Department of Justice

COMPLIANCE PROGRAMS

AS VIEWED FROM THE ANTITRUST DIVISION

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When I was a lawyer in private practice advising corporations as to the antitrust implications of their conduct, I hoped that the advice was useful in a number of different ways. It was perhaps useful to let managers know the areas within which they could plan for corporate action without fear of antitrust difficulty. It was useful also perhaps because it released the energies of corporations to compete vigorously but warned them in advance of the dangers of moving too close to the line of antitrust illegality. I hoped my advice as a counselor was useful because it would make my advice as an antitrust litigator someday in the future unnecessary.

From my perspective as head of the Antitrust Division of the Department of Justice, I can say with confidence that I only knew the half of it. After two years in the role of law enforcement officer, I am more than ever convinced that the private bar is the front line of antitrust enforcement. You who advise corporations on a day-to-day basis probably have as much to do with obedience to the antitrust laws as anybody else. I am also convinced that you could not do it alone--that you need the help, the added credibility, if you will, that is given you in your advice by vigorous enforcement. But you do do it, that is valuable, and your role should be properly acknowledged.

I would therefore like to commend the Section of Antitrust Law and the Section of Corporation, Banking and Business Law who are jointly sponsoring this American Bar Association National Institute. The staging of the Institute on this subject is an acknowledgment that staying out of trouble is easier and less expensive than getting out of trouble. I am happy to participate in this Institute, and the Division and I are anxious to participate in similar efforts in the future.

Preventive antitrust counseling--or, more formally, the institution of an antitrust compliance program--makes sense for both philosophical and practical reasons. Our country is organized economically as a free enterprise system, driven by the engine of competition. Our effort--yours and mine--must be to encourage enterprises to seek out ways of better satisfying consumer needs with higher quality, innovative goods, at the lowest possible prices, consistent with the incentives needed to encourage production. The words of Justice Black in the Northern Pacific case describe this central organizing principle, and relate it to our fundamental political and social values. So it is clear that in discussing antitrust, we are discussing basic issues for our country. Given this perspective, I am confident that insuring obedience to the antitrust laws comes easily, indeed, is affirmatively important

to businessmen and their antitrust counselors, for reasons having nothing whatever to do with a balance sheet.

But there is in addition an overriding practical reason for strict compliance with the antitrust laws. Simply put, failure to comply can be very expensive--both financially to the corporation, and personally to individual violators. I will not go through the litany of jail terms and fines accumulated so far this fiscal year, but you should assume that antitrust violations are more likely to be detected now than ever before; that once detected, they are certain to be prosecuted; that once prosecuted, violators are more likely to be convicted than ever before; and that once convicted, antitrust violators are more likely to receive severe sentences than ever before. Adding to all of that the high cost of defending suits both in lawyers' fees and management time demonstrates the wisdom of establishing and maintaining an effective compliance program.

Once it is decided that a compliance program is crucial, the actual formulation and implementation of such a program will of course depend on the special characteristics of the company involved. The program must be tailored to fit the needs of the individual company in order for it to be successful. Nothing will quite so clearly demonstrate empty formalism or lack of conviction than a program that includes irrelevancies

adopted untested and unscreened from the program of other companies with quite different problems. The materials you received for this Institute and the speakers are providing specific illustration of the wide variety of approaches to compliance counseling. But I would like to highlight several elements that I believe are important, and along the way, demonstrate that the Antitrust Division can be immediately useful in this segment of antitrust practice.

Without doubt the most important element in a successful compliance program is the undoubted commitment of company management toward making the program work. That commitment can and should be demonstrated on several levels: commitment to the worth of antitrust and competition, and commitment to the importance of obeying the law. Lack of conviction on the part of top management in either area will ensure that a compliance program will fail. Employees at lower levels in any organization surely take their cue from top management. If the head of the company doesn't take the program seriously, neither will anyone else. The commitment of top management must be visible, constant and sincere. And to state the obvious, the actions of top management must match the teachings of the compliance program.

Several other points need to be made. A compliance program will not be credible or useful unless it emphasizes

the pragmatic over the theoretical. Lawyers must not be content simply to list prohibitions. Rather, they must seek to give answers that company personnel can live with. The emphasis must be on understanding the business problems of the corporate officer and advising on appropriate solutions without violation of the law.

Here the Antitrust Division can be useful in several respects. Most importantly, the business review procedure is an institutionalized corporate compliance program. Like other private lawyers, I confess that in my own practice I was skeptical of the value of the business review procedure. I perceived it as unlikely to be of any major affirmative assistance, and rather likely to identify my client as someone the Antitrust Division ought to watch carefully. In any event, the procedure appeared unnecessarily lengthy and the collection of facts seemed to be carried to an extreme.

Closer contact with the procedure persuades me that my earlier view was too pessimistic.

Over the years, the Division has acted on some 230 business review requests, stating a present intention not to bring an enforcement action in 162 cases, or approximately 70 percent. While such an affirmative letter does not legally bind the Division, it is noteworthy that the Division has never brought suit to challenge an activity "cleared" in a

business review letter, absent changed circumstances. While business reviews do not provide "certainty," they can and do provide a practical level of guidance to you as antitrust counselors upon which your clients can reasonably base decisions.

I agree that the length of time involved in obtaining a business review response is often excessive. That is really the result of two factors: the applicant's reluctance to be openhanded and forthcoming at the outset, and the Division's understandable reluctance to take a committed position that enforcement action would not be appropriate without a complete understanding of the facts.

We are undertaking in the Division a new effort to track our business review requests more precisely and to highlight those that have been pending for an inordinate length of time. I am confident that shortly we shall be able to expedite all business review requests so that the responses will be both useful and timely. As you know, pursuant to President Carter's request that the Department of Justice give expedited treatment to requests by business firms for guidance on international antitrust issues, we have pledged that export-related requests for business review letters will be answered within 30 business days from the date the Antitrust Division receives all relevant data concerning the proposed transaction. My goal is to accord this treatment to all standard business review requests.

We also mean to assist the counseling process by offering generalized statements of antitrust enforcement policy. You know these in a variety of forms including guidelines, as in the merger area, such publications as the Guide for International Operations, and the frequent speeches and testimony that incorporate views and analysis and offer conclusions on a wide variety of issues. You should know that this kind of advance notice of antitrust enforcement policy is not universally acclaimed. Some in the Division feel that we ought not to "telegraph our punches," that we ought rather to develop the law through filed cases and litigated judgments. Some would argue that the publication of guidelines is at odds with our professed interest in deregulation. Others, outside the Division, see our efforts to provide the private bar with some guidance as a means of coddling antitrust defendants. It is sometimes suggested that the Division speaks too much to the private bar, and offers too much advice, and that that is not an appropriate role for the antitrust enforcer.

My own view, born both of conviction and experience, is that our job is to see that the antitrust laws are obeyed. Where the effective means is prosecution, we are ready for that. Where it is more effective to set out our approach in advance or to communicate openly with the private bar, we are ready to do that. Both are in their places acceptable and appropriate. And I mean to continue to do both.

I would suggest that another essential element for a successful compliance program is the incorporation of the "safe harbor" concept. Every employee in the company must feel free to seek advice from and give information to anti-trust counsel, without fear of reprisal or condemnation. As part of a compliance program, I should think it would be well to make it clear to all employees that any suspicious activity should be reported directly to corporate counsel's office without the necessity of going through the chain of command or necessarily notifying a supervisor.

From the point of view of the employee, this may make the decision whether or not to report antitrust violations much easier, particularly if the putative violation involves the employee's supervisor. From the point of view of the company, it tends to ensure that violations or potential violations are discovered earlier than would be the case if several levels of decision-making on whether to report are in the picture.

Similarly, the antitrust counsel should have the freedom to move throughout the company to audit compliance. It should be understood that the counsel can request access to files or to personnel at every level without advance notice to discuss aspects of the company's operations that may appear especially sensitive from the antitrust point of view. This, of course,

requires tact and firmness, and again, the very clear, ever-present support of top management.

To some, this notion of open doors to the corporate "whistle-blower" will seem offensive. It can obviously go too far and become a device for circumventing the chain of control and circulating idle gossip. But with healthy amounts of common sense, the procedure of the open door to the office of the antitrust counsel can forestall serious corporate liability before it ever becomes a problem. In truth, an employee who is sufficiently loyal to the corporation and sufficiently aware of the gravity of a law violation to take it upon himself to come forward in difficult circumstances ought to be encouraged and rewarded, and not discouraged or punished. An effective mechanism for direct communication would seem, therefore, to be a necessary ingredient.

Finally, at the risk of stating the obvious, a compliance program should not be a program to conceal unlawful activity or to avoid being caught. On the discovery of serious antitrust violation, the corporate counsel must give attention to the question of what to do with evidence of antitrust violation--evidence that would be of substantial interest to the Antitrust Division.

It is at that point that our new corporate leniency policy becomes especially relevant. In the materials distributed to you in connection with this Institute is a copy of a speech

I made last October in Chicago, in which I described formally the nature of a new approach we were then adopting in the Antitrust Division to voluntary disclosure of antitrust violations. Distilled to its essence, the new policy was that the Antitrust Division would give serious consideration to lenient treatment of corporations or officers voluntarily reporting their wrongdoing prior to our detection of it.

The speech goes on to list a catalog of considerations that are for the most part obvious. For instance, I said that the Division will give lenient treatment unless we were about to become aware of the conduct in the course of an investigation in the near future, or unless the corporation had failed to report with candor and completeness the extent of the wrongdoing. And there were a number of other considerations that would guide our decision on this issue. I have, since the speech was made, noted two things: first, the instances in which corporations have come forward pursuant to this policy have been far fewer than I expected, and second, the legal advice that is being given to corporations on this point is exceedingly conservative and depends on the conclusions that the Antitrust Division really cannot be trusted to carry out the policy and that the listed conditions are simply efforts to, in effect, withdraw the offer of leniency.

Advice of that kind is simply wrong. In the only two instances in which the policy was triggered, confessing corporations were not indicted. In those cases, every other conspirator was charged with a felony, and either entered a plea or was convicted by a jury. In one case, every individual that was indicted received a jail sentence. The point is that we are committed to carry out the policy, and the best proof of that is our past action. Moreover, to fail to come forward can entail devastating results.

The Antitrust Division is willing to take a step that will, we hope, decisively tilt the balance of decision toward making a clean breast of antitrust violations. I would like to take this occasion once again to urge all corporations, and particularly their counsel, to weigh carefully the Division's commitment on the one hand to consider giving them lenient treatment at the indictment stage if they voluntarily report their illegal conduct before detection, and our commitment on the other hand to pursue in an unrelenting way violations we detect to the point of conviction and appropriately severe sentence.

We have sometimes found lawyers who think that a company convicted of antitrust violation has no need of a compliance policy, that the experience of being prosecuted is sufficient incentive enough to obey the law. We do not share

that optimism. Our files contain the stories of industries that seem again and again to have had antitrust difficulty. For one reason or another, corporate recidivism is not at all unknown in the antitrust world.

While a compliance program is important, it will not solve all the antitrust problems of a corporation. And if, despite the best intentions in the world, the corporation should happen to stray into violation of the antitrust laws, the existence of a corporate compliance program is, as a matter of law, irrelevant. That was why we disagreed so strongly with the instruction given by Judge Singleton during the recently concluded trial of the Corrugated Container case in Houston, in which he included the following statement:

> One of the factors you may consider in determining the intent of each corporation, among other evidence, is whether or not that corporation had an antitrust compliance policy. In this regard, you are instructed that the mere existence of an antitrust compliance policy does not automatically mean that a corporation did not have the necessary intent. If, however, you find that a corporation acted diligently in the promulgation, dissemination, and enforcement of an antitrust compliance program in an active good faith effort to ensure that the employees would abide by the law, you may take this fact into account in determining whether or not the corporation had the required intent.

We believe that this was an erroneous instruction and contrary to settled law.

The law is clear that a corporation may be held criminally liable for the acts of its employees and agents when those acts are undertaken for the benefit of the corporation

and are within the scope of the implied or expressed authority granted to the employee. That kind of liability may arise even when the corporation has expressly instructed its employees not to undertake the acts that gave rise to criminal liability.

Carrying the Corrugated instruction to its logical conclusion would make it virtually impossible to convict a corporation of criminal antitrust violation--a result that is self-evidently nonsensical. The effect of the instruction is to give the corporation an identity independent of the sum of its parts. Thus, regardless of the intent of its agents and employees, the corporation could absolve itself of all liability by virtue of the existence of a compliance program. This imbues the corporation with anthropomorphic qualities that clearly are contrary to settled legal principles.

In summary, a compliance program, while not all-powerful, is, we feel, extremely important. I can't help but assume that all of those who are here at this Institute and the additional audience that will have access to these materials will in the end share the same conclusion. Let me assure you that we in the Antitrust Division will do our part to assist you in putting compliance programs into place and giving them credibility through vigorous enforcement of the antitrust laws where necessary.