employees, it made clear that retention of culpable
employees raises serious questions about the company's commitment to antitrust compliance.

- The policy should be updated and strengthened when a company does discover criminal antitrust violations in order to ensure that they do not happen again.
- Companies can look to external sources for guidance, such as the U.S. Sentencing Guidelines and the ICC Antitrust Compliance Toolkit, both of which discuss principles of effective compliance programs.

Companies that follow these core principles — top-down commitment, comprehensive training, auditing, and disciplinary measures — will have taken a major step toward implementing an effective antitrust compliance policy. More generally, criminal antitrust exposure can be reduced if companies instruct their employees to follow a cardinal rule: competitors should never talk about how they do or should do business. This includes discussing information such as pricing, pricing terms, distribution policies (such as plans to change geographic territories), or methods of doing business. Personnel who are in a position to have frequent interactions with competitors — such as at trade association meetings, charitable events, or other meetings with competitors — are in positions of particular risk and should be instructed not to participate in any such discussions. While these rules are applicable in all industries, it should be noted that the pharmaceuticals, health care, and technology (particularly raw materials and components) industries have been a particular focus of antitrust enforcement authorities in recent years, so companies in those industries should be particularly vigilant.

Companies crafting compliance policies should be mindful that so-called “vertical” agreements between suppliers and customers (such as policies that restrict customer pricing, exclusive dealing, tying arrangements or customer/territorial restraints) are also subject to antitrust scrutiny. Although horizontal conspiracies are typically the focus of criminal enforcement, vertical arrangements are often litigated in private lawsuits. Moreover, the law in these areas is something of a patchwork, with rules that may vary from state to state. As a result, effective compliance programs should require review of such policies by the Legal Department and/or outside counsel before being implemented.

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3 15 U.S.C. § 1, 2, 3.


5 The Sentencing Guidelines do expressly provide for a reduction in culpability score for a company that had in place an “Effective Compliance and Ethics Program.” U.S.S.G. § 8C2.5(f). On its face, then, the DOJ’s position may appear somewhat inconsistent with the Sentencing Guidelines, which state that “the failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.” Id. §8B2.1(a). If, for example, a violation were the result of activities by a “rogue” employee within the company without the knowledge or participation of management, it could be argued that having an effective compliance program should still be taken into account at sentencing. However, according to DAAG Snyder, the DOJ’s position is that companies other than leniency applicants rarely self-report violations, and the Sentencing Guidelines state that a company that “unreasonably delayed reporting the offense to appropriate governmental authorities” is not entitled to a reduced culpability score for an effective compliance program. Id. § 8C2.5(f).

6 As just one example, the Supreme Court now takes the view that “minimum resale price maintenance” is subject to the “rule of reason,” Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007), while some states continue to consider this practice to be per se unlawful under the antitrust laws.

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